**Senator Chuck Grassley, Ranking Member**
**Questions for the Record**
**Ms. Araceli Martinez-Olguin**
**Nominee to be United States District Judge for the Northern District of California**

1. **According to your Questionnaire, you have never tried a federal case, either as lead counsel or as part of a team. You also report that you have not had any experience with a jury, and that you have argued two motions for summary judgment and two motions for permanent injunctions.**

    a. **In addition to these four arguments, how many times have you appeared in federal court?**

    Response: While I do not have a precise record of the number of times that I have appeared in federal court, my best estimate is that I have appeared in federal court more than 50 times.

    b. **Given your lack of experience with federal trials and with juries, what legal experiences have prepared you to serve as a federal district court judge?**

    Response: I have spent my 18-year career immersed in federal civil law and practice. I began my career as a law clerk in the Western District of Texas, which exposed me to one of the busiest federal criminal dockets in the country and provided an inside look at a wide range of federal civil cases, including approximately ten jury trials. During my years as a practitioner, I focused on complex civil rights litigation, through the course of which I acquired expertise in several areas of substantive federal law, as well as complex civil procedure issues, including third-party standing, injunctions, class actions, and removal from and remand to state courts. In matters I litigated in federal courts throughout the country, I drafted complaints and motions to intervene; briefed and litigated motions to dismiss for failure to state a claim or for lack of jurisdiction; led and managed discovery; briefed and argued discovery disputes; took and defended depositions; worked with expert witnesses and prepared them for testimony at depositions and in court; litigated and argued motions for summary judgment and for permanent injunctions; prepared cases for trial, including preparing motions in limine and other pretrial submissions; participated in settlement and mediation sessions; and served as lead counsel in a bench trial in state court.

2. **In 2021, you criticized a federal immigration raid in Tennessee, suggesting that the 2018 raid was evidence of "the racism and unconstitutionality of the federal government's conduct." You have also supported sanctuary policies, including publicly affirming your support for California's sanctuary state law, SB 54, and urging San Mateo County to "be more proactive in adopting sanctuary policies."**

    a. **Please describe your understanding of the federal government's authority to conduct immigration raids to apprehend individuals suspected of being in the**

**country illegally, citing any relevant Ninth Circuit and Supreme Court precedent.**

Response: The Supreme Court has held that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). To that end, the U.S. Congress has codified which immigrants may be removed from the United States and the procedures for removal. *Id.* at 396. Additionally, in order to "briefly detain" someone for questioning, federal regulations require that immigration officers have "a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States." *Perez Cruz v. Barr*, 926 F.3d 1128, 1137 (9th Cir. 2019) (quoting 8 C.F.R. § 287.8(b)(2)).

b. **Given your prior support for sanctuary policies and opposition to federal immigration law enforcement as an advocate, how can litigants who might appear before you be confident that you will faithfully and fairly apply immigration laws?**

Response: Respectfully, I would like to clarify that I have never stated that I am opposed to the enforcement of federal immigration laws nor have I expressed opposition to immigration enforcement operations that are conducted in a lawful and nondiscriminatory manner. As an advocate, I was duty bound to advance legally cognizable arguments that served my clients' interests, however, I understand that any personal views or prior advocacy I have undertaken are irrelevant to serving as a judge. In agreeing to be nominated, and if I am fortunate enough to be confirmed, I am committed to the neutral and even-handed application of precedent to each case that comes before me.

3. **In 2009, you wrote a letter to then-Secretary of HHS Kathleen Sebelius on behalf of the ACLU. The letter argued that a government policy requiring organizations that receive federal funding to have a policy explicitly opposing prostitution and sex trafficking was "an unconstitutional restriction on speech." The letter also argued that "the anti-prostitution pledge" undermines federal efforts to combat HIV and AIDS because "experience has shown that gaining the trust and cooperation of sex workers is a crucial component of successful anti- HIV/AIDS programs around the world." Do you still believe that the federal government should not oppose prostitution?**

Response: As an advocate, I was duty bound to advance legally cognizable arguments that served my client's interests. The federal government's position is an important policy decision best left to the elected branches. As a judicial nominee, the Code of Judicial Conduct indicates it would be imprudent for me to offer a personal opinion. Moreover, I understand that any personal views or prior advocacy I have undertaken are irrelevant to serving as a judge. In agreeing to be nominated, and if I am fortunate enough to be

confirmed, I am committed to the neutral and even-handed application of precedent to each case that comes before me.

4. **While in law school, you wrote that you were "shocked by the way judges distanced themselves from the ability to influence public policy." You suggested that your time in law school "has made [you] skeptical about questions of policy and politics not entering into the mix when judges rule." Are you still skeptical that judges cannot judge cases without considering policy and politics and, if not, what changed your mind?**

   Response: The article quoted above was published when I was a second-year law student, and I believe I wrote it as a first-year law student, more than 20 years ago. Since then, I have had the privilege of working as a law clerk to a federal judge for two years. This experience was formative in helping me better understand the role of a judge in the legal system established by our Constitution, and the cornerstone that a judge's neutrality plays. Moreover, in my 18 years as a litigator, I have practiced before countless judges across the country, and know that what my clients most depended on was a neutral, open-mind judge.

5. **While in law school, you expressed support for the use of race-based college admissions in the context of *Grutter v. Bollinger*. After you graduated, you helped draft a manual advising universities on how best to construct "race-conscious admissions plans." The manual urged colleges to "not simply abandon race-conscious admissions programs" in favor of "less effective 'race-neutral' alternatives." Do you still believe that universities should make admissions decisions on the basis of race?**

   Response: As a law student, I signed onto an amicus brief submitted to the Supreme Court in *Grutter v. Bollinger* in support of the Respondents which shared the experiences of students at universities where race is not considered in admissions. I contributed to the manual referenced above as a summer associate at Morrison & Forester. The manual was drafted in the wake of the *Grutter* decision to provide guidance to clients about the sorts of admissions policies that would likely comply with the then-recent Supreme Court precedent, in which the Court upheld the University of Michigan's admission program as constitutional because the University had a compelling state interest in achieving a racially diverse student body, *see Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and the admission program bore "the hallmarks of a narrowly tailored plan." *Id.* at 334.

   Because the use of race as a factor in university admissions is currently being litigated before the Supreme Court, Canon 3 of the Code of Conduct for United States Judges precludes me from commenting further, other than to add that I will fully, faithfully, and and impartially apply any Supreme Court or Ninth Circuit precedent on this issue.

6. **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 from then-Judge Ketanji Brown Jackson or its context. I believe the Constitution does not change unless it is amended pursuant to Article V, and that it is intended to endure for ages and be adapted to apply to modern life. *See McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

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

   Response: I am not familiar with this statement or its original context. Judges should interpret the Constitution employing the interpretative methodologies endorsed by the Supreme Court and by following Supreme Court and other binding precedent.

8. **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: I am not familiar with this statement or its context. If I am confirmed, I will fully, faithfully, and impartially apply all Supreme Court and Ninth Circuit precedent.

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

   Response: I am not sufficiently familiar with all the decisions issued by the Supreme Court in the last 50 years to select one that exemplifies my judicial philosophy. If confirmed, I will resolve only those issues properly before me, and will approach them with an open mind. I will carefully review the briefs submitted by the parties, provide all parties an opportunity to be heard, conduct my own independent legal research, and will impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, and which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges and Supreme Court opinions.

10. **Please identify a Ninth Circuit or Northern District of California judicial opinion from the last 50 years that exemplifies your judicial philosophy and explain why.**

    Response: I am not sufficiently familiar with all the decisions issued by the Ninth Circuit or the Northern District of California in the last 50 years to select one that exemplifies my judicial philosophy. If confirmed, I will resolve only those issues properly before me, and will approach them with an open mind. I will carefully review the briefs submitted by the parties, provide all parties an opportunity to be heard, conduct my own independent legal research, and will impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, and which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges and Ninth Circuit and Northern District of California opinions.

11. **How would you evaluate a claim that a previously un-enumerated "fundamental" right is protected by the Due Process Clause? In your answer, please cite any relevant Supreme Court and Ninth Circuit precedent that you would consider.**

    Response: A federal judge assessing a claim asserting an un-enumerated fundamental right should examine whether the asserted right is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted).

12. **Assume that the original public meaning of a statutory or constitutional provision is clear. Under what circumstances would it be appropriate for a federal judge to decline to apply the original public meaning of that provision?**

    Response: As a district court judge, I would be bound by Supreme Court and Ninth Circuit precedent regarding the interpretation of statutory or constitutional provisions. Where there is no binding precedent regarding a provision's interpretation, I would be bound by the interpretative strategies employed by the Supreme Court and Ninth Circuit to interpret that or analogous provisions.

13. **Under existing federal law, may a small business owner decline to provide customers with service on the basis of a sincerely held religious belief? Please explain your answer, citing any relevant statutes or Supreme Court precedent.**

    Response: The Religious Freedom Restoration Act – which protects small businesses, as well as individuals – prohibits the federal government "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014).

    Additionally, to comply with the First Amendment's Free Exercise Clause, any governmental burden on the free exercise of religion must be neutral and generally applicable; or it must survive strict scrutiny. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). The Supreme Court has made clear that a law is not neutral and generally applicable if, for example, the "object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if a facially neutral law has been applied with hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Yes, parents have a constitutional right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

15. **How do you decide when text is ambiguous?**

Response: If I am confirmed, the parties to a matter will assert that the text at issue is ambiguous. I would begin my analysis with the text and assess whether the text could bear the interpretations put forward by the parties. If the text at issue were a statutory or Constitutional provision, I would also research whether there is binding Supreme Court or Ninth Circuit precedent interpreting the text.

16. **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?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
    k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

    Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to state whether any Supreme Court case was correctly decided. However, because issues of *de jure* racial segregation are unlikely to be relitigated, I can state that *Brown v. Board of Education* and *Loving v. Virginia* were rightly decided. I would also note that the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Org*. If I am confirmed, I will fully, faithfully, and impartially apply all binding Supreme Court and Ninth Circuit precedents.

17. **Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.**

Response: 18 U.S.C. § 1507 prohibits "pickets or parades" or the "use [of] any sound-truck or similar device" or "any other demonstration" "in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such

judge, juror, witness, or court officer." Section 1507 prohibits that conduct when it is engaged in "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 duties[.]"

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

Response: I am unaware of any Supreme Court precedent that analyzes 18 U.S.C. § 1507 or a state analog statute. As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If this issue were to come before me, I would fully, faithfully, and impartially apply relevant Supreme Court and Ninth Circuit precedents.

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

Response: Each California Senator engages a judicial evaluation commission. I submitted application materials to Senator Feinstein's commission on or about February 12, 2021, for either the Northern District of California or the Eastern District of California. On or about March 7, 2021, I submitted application materials to Senator Padilla's commission and sought to be recommended for either the Northern District of California or the Eastern District of California. On April 2, 2021, I met with the statewide chair of Senator Feinstein's Judicial Advisory Process. On April 13, 2021, I met with members of Senator Padilla's Northern District Commission. On July 6, 2021, I was interviewed by members of Senator Padilla's Eastern District Commission. On July 13, 2021, I met with the statewide chairs of Senator Padilla's Commission. On August 5, 2021, I met with a member of Senator Padilla's staff. On August 18, 2021, I was interviewed for a second time by members of Senator Padilla's Northern District Commission. On October 12, 2021, I spoke for a second time with a member of Senator Padilla's staff. On October 25, 2021, I spoke with the new statewide chair of Senator Padilla's Commission. Senator Padilla interviewed me on November 1, 2021. On November 30, 2021, I met with members of Senator Padilla's Eastern District Commission for a second time. I was interviewed by attorneys from the White House Counsel's Office on January 18, 2022. Since January 20, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On August 1, 2022, my nomination was submitted to the Senate.

20. **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: During my selection process, I spoke with Robert Raben a few times between March 2021 and January 2022. Each time we spoke, Mr. Raben provided practical and

procedural information about the nomination process. At no point did we discuss any substantive legal or policy-related topics.

21. **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: During my selection process, I spoke with Christopher Kang a few times between February 2021 and January 2022. Each time we spoke, Mr. Kang provided practical and procedural information about the nomination process. At no point did we discuss any substantive legal or policy-related topics.

22. **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: During my selection process, I was a Board Member of the American Constitution Society-Bay Area Lawyer Chapter, and regularly spoke with officials associated with the American Constitution Society (ACS), though not about my selection. Aside from those conversations, I met with Russ Feingold on October 28, 2021. Mr. Feingold provided practical and procedural information about the nomination process. During none of these conversations were substantive legal or policy-related topics discussed.

23. **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.

24. **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.

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

       Response: No.

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

Response: No.

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

Response: Yes, I have spoken to Mr. Kang a few times, as explained in response to Question 21. He is the sole person associated with Demand Justice with whom I have had contact.

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

    Response: No.

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

    Response: No.

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

    Response: No.

27. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

Response: No.

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

Response: No.

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

Response: No.

28. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

29. **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."**
    **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

Response: No.

b. **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.

30. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**

**a. Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: Yes, I have spoken to Mr. Raben a few times, as explained in response to Question 20. He is the sole person associated with the Raben Group or the Committee for a Fair Judiciary with whom I have had contact.

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

Response: The Office of Legal Policy sent me these questions on September 28, 2022. After reviewing the questions, I conducted some research and drafted my response to each question. The Office of Legal Policy provided limited feedback on my draft. I then finalized and submitted my responses.

**Questions for the Record for Araceli Martinez-Olguin**
**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**
**Araceli Martinez-Olguin, Nominee to be United States District Court for the Northern District of California**

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

Response: My judicial philosophy will be guided by my experiences working for two federal district court judges. If confirmed, I will resolve only those issues properly before me, and will approach them with an open mind. I will carefully review the briefs submitted by the parties, provide all parties an opportunity to be heard, conduct my own independent legal research, and will impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, and which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges.

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

Response: If confirmed, I would first determine whether the Supreme Court or Ninth Circuit have previously interpreted the federal statute at issue. In the unusual circumstance where I confronted an issue of first impression, I would look first to the text of the statute. If the text is clear, my inquiry will stop there. If not, I would then look to methods of interpretation employed by the Supreme Court, as well as to persuasive authority from the other Circuits. I would similarly follow Supreme Court precedent regarding the propriety of looking to legislative history to resolve any ambiguity.

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

Response: If confirmed, I would first determine if the Supreme Court or the Ninth Circuit have previously interpreted the constitutional provision at issue. In the unusual circumstance where I confronted an issue of first impression, I would be guided by the interpretive methods the Supreme Court and the Ninth Circuit have used to interpret the implicated constitutional provision or the most analogous provisions.

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

Response: Absent Supreme Court precedent to the contrary, the text and original meaning of the Constitution play an essential role in interpretating the Constitution.

**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 recently stated that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). However, the Supreme Court has also found that certain First Amendment issues require looking to "contemporary community standards." *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

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

Response: Article III requires that a party establish standing by showing "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561) (1992)).

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

Response: The Supreme Court has long recognized that the Constitution's Necessary and Proper clause grants Congress implied power to carry out its powers enumerated in the Constitution. *McCulloch v. State of Maryland*, 17 U.S. 316 (1819).

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

Response: The Supreme Court has held that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). Thus, if confirmed, I would assess the constitutionality of a law enacted without reference to a specific Constitutional provision by referring to Supreme Court and Ninth Circuit precedent, as well as the submissions of the parties.

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

Response: The Supreme Court has concluded that the Fifth Amendment and Fourteenth Amendment Due Process Clauses protect a number of unenumerated rights all of which 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 and internal quotation marks omitted). Those rights include, for example: marital privacy and contraceptive use, *Griswold v. Connecticut*, 381 U.S. 479 (1965); interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); the use of

contraception by unmarried individuals, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); engaging in intimate sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); and same-sex marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: Please see my response to Question 9.

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

Response: The Supreme Court has recently ruled that the Constitution does not protect the right to an abortion. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Supreme Court has also held that the economic rights at stake in *Lochner v. New York* are not protected by the Constitution. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will fully, faithfully, and impartially follow Supreme Court and Ninth Circuit precedent regarding substantive due process.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court concluded that Congress can exercise its power under the Commerce Clause to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or the persons or things in interstate commerce," and "those activities that substantially affect interstate commerce."

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

Response: The Supreme Court has stated that various criteria can qualify a particular group as a suspect class. *See, e.g., San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (stating that the "traditional indicia of suspectness" are "being saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.") The Supreme Court has identified race, religion, national origin, and alienage as suspect classes, and laws based on those characteristics are subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: The Supreme Court has explained that the Constitution's separation of powers is a structural protection against abuse of governmental power to secure

liberty. *Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020). "[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

**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: To resolve a case in which a branch of the federal government has exercised authority not granted it by the text of the Constitution, I would begin by researching Supreme Court and Ninth Circuit precedent related to the powers of that branch of government and would carefully review the text and structure of the Constitution. Ultimately, I would fully, faithfully and impartially apply the operative law to the facts before me.

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

Response: A federal judge is required to impartially administer justice, based only on the law and facts of the case before them. In this context, empathy should be limited to understanding all parties' arguments, and should not impact the outcome of a case.

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

Response: Both outcomes are problematic and a judge should do neither.

**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: In my career as a federal law clerk, a civil litigator, and Department of Education employee, I have not studied the rate of invalidation of federal statutes and am not sufficiently informed to offer a reason for the increase over time posited by the question.

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

Response: I understand "judicial review" to refer to the power granted to the judiciary by Article III to review the actions of the other branches of government. I understand "judicial supremacy" to refer to our system of vertical *stare decisis* and that the United States Supreme Court has the final word on the state of the law.

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

Response: Elected officials take an oath to uphold the Constitution. Additionally, elected officials are bound by Supreme Court decisions interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

**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: Judges should base their decisions on neutral application of precedent to the facts of the cases before them, to enhance the public's confidence in an independent and impartial judiciary.

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

Response: A district court judge is duty bound to apply binding precedent fully, faithfully, and impartially. If I am confirmed, I will fully, faithfully, and impartially apply Supreme Court and Ninth Circuit precedent.

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

Response: None; when sentencing a convicted criminal defendant, a federal judge should consider the seven factors enumerated in 18 U.S.C. 3553(a). Among those factors is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *See* 18 U.S.C. §3553(a)(6). Additionally, Section 5H1.10 of the United States Sentencing Commission Guidelines Manual 2021 provides that the race, sex, national origin, creed, religion, and socio-economic status of the defendant are irrelevant in sentencing.

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

Response: I am not familiar with the Biden Administration's definition or the context in which it was adopted or developed. Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right." 11th ed. 2019. If I am confirmed, I will fully, faithfully, and impartially apply Supreme Court and Ninth Circuit precedent to any cases raising questions of "equity."

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

Response: Equity and equality are generally considered distinct. As compared with the definition of equity in my response to Question 24, Black's Law Dictionary defines "equality" as "the quality, state, or condition of being equal" or "likeness in power or political status." *Id*.

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

Response: The Fourteenth Amendment prohibits States from denying any person the "equal protection of the laws." If confirmed, I will fully, faithfully, and impartially apply all Supreme Court and Ninth Circuit precedents interpreting the Fourteenth Amendment's protections.

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

Response: I do not understand there to be a consensus definition of "systemic racism," nor do I have a personal one. If I am confirmed and am presented with a case raising allegations of "systemic racism" I will fully, faithfully, and impartially apply all relevant Supreme Court and Ninth Circuit precedents.

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

Response: I understand "critical race theory" to be a legal school of thought. Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." (11th Ed. 2019).

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

Response: Please see my response to Questions 28 and 29.

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

**Questions for the Record for Martínez-Olguín, Nominee to the United States District Court for the Northern District of California**

## I. Directions

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

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

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

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

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

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

## II. Questions

1. **Is racial discrimination wrong?**

Response: Racial discrimination is unlawful. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) the Fair Housing Act of 1968, 42 U.S.C. § 3605(a); Civil Rights Act of 1866, 42 U.S.C. § 1981. Further, the Supreme Court has held that racial classifications be subjected to strict scrutiny and are only permissible when narrowly tailored to achieve a compelling government interest.

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: A federal judge assessing a claim asserting an unenumerated right should examine whether the asserted right is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks 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 am not sufficiently familiar with the judicial philosophies of the listed Chief Justices to select the one that is most analogous to mine. My judicial philosophy will be guided by my experiences working for two federal district court judges. If confirmed, I will resolve only those issues properly before me, and will approach them with an open mind. I will carefully review the briefs submitted by the parties, provide all parties an opportunity to be heard, conduct my own independent legal research, and will impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, and which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges.

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

Response: Black's Law Dictionary defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." 11th ed. 2019. I believe the Constitution does not change unless it is amended pursuant to Article V, and that it is intended to endure for ages and be adapted to apply to modern life. *See McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). If confirmed, I will fully, faithfully, and impartially apply Supreme Court and Ninth Circuit precedents, including with respect to interpretative methods.

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

Response: Black's Law Dictionary defines "living constitutionalism" as a "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances

and, in particular, with changes in social values." 11th ed. 2019. I believe the Constitution does not change unless it is amended pursuant to Article V, and that it is intended to endure for ages and be adapted to apply to modern life. *See McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). If confirmed, I will fully, faithfully, and impartially apply Supreme Court and Ninth Circuit precedents, including with respect to interpretative methods.

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: Where there is no binding precedent regarding a provision's interpretation, I would be bound by the interpretative strategies employed by the Supreme Court and Ninth Circuit to interpret that or analogous provisions.

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: Sometimes. For example, the Supreme Court has found that certain First Amendment issues require looking to "contemporary community standards." *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

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

Response: The Constitution does not change unless it is amended pursuant to Article V, and it is intended to endure for ages and be adapted to apply to modern life. *See McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

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

Response: Yes, it is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to state whether any Supreme Court case was correctly decided. If I am confirmed, I will fully, faithfully, and impartially apply all binding Supreme Court precedents.

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

Response: Yes, it is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to state whether any Supreme Court case was correctly decided. If I am confirmed, I will fully, faithfully, and impartially apply all binding Supreme Court precedents.

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

Response: Yes, it is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to state whether any Supreme Court case was correctly decided. However, because issues of *de jure* racial segregation are unlikely to be relitigated, I can state that *Brown v. Board of Education* was rightly decided. If I am confirmed, I will fully, faithfully, and impartially apply all binding Supreme Court precedents.

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

Response: A presumption in favor of pretrial detention is triggered where the criminal defendant was previously convicted of certain offenses enumerated in 18 U.S.C. § 3142(f)(1) – including "a crime of violence . . . for which a maximum term of imprisonment of 10 years or more is prescribed;" "an offense for which the maximum sentence is life imprisonment or death;" and others – and if the conviction is less than five years old or the person was released from imprisonment less than five years before. 18 U.S.C. § 3142(e)(2). Additionally, Section 3142(e)(3) establishes a rebuttable presumption in favor of pretrial detention if the presiding judge "finds that there is probable cause to believe that the person committed" a drug offense for which the maximum term of imprisonment is 10 years or more, or certain offenses involving firearms or minors, among other crimes. If I am confirmed, I will follow the applicable statues in matters related to pretrial detention in all cases.

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

Response: If confirmed, my concern is not with the policy rationales of any law, but instead its evenhanded application to the facts of any case that comes before me.

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: The Religious Freedom Restoration Act – which protects small businesses, as well as individuals – prohibits the federal government "from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014).

Additionally, to comply with the First Amendment's Free Exercise Clause, any governmental burden on the free exercise of religion must be neutral and generally applicable; or it must survive strict scrutiny. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). The Supreme Court has made clear that a law is not neutral and generally applicable if, for example, the "object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if a facially neutral law has been applied with hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: A government policy that discriminates on the basis of religion violates the First Amendment unless it is "justified by a compelling governmental interest and [is] narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court concluded that the petitioners were entitled to a preliminary injunction because they had shown that "their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." 141 S. Ct. 63, 66 (2020) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

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

Response: In *Tandon v. Newsom*, the Supreme Court held that a California COVID-19 regulation was subject to strict scrutiny because it treated secular gatherings more favorably than religious ones, and thus was not neutral and generally applicable. 141 S. Ct. 1294, 1296 (2021). The Court reasoned that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* The Court went on to preliminarily enjoin the regulation because the "[a]pplicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights 'for even minimal

periods of time'; and the State has not shown that 'public health would be imperiled' by employing less restrictive measures." *Id.* at 1297 (quotations omitted).

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), a baker informed a same-sex couple that he would not make their wedding cake because of his religious opposition to same-sex marriages. The couple filed a complaint with the Colorado Civil Rights Commission ("Commission"), which concluded that Colorado's anti-discrimination law required the baker to design and create the cake. The Supreme Court held that the Commission violated the baker's rights under the First Amendment's Free Exercise Clause because the Commission failed to apply the state's anti-discrimination law in a "neutral and respectful" manner towards religion and instead had showed "clear and impermissible hostility" towards the baker's sincere religious beliefs. *Id*. at 1729.

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

Response: Yes. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."), *Frazee v. Ill. Dept. of Empl. Sec.*, 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."), *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (finding that protection extends to an individual's religious beliefs even if they are not "logical, consistent or comprehensible to others" and should not turn on a "a judicial perception of the particular belief or practice in question").

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: As a judicial nominee, it is inappropriate for me to comment on the official position of a religion.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court held that it would violate the First Amendment to allow judicial review of employment discrimination claims filed by two teachers against the schools because doing so would undermine the independence of those religious institutions. 140 S. Ct. 2049, 2055 (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 Court found that a relevant provision of Philadelphia's standard foster care contract was not generally applicable because it incorporated a system of individual exemptions, 141 S. Ct. 1868, 1878 (2021), and thus needed to survive strict scrutiny. The Court found that Philadelphia's policy violated the Free Exercise Clause because its asserted interests were insufficient. *Id.* at 1881.

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

Response: In *Carson v. Makin*, the Supreme Court struck down Maine's tuition assistance program as violative of the First Amendment's Free Exercise Clause because Maine's practice excludes religious observers from otherwise available public benefits, and in so doing effectively penalizes the free exercise of religion. The Court then submitted Maine's policy to strict scrutiny and concluded that Maine's asserted interest in stricter separation between church and state cannot qualify as a compelling state interest.

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that the Bremerton School District violated the Free Exercise and Free Speech

Clauses of the First Amendment by disciplining and ultimately firing a high school football coach who had knelt at midfield to quietly pray after games. The Court concluded that the coach's speech was private expression protected by the First Amendment, and not government speech because prayers were not "within the scope" of the coach's job duties. *Id.* at 2424. Next, the Court applied strict scrutiny because it found that the District was motivated at least in part by the "religious character" of the coach's action. Additionally, the Supreme Court rejected the school district's claim that it was necessary to discipline Coach Kennedy to avoid violating the Establishment Clause because the District's actions were not neutral and generally applicable. *Id*. at 2426-29.

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

Response: In *Mast v. Fillmore County*, the Supreme Court granted certiorari, vacated the judgment, and remanded the case back to the Minnesota Court of Appeals to reconsider its ruling in light of *Fulton v. City Philadelphia,* 141 S. Ct. 1868 (2021). Justice Gorsuch wrote separately to "highlight" some issues the lower court and administrative agencies should consider on remand. Like Justice Alito, Justice Gorsuch opined that the lower court had misapplied the Religious Land Use and Institutionalized Persons Act. Among other things, Justice Gorsuch noted the error of treating "the County's general interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." 141 S. Ct. 2430, 2432 (2021).

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: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If I am confirmed and this issue were to come before me, I would fully, faithfully, and impartially apply any Supreme Court and Ninth Circuit precedent, including guidance about interpretive methods. I would also carefully review the text and structure of the statute.

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;**

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

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

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 aware of any trainings that fit this description and would not support them being provided.

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 I am confirmed, I will comply with the Constitution and all applicable laws when hiring law clerks and other staff.

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

Response: Article II of the Constitution grants the President the power, with the advice and consent of the Senate, to make appointments to high-level political positions in the federal government. I am not aware of any Supreme Court or Ninth Circuit precedent related to the factors that the President or Senate may consider. If I am confirmed and this this issue were to come before me, I would resolve the case based on the facts presented and an even-handed application of the governing law.

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

Response: I do not understand "systemic racism" to have a consensus definition. Further, questions regarding our legal systems are best left to policy makers. If I am confirmed, I will fully, faithfully, and impartially apply the relevant laws to the record of each case that comes before me, without bias toward any party.

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: This is an issue the Constitution commits to Congress. *See* U.S. Const. art. III, § 1. As a judicial nominee, it would be inappropriate for me to opine the Supreme Court's

composition. If I am confirmed, I will be bound to follow all Supreme Court precedents, regardless of its size, and will do so fully, faithfully, and impartially.

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 held in *District of Columbia v. Heller* that the text and historical background of the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008).

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

Response: In *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that where the Second Amendment's text covers individual conduct, the government must demonstrate that "the regulation is consistent with our Nation's historical tradition of firearm regulation." 142 S. Ct. at 2126.

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

Response: Yes. The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), that "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."

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

Response: No.

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

Response: No.

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

Response: In *Heckler v. Chaney*, the Supreme Court held that the Executive Branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. 470 U.S. 821, 831 (1985). Because questions regarding the extent to which the Executive Branch can determine enforcement priorities are currently pending before the courts, as a judicial nominee, it would be inappropriate for me to comment further.

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 refers to the individual decisions the Executive Branch makes regarding whether to initiate cases. As a general matter, a substantive administrative rule is one that has the "force and effect of law," as distinguished from "interpretive rules," which merely "advise the public of the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-97 (2015)). Because cases related to these issues are pending in the courts, as a judicial nominee, it would be inappropriate for me to comment further.

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

Response: No. The death penalty is established by federal and state statutes. The President lacks authority to legislate or to invalidate statutes.

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

Response: In *Alabama Association of Realtors v. HHS*, the Supreme Court concluded that the Centers for Disease Control and Prevention lacked statutory authority to institute a nationwide eviction moratorium in response to the COVID–19 pandemic. 141 S. Ct. 2485, 2487 (2021). The Court applied the test laid out in *Nken v. Holder*, 556 U.S. 418 (2009), and vacated the stay, explaining that the applicants were "virtually certain to succeed on the merits of their argument that the CDC [had] exceeded its authority" and that the "equities do not justify depriving the applicants of the District Court's judgment in their favor." 141 S. Ct. at 2486, 2489.

42. **Please list your cases that you have tried in federal district court.**

Response: I have spent my 18-year career immersed in civil federal law and practice. I began my career as a law clerk in the Western District of Texas, which exposed me to one of the busiest federal criminal dockets in the country and provided an inside look at a wide range of federal civil cases, including approximately ten jury trials. During my years as a practitioner, I focused on complex civil rights litigation, through the course of which I acquired expertise in several areas of substantive federal law, as well as complex procedure, including third-party standing, injunctions, class actions, and removal from and remand to state courts. In matters I litigated in federal courts throughout the country, I drafted complaints and motions to intervene; briefed and litigated motions to dismiss for failure to state a claim or for lack of jurisdiction; led and managed discovery; briefed and argued discovery disputes; took and defended depositions; worked with expert witnesses and prepared them for testimony at depositions and in court; litigated and argued motions for summary judgment and for permanent injunctions; prepared cases for trial, including preparing motions in limine and other pretrial submissions; participated in settlement and mediation sessions; and served as lead counsel in a bench trial in state court. None of my

cases have required a trial in federal district court.

43. **Please list your experience in <u>all</u> criminal law matters.**

Response: I have spent my 18-year career immersed in federal civil law and practice. I began my career as a law clerk in the Western District of Texas, which exposed me to one of the busiest federal criminal dockets in the country and provided an inside look at a wide range of federal civil cases, including approximately ten jury trials. During my years as a practitioner, I focused on complex civil rights litigation, through the course of which I acquired expertise in several areas of substantive federal law, as well as complex civil procedure issues, including third-party standing, injunctions, class actions, and removal from and remand to state courts. In matters I litigated in federal courts throughout the country, I drafted complaints and motions to intervene; briefed and litigated motions to dismiss for failure to state a claim or for lack of jurisdiction; led and managed discovery; briefed and argued discovery disputes; took and defended depositions; worked with expert witnesses and prepared them for testimony at depositions and in court; litigated and argued motions for summary judgment and for permanent injunctions; prepared cases for trial, including preparing motions in limine and other pretrial submissions; participated in settlement and mediation sessions and served as lead counsel in a bench trial in state court.

44. **You previously said, "our country is dependent on immigrants" and that not providing a pathway to citizenship for illegal immigrants presently in the country is "unacceptable." What is your basis for making this statement?**

Response: I made these statements as an advocate, relying on social science research, and speaking to advance the interests of my clients. By accepting this nomination, and if I am fortunate enough to be confirmed, I am committed to the neutral and even-handed application of precedent to each case that comes before me.

45. **You also said that describing an illegal immigrant as a "noncitizen" is "dehumanizing and otherizing." Are you aware the Immigration and Nationality Act uses the term "alien"?**

Response: Respectfully, I do not believe I have ever said that describing someone as a "noncitizen" is "dehumanizing or otherizing." I am aware that the Immigration and Nationality Act ("INA") uses the term "alien."

a. **Is the Immigration and Nationality Act "dehumanizing"?**

Response: The INA is federal law, and if I am confirmed I will fully, faithfully, and impartially apply it to the facts of any case that comes before me.

46. **In 2022, nearly twenty years after the *Grutter* decision, is the use of race as a factor in university admission decisions still appropriate?**

a. **If yes, when will it become inappropriate?**

Response: Because the use of race as a factor in university admissions is currently being

litigated before the Supreme Court, the Code of Conduct for United States Judges precludes me from commenting further, other than to state that I will fully, faithfully, and impartially apply any Supreme Court or Ninth Circuit precedent on this issue.

47. **I am proud to be leading an amicus brief in *Students for Fair Admissions v. Harvard College*, which challenges the constitutionality of race-based admissions. If the Supreme Court agrees with me and my colleagues, and overturns *Grutter*, will you faithfully apply the Supreme Court's decision?**

Response: Yes. If confirmed, I will be duty bound to faithfully apply all Supreme Court decisions and will do so.

**Senator Ben Sasse**
**Questions for the Record for Araceli Martínez-Olguín**
**U.S. Senate Committee on the Judiciary**
**Hearing: "Nominations"**
**September 21, 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: My judicial philosophy will be guided by my experiences working for two federal district court judges. If confirmed, I will resolve only those issues properly before me, and will approach them with an open mind. I will carefully review the briefs submitted by the parties, provide all parties an opportunity to be heard, conduct my own independent legal research, and will impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, and which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges.

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

   Response: Black's Law Dictionary defines "originalism" as a "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." 11th ed. 2019. I believe the Constitution does not change unless it is amended pursuant to Article V, and that it is intended to endure for ages and be adapted to apply to modern life. *See McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). If confirmed, I will fully, faithfully, and impartially apply Supreme Court and Ninth Circuit precedents, including with respect to interpretative methods.

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

   Response: I do not subscribe to particular labels because, if confirmed, I will be bound to utilize the interpretive methods employed by the Supreme Court and the Ninth Circuit. That said, binding precedent is clear that the starting point of any interpretative analysis of the Constitution or a statute is the provision's text.

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

Response: I believe the Constitution does not change unless it is amended pursuant to Article V, and that it is intended to endure for ages and be adapted to apply to modern life. *See McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). If confirmed, I will impartially, faithfully, and fully apply Supreme Court and Ninth Circuit precedents, including with respect to interpretative methods.

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 am not sufficiently familiar with the jurisprudence of each Supreme Court Justice appointed since January 20, 1953 to pick one whose jurisprudence I most admire. If confirmed, I will resolve only those issues properly before me, and will approach them with an open mind. I will carefully review the briefs submitted by the parties, provide all parties an opportunity to be heard, conduct my own independent legal research, and will impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, and which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges and Supreme Court opinions.

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: Generally, a three-judge panel of the Ninth Circuit may not overturn circuit precedent. *United States v. Wilson*, 659 F.3d 947, 955 (9th Cir. 2011). Only the Court of Appeals sitting *en banc* or the Supreme Court has the authority to overrule prior circuit precedent and only the Supreme Court has authority to overrule Supreme Court precedent.

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

Response: Please see my response to Question 7.

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

Response: If confirmed and when called upon to interpret a statutory provision, I would first determine whether the Supreme Court or Ninth Circuit have previously interpreted the federal statute at issue. In the unusual circumstance where I confronted an issue of first impression, I would look first to the text of statute. If the text is clear, my inquiry will stop there. If not, I would then look to methods of interpretation employed by the Supreme Court, as well as to persuasive authority from the other Circuits. I would similarly follow Supreme Court precedent regarding the propriety of looking to legislative history to resolve any ambiguity.

**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: No, when sentencing a convicted criminal defendant, a federal judge should consider the seven factors enumerated in 18 U.S.C. 3553(a). Additionally, Section 5H1.10 of the United States Sentencing Commission Guidelines Manual 2021 provides that the race, sex, national origin, creed, religion, and socio-economic status of the defendant are irrelevant in sentencing.

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

**Araceli Martínez-Olguín**
**Nominee, Northern District of California**

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

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

    Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Sentencing is a fact-specific, individualized process for each defendant. If confirmed, at sentencing I will fully, faithfully, and impartially apply all binding Supreme Court and Ninth Circuit precedent and will consider all the factors Congress requires district court judges take into account in 18 U.S.C. § 3553(a); the sentencing recommendations made by the prosecution, defense, and probation office; as well as any relevant sentencing enhancements as are appropriate on a case-by-case basis.

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

    Response: Please see my response to Question 1(a).

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

    Response: Please see my response to Question 1(a).

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

    Response: Please see my response to Question 1(a).

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

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

Response: Whether the penalties should be aligned is a matter for policy makers and, as a judicial nominee, it is imprudent for me to comment on any issue that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Sentencing is a fact-specific, individualized process for each defendant. If confirmed, at sentencing I will fully, faithfully, and impartially apply all binding Supreme Court and Ninth Circuit precedent and will consider all the factors Congress requires district court judges take into account in 18 U.S.C. § 3553(a); the sentencing recommendations made by the prosecution, defense, and probation office; as well as any relevant sentencing enhancements as are appropriate on a case-by-case basis.

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

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

**c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Sentencing is a fact-specific, individualized process for each defendant. If confirmed, at sentencing I will fully, faithfully, and impartially apply all binding Supreme Court and Ninth Circuit precedent and will consider all the factors Congress requires district court judges take into account in 18 U.S.C. § 3553(a); the sentencing recommendations made by the prosecution, defense, and probation office; as well as any relevant sentencing enhancements as are appropriate on a case-by-case basis.

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

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

Response: I am not familiar with this statement from Justice Marshall or its context. If I am confirmed, my judicial philosophy will be to: resolve only those issues properly before me and approach them with an open mind; carefully review the briefs submitted by the parties; provide all parties an

opportunity to be heard; conduct my own independent legal research; and impartially apply the law to the facts of each case. Additionally, I will draft opinions in a timely manner, which clearly explain the court's ruling and reasoning. I believe this is consistent with the oath taken by federal judges.

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

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

**4. Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?**

Response: Yes, it is binding Supreme Court precedent.

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

Response: Below are the standards for the most common abstention doctrines in the Ninth Circuit.

*Pullman* abstention is available to federal judges in cases that raise both federal constitutional claims and state law claims. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941). In the Ninth Circuit, "*Pullman* requires that the federal court abstain from deciding the *federal* question while it awaits the state court's decision on the state law issues." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1209 (9th Cir. 2021).

Pursuant to *Younger* abstention, federal courts should abstain from enjoining certain state proceedings based on a claim that the underlying state statute is facially unconstitutional. *See Younger v. Harris*, 401 U.S. 37, 54 (1971). In the Ninth Circuit, *Younger* abstention is limited to "three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020) (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)).

*Burford* abstention requires that "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of

federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (internal quotations and citation omitted); *see also Burford v. Sun Oil Co.*, 379 U.S. 315 (1943). The Ninth Circuit has held that *Burford* abstention applies if the party invoking the doctrine shows "(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 Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

The *Colorado River* abstention doctrine applies in cases where there are concurrent state and federal suits addressing the same subject matter. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Federal courts should not stay a case in that scenario unless the "clearest of justifications" shows that a stay would be in the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 818-19. The Ninth Circuit has held that courts should consider eight factors to determine whether a *Colorado River* stay is appropriate: "(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 Res. Control Bd.*, 988 F.3d 1194, 1203 (9th Cir. 2021) (internal citation omitted).

Under the *Rooker–Feldman* doctrine, a federal district court lacks subject matter jurisdiction to hear a direct appeal from the final judgment of a state court. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). Essentially, *Rooker-Feldman* abstention prohibits a federal district court from hearing claims from a party disappointed by a decision of a state court, even if a federal question is present or if there is diversity of citizenship between the parties. *Id.* at 1155.

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

Response: To the best of my recollection, I have never worked on a legal case or representation in which I opposed a party's religious liberty claim.

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: Please see my response to Question 6.

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

Response: There are instances where the Supreme Court has looked to the original public meaning to interpret the Constitution, such as in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

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

Response: If confirmed and called upon to interpret a federal statute, I would first determine whether the Supreme Court or Ninth Circuit have previously interpreted the federal statute at issue. In the unusual circumstance where I confronted an issue of first impression, I would look first to the text of statute. If the text is clear, my inquiry will stop there. If not, I would then look to methods of interpretation employed by the Supreme Court, as well as to persuasive authority from the other Circuits. I would similarly follow Supreme Court and Ninth Circuit precedent regarding the propriety of looking to legislative history to resolve any ambiguity.

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

Response: If confirmed, I will follow Supreme Court and Ninth Circuit precedent about which legislative history to treat as probative. For example, the Supreme Court has held that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (*quoting Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Additionally, the Supreme Court has concluded that some forms of legislative history, such as "failed legislative proposals," are "particularly dangerous" to rely upon because such history is generally not probative of legislative intent. *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted).

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

Response: Our Constitution is a domestic document, and I will not use foreign documents to interpret it unless the Supreme Court has done so in a similar context.

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

Response: To succeed on an Eighth Amendment claim challenging an execution protocol, a petitioner must: (1) establish that the method of execution presents a "substantial risk of serious harm" and (2) "'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]" the risk of harm involved. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (*quoting Glossip v. Gross*, 576 U.S. 863, 877 (2015)) (alterations in original).

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

Response: Yes.

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

Response: The Supreme Court held in *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 67-74 (2009), that a habeas petitioner had no due process right, either procedural or substantive, to access DNA evidence.

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

Response: No.

**13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a**

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

Response: To comply with the First Amendment's Free Exercise Clause, any governmental burden on the free exercise of religion must be neutral and generally applicable; or it must survive strict scrutiny. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). The Supreme Court has made clear that a law is not neutral and generally applicable if, for example, the "object or purpose of the law is suppression of religion or religious conduct," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), if a facially neutral law has been applied with hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

    Response: Please see my response to Question 13.

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

    Response: The Ninth Circuit has held that the Free Exercise Clause protects sincerely held religious beliefs that are not "obviously" a "sham" or an "absurdit[y]." *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (citing *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."), *Frazee v. Ill. Dept. of Empl. Sec.*, 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."), *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (finding that protection extends to an individual's religious beliefs even if they are not "logical, consistent or comprehensible to others" and should not turn on a "a judicial perception of the particular belief or practice in question").

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

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

    Response: The Supreme Court held in *District of Columbia v. Heller* that the text and historical background of the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008).

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

    Response: No.

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

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

    Response: The thrust of Justice Holmes' dissent is that the "Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." 198 U.S. 45, 75 (1905).

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

    Response: *Lochner* was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and is no longer binding precedent. If confirmed, I would follow all binding Supreme Court precedents.

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

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

Response: Supreme Court opinions can only be overruled by the Supreme Court. If confirmed, I will fully, faithfully, and impartially apply Supreme Court precedents.

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

Response: Yes.

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

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

Response: The Supreme Court has concluded that evidence showing that a company holds more than 80% share of the market "with no readily available substitutes" suffices to support a finding of monopoly power. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). The Court has also recognized that controlling over two-thirds of the market constitutes a monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946). Relying on these cases, the Ninth Circuit has held that a "65% market share" typically "establishes a *prima facie* case of market power." *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). Although "numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power," *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995), the Ninth Circuit has also held that a company may possess monopoly power with less than 50% market share if "entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id.* at 1438, n.10. If I am confirmed, I will fully, faithfully, and impartially apply the precedents of the Supreme Court and Ninth Circuit regarding monopolies.

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

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

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

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

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

Response: The Supreme Court stated in *Erie v. Tompkins*, 304 U.S. 64 (1938), that there is no federal general common law, and federal common law exists only in certain "limited enclaves in which federal courts may derive some substantive law in a common law way," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), such as admiralty cases. *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

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

Response: The interpretation of a state constitutional provision is a matter of state law, and federal courts are bound to apply those state law decisions when interpreting a state constitutional provision. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Please see my response to Question 21.

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

Response: The U.S. Constitution is "the supreme law of the land" which the states are bound to follow. U.S. Const. art. VI. cl. 2. Thus, states may not afford less protection than guaranteed by the federal Constitution. State courts may, however, "interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to state whether any Supreme Court case was correctly decided. However, because issues of *de jure* racial segregation are unlikely to be relitigated, I can state that *Brown v. Board of Education* was rightly decided. If I am confirmed, I will fully, faithfully, and impartially apply all binding Supreme Court precedents.

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

Response: Because this issue is being litigated before the Supreme Court, as well as before federal courts nationwide, it is imprudent for me to comment. I will note that injunctive relief is an "extraordinary remedy, which should not be granted as a matter of course" *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and "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 upheld nationwide injunctions in certain circumstances. *See, e.g., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017). If confirmed and faced with a case where a party seeks a nationwide injunction, I will follow applicable Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Federalism allocates power between the federal government and the States. Our federalist structure is most clearly outlined in the Tenth Amendment, which provides that the powers neither given to the federal government nor barred from the states are reserved for the states or the people.

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

Response: Please see my response to Question 5.

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

Response: Injunctive relief is normally reserved for instances where a party has suffered irreparable harm that cannot be remedied with money damages.

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments Due Process Clauses have a substantive component which protect unenumerated rights that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations and internal quotation marks omitted); *see also id.* at 720 (gathering cases in which the Supreme Court recognized such unenumerated rights).

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

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

Response: If confirmed and faced with a case that requires I delineate the scope of the First Amendment's right to free exercise of religion, I will follow applicable Supreme Court and Ninth Circuit precedent. Please also see my answer to Question 13.

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

Response: The Supreme Court has made clear that the Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) quoting (*Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

**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 answer to Question 13.

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

Response: Please see my answer to Question 15.

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

Response: The United States Supreme Court has made clear that the Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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

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

Response: I am not familiar with Justice Scalia's statement or its context. I understand this statement to mean that a judge who always personally likes the result they reach is a judge who is failing to put aside their personal views, and is failing to fulfill their judicial oath.

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

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

Response: To the best of my recollection, I have never taken a position in litigation or in a publication that a federal or state statute was unconstitutional.

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

Response: No.

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

Response: I believe ours is the greatest country in the world, and that I and my family are fortunate to have made our lives here. I also do not understand "systemic racism" to have a consensus definition. If confirmed, I will fully, faithfully, and impartially apply the relevant laws to the record of each case that comes before me, without bias toward any party.

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

Response: Yes.

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

Response: As an advocate, I was duty bound to zealously advance my clients' interests. I fully and faithfully fulfilled my obligation.

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

Response: Yes.

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

Response: No particular Federalist Paper has shaped my view of the law more than any other.

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

Response: The Supreme Court recently explained in *Dobbs v. Jackson Women's Health Organization* that states have a legitimate interest in "preservation of prenatal life at all stages of development" and that its holding in that case is "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests" nor "on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id*. at 2256, 2262, & 2284. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedents, regardless of any personal views.

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

Response: No, I have never before testified under oath.

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

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

Response: No.

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

Response: No.

**c. Systemic racism?**

Response: No.

**d. Critical race theory?**

Response: No.

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

**a. Apple?**

**b. Amazon?**

**c. Google?**

**d. Facebook?**

**e. Twitter?**

Response: I do not own any individual shares in these companies. I am not aware whether any of my retirement accounts, which have investments in mutual and index funds, may include shares in these companies.

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

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

Response: Over the course of my career, often in a supervisory capacity, I reviewed and edited briefs for colleagues in several matters beyond those in which I entered an appearance. I have not kept track of those briefs and am not able to provide citations.

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

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

Response: I filed two *errata* with the California Supreme Court related to *Salas v. Sierra Chemical*. One corrected errors in the Table of Contents and the Table of Authorities which had accompanied the opening brief. The second *errata* related to the reply brief and corrected the citation to a law review article and an internal citation.

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

Response: When testifying before the Senate Judiciary Committee, I took an oath to tell the truth. I understand my obligation to extend to these questions for the record. As a judicial nominee, I am also bound by the Code of Conduct for United States Judges, which advises that nominees refrain from publicly commenting "on the merits of a matter pending on impending in any court." Canon 3(A)(6).

**Questions from Senator Thom Tillis**
**for Araceli Martinez-Olguin**
**Nominee to be United States District Judge for the Northern District of California**

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

   Response: Yes. Moreover, each judge takes an oath requiring that they "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [them.]" 28 U.S.C. § 453. Impartiality is a cornerstone of our system of justice.

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

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." 11th ed. 2019. No, judicial activism is not appropriate and runs contrary to a judge's oath.

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

   Response: Impartiality is expected of a judge.

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

   Response: No; the role of a judge is the impartial application of laws adopted by legislative bodies, unless those laws conflict with the Constitution.

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

   Response: A judge's duty is to faithfully, fully, and impartially apply the law to the facts of each case that come before them. Fulfilling this duty is a desirable outcome and, if confirmed, I would adhere to this principle because doing so is critical to our system of justice.

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

   Response: No. It is contrary to the judicial oath and the system of justice established by our Constitution.

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

   Response: If confirmed I will abide by faithfully, fully, and impartially apply the Second Amendment and Supreme Court's decisions interpreting it. *See New York State Rifle & Pistol Ass'n. v. Bruen*, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

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 a case like this by reviewing its record and the parties' pleadings, and applying the relevant Supreme Court and Ninth Circuit's precedents, including, but not limited to *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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 whether a law enforcement officer is entitled to qualified immunity by reviewing the case's record and the parties' pleadings, and applying the relevant Supreme Court and Ninth Circuit's precedents. The Supreme Court has established a two-part test to determine whether law enforcement officials are entitled to qualified immunity under 42 U.S.C. §1983: (1) whether the official violated a statutory or constitutional right; and (2) whether the right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Court has found that a right is "clearly established" when "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Dist. 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: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to state if qualified immunity jurisprudence provides sufficient protection for law enforcement officers. If I am confirmed, I will faithfully, fully, and impartially apply all binding Supreme Court and Ninth Circuit precedents related to 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. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?**

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is generally inappropriate for me to comment on the state of the Supreme Court's jurisprudence. If I am confirmed, I will fully, faithfully, and impartially apply all binding Supreme Court precedents regarding patent eligibility.

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

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

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

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

**d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing**

**system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

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

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

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

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

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is inappropriate for me to analyze these hypotheticals, beyond saying that if I am confirmed, when examining patent eligibility cases, I will fully, faithfully, and impartially apply the Patent Act, 35 U.S.C. § 101, and all binding Supreme Court and Ninth Circuit precedents, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

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

Response: If I am confirmed, when examining patent eligibility cases, I will fully, faithfully, and impartially apply the Patent Act, 35 U.S.C. § 101, and all binding Supreme Court and Ninth Circuit precedents, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014). Whether the Supreme Court's jurisprudence incentivizes innovation is a matter for policymakers, on which it is inappropriate for me to opine.

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

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

Response: In my 16 years as a complex civil rights litigator and two years as a federal law clerk, I have not had occasion to study or practice copyright law. Over the course of my career, I have regularly been required to analyze legal issues I had not previously encountered. If confirmed, I am confident in my ability to thoroughly research and quickly get up to speed on issues of copyright law when they arise in a case that comes before me.

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

Response: In my 16 years as a complex civil rights litigator and two years as a federal law clerk, I have not had occasion to study or litigate issues under the Digital Millennium Copyright Act. Over the course of my career, I have regularly been required to analyze legal issues I had not previously encountered. If confirmed, I am confident in my ability to thoroughly research and quickly get up to speed on the Digital Millennium Copyright Act when a case raising it comes before me.

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

Response: In my 16 years as a complex civil rights litigator and two years as a federal law clerk, I have not had occasion to study or litigate issues related to intermediary liability for online service providers. Over the course of my career, I have regularly been required to analyze legal issues I had not previously encountered. If confirmed, I am confident in my ability to thoroughly research and quickly get up to speed on issues related to an online service providers liability for unlawful content posted by users when a case raising those issues comes before me.

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

Response: In my 16 years as a complex civil rights litigator and two years as a federal law clerk, I have had some experience with free speech issues. I have no experience with the intersection of free speech and intellectual property issues. Over the course of my career, I have regularly been required to analyze legal issues I had not previously encountered. If confirmed, I am confident in my ability to thoroughly research and quickly get up to speed on free speech issues, including when they involve intellectual property matters, when a case raising those issues comes before me.

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

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

Response: If confirmed, when a case requires statutory interpretation, I would first determine whether the Supreme Court or Ninth Circuit have previously interpreted the federal statute at issue. In the unusual circumstance where I confronted an issue of first impression, I would look first to the text of the statute. If the text is clear, my inquiry will stop there. If not, I would then look to methods of interpretation

employed by the Supreme Court, as well as to persuasive authority from the other Circuits. I would similarly follow Supreme Court precedent regarding the propriety of looking to legislative history to resolve any ambiguity.

**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: If confirmed, I would first look for binding Supreme Court and Ninth Circuit precedent regarding the issue. Courts generally defer to an agency's interpretations of ambiguous statutes when those interpretations are arrived at through formal adjudications or notice and comment rule making. *Chevron, U.S.A., Inc v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). An expert federal agency's advice or analysis of legislative text, as contained in an agency opinion letter, policy statement, agency manual, or enforcement guideline, is "entitled to respect," but only to the extent those materials are persuasive. *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is inappropriate for me to comment other than to say that I will fully, faithfully, and impartially apply all binding Supreme Court and Ninth Circuit precedents when analyzing the facts and circumstances in copyright infringement cases.

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

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

Response: If confirmed, I would first determine whether the Supreme Court or Ninth Circuit have previously interpreted the DMCA provision at issue. In the unusual circumstance where I confronted an issue of first impression, I would look first to the DMCA's text. If the text is clear, my inquiry will stop there. If not, I would then look to methods of interpretation employed by the Supreme Court, as well as to persuasive authority from the other Circuits. I would similarly follow Supreme Court

precedent regarding the propriety of looking to legislative history to resolve any ambiguity.

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

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

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

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

Response: In the Northern District of California, the Clerk of the Court assigns cases to the District's divisions and judges pursuant to the Assignment Plan of the Court. If confirmed, I will fully, faithfully, and impartially comply with the Assignment Plan of the Court, venue rules, and any other governing precedents.

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

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

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

Response: I commit that, if confirmed, I will not take proactive steps to attract any particular type of case or litigant.

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

Response: I commit that, if confirmed, I will not take proactive steps to attract any particular type of case or litigant.

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

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

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

Response: As a judicial nominee, it is improper for me to comment on any issues "pending or impending in any court". *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is inappropriate for me to comment on this situation.

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

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

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

Response: As a judicial nominee, it is improper for me to comment on any issues that might come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is inappropriate for me to comment on venue rules other than to state that, if confirmed, I would faithfully and fully apply them and any other governing precedents.

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

Response: Please see my response to Question 20(a).

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

Response: Please see my response to Question 20(a)

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

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

Response: As a judicial nominee, it is improper for me to comment on any issues "pending or impending in any court." *See* Code of Conduct for United States Judges, Canon 3(A)(6). Accordingly, it is inappropriate for me to comment on this situation.

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

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

**22. I was deeply concerned to learn about your strong support and advocacy for dangerous sanctuary city policies. The core premise of sanctuary policies is that state and local governments should ignore federal immigration law and release potentially violent, criminal aliens into our communities.**

**a. Please explain your views of why state and local governments should be allowed to ignore federal law and release dangerous criminals.**

Response: Respectfully, I would like to clarify that I have never stated that state and local governments should ignore federal law and release dangerous criminals. As an advocate, I met with local law enforcement officials and, on behalf of my clients, urged policies – consistent with federal law – that my clients believed would make their communities safer by facilitating immigrants coming forward to report crimes and serving as witnesses in criminal cases. As an advocate, I was duty bound to advance legally cognizable arguments, however I understand that any personal views or prior advocacy I have undertaken are irrelevant to serving as a judge. In agreeing to be nominated, and if I am fortunate enough to be confirmed, I am committed to the neutral and even-handed application of precedent to each case that comes before me.

**b. As a federal judge, it would be your responsibility to enforce federal law. How does that constitutional responsibility to enforce federal law conflict with your own advocacy to allow states and cities to ignore federal law?**

Response: Please see my response to 22(a).

**c. If confirmed, how would you separate your strongly held views supporting sanctuary policies from your responsibility to enforce the law as written?**

Response: Please see my response to question 22(a).