Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Salvador Mendoza, Jr.
Nominee to the Court of Appeals for the Ninth Circuit
May 18, 2022

1. **You have been a district court judge since 2014, and you previously served as a state court judge. Throughout your time on the bench, you have presided over more than 55 trials that proceeded to verdict or final decision. You also have appellate court experience, having sat by designation on the Ninth Circuit a number of times. In that capacity, you presided over 31 cases and authored two opinions for the Ninth Circuit, both of which were for unanimous three-judge panels.**

   Can you tell us about what you learned from the experience of sitting by designation on the Ninth Circuit?

   Response: While participating on the appellate bench, I found my practical, hands-on experience as a trial judge and former trial lawyer provided invaluable insights into the cases before the appellate court. This experience informed my evaluation of cases and took the motion or the issue before me from the abstract to the concrete. The experience I gained throughout my career clarified the context of the motions that are often undiscernible from simply reading a cold record. Also, I approached the appellate case from the perspective of a trial judge who is often handling a myriad of issues needing accurate and concrete answers to often complex and time-sensitive matters.

2. **Before assuming the bench, you had a great deal of courtroom experience. You practiced law for 14 years, handling approximately 150 to 250 cases per year. You tried more than 75 cases to verdict or final decision. You also maintained a significant commitment to pro bono work. According to your Questionnaire, roughly half of your cases involved the representation of indigent clients.**

   How did your litigation experience help prepare you to be a judge?

   Response: In the 16 years that I practiced as an attorney, I gained a wealth of litigation experience. As an Assistant Attorney General for the State of Washington, I represented the Department of Social and Health Service, Department of Licensing, and the Department of Labor and Industries. In that role, I handled a panoply of hearings ranging from child protective services matters to licensing and other administrative cases. As a Deputy Prosecutor for Franklin County Washington, I prosecuted felony and misdemeanor juvenile criminal cases in a wide array of subject matters, including vehicular homicide, sex offenses, assault, and theft. In private practice for 14 years, I handled both private and indigent defense in state and federal felony matters, including drug trafficking conspiracies, firearms offenses, immigration offenses, sex offenses and fraud cases. Throughout this time, I also handled pro bono cases and was active in legal aid in my community. Additionally, I helped establish the first drug courts in Benton and Franklin Counties to reduce recidivism rates in the community. While in private practice, I was also a judge pro tempore for various

jurisdictions in adult and juvenile court. This wide range of litigation experience has guided my understanding and preparation for my role as a judge.

3. **In *United States v. Henrikson*—which you presided over—the defendant was accused of paying for the murder of two people who had been involved in a North Dakota oil business deal that went awry. You handled pretrial discovery disputes and evidentiary issues that went on for approximately two years. Ultimately, you presided over a month-long trial, and the jury convicted the defendant on all counts. You sentenced the defendant to two concurrent life terms in prison.**

   Can you tell us about your experience presiding over this case and the procedural complexities it presented?

   Response: In this case, six defendants were charged with various crimes related to several attempted murders and two murders-for-hire committed in 2014. I presided over the trial of Mr. Henrikson where he was accused of paying and promising to pay associates significant sums of money to murder two people connected to his North Dakota oil business dealings and the attempted murder of other witnesses and business associates across the country. Mr. Henrikson elected to take the case to trial. Over the course of approximately two years, I issued a significant number of pretrial orders regarding the parties' discovery disputes and evidentiary issues. Because the case received some notoriety, I also managed the media orders and issues involving national news organizations and local news outlets. Following a complex jury selection process and an approximately month-long trial over which I presided, a jury convicted Mr. Henrikson on all counts. I then sentenced him to two concurrent life terms of imprisonment.

Senator Grassley, Ranking Member
Questions for the Record
Judge Salvador Mendoza
Nominee to be United States Circuit Judge for the Ninth Circuit

1. **In your questions for the record following your 2014 Senate Judiciary Committee hearing to consider your nomination to be a district court judge, Senator Ted Cruz asked you how you would describe your judicial philosophy. You responded that your judicial philosophy is "guided by the principles of patience, respect for the rule of law, and humility" and by "applying the statutory authority and case precedent to the facts presented." Now that you have experience hearing cases, are you able to describe your judicial philosophy with any more specificity?**

   Response: I am still guided by the same principles that I articulated in 2014. I do not characterize myself by any particular label. Instead, I begin each case with an open mind and a commitment to applying Supreme Court and Ninth Circuit precedent to the specific facts before me.

2. **What role does historical practice play when you are interpreting the Constitution?**

   Response: When interpreting the Constitution, I always apply the binding Supreme Court and Ninth Circuit precedent addressing the constitutional provision. This includes applying any standards of review or frameworks of analysis set out by the courts in prior cases. In certain circumstances, historical practice may also be relevant to determining the historical scope of a constitution provision, such as the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc).

3. **What opinion that you've issued best reflects your approach to the law?**

   Response: I approach each case with an open mind and base my decisions on the facts before me and the law as interpreted in binding Supreme Court and Ninth Circuit precedent. While I think that all of my opinions reflect this respect for precedent, I would point to my opinion in *United States v. Cloud*, No. 19-CR-02032, Dkt. 219 (E.D. Wash. Oct. 14, 2020), as one example.

4. **At your hearing, you mentioned Justice Sotomayor and stated that you "admired her work." Do you have a favorite opinion by Justice Sotomayor?**

   Response: I do not have a favorite opinion by Justice Sotomayor. As I mentioned at the hearing, Justice Sonia Sotomayor agreed to participate in an introductory video for students as part of the Tri-Cities Youth and Justice Forum in Pasco, Washington that I coordinate. I admire Justice Sonia Sotomayor for her illustrated commitment to inspiring our youth to pursue careers in the legal profession.

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

Response: I do not approach my responsibility as judge from the perspective of whether the Supreme Court will "catch" any of my decisions. Instead, in reaching my decisions, I look at the facts presented and faithfully and impartially apply the statutes at issue and any binding Supreme Court and Ninth Circuit precedent.

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

Response: The First Amendment protects freedom of speech. The Supreme Court has indicated that speech "is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The Court has indicated that "fighting words" do not receive the protections of the First Amendment. *Id.* at 572. As Justice Scalia has indicated, "fighting words" are "non speech" and are more akin to a "noisy truck." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). The Court held that "fighting words—'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction'—are generally proscribable under the First Amendment." *Virginia v. Black*, 538 U.S. 343, 359 (2003), citing *Cohen v. California*, 403 U.S. 15, 20 (1971).

7. In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?

Response: Black's Law Dictionary provides the following definition for super precedent: "[a] precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation" and "[a] precedent that has become so well established in the law by a long line of reaffirmations that it is very difficult to overturn it; specif., a precedent that has been reaffirmed many times and whose rationale has been extended to cover cases in which the facts are dissimilar, even wholly unrelated, to those of the precedent." *Super precedent*, Black's Law Dictionary (10th ed. 2014). I note that as a United States District Judge and judicial nominee to the Ninth Circuit Court of Appeals, I will apply all Supreme Court and Ninth Circuit Precedent.

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

Response: Yes. The Supreme Court held that parents have the right to teach and the right as parents to direct the upbringing of one's children. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court reasoned that those rights are within the liberty interest of the Fourteenth Amendment's Due Process Clause. *Id*. at 400.

9. In the comment you wrote for a law review during law school, which was entitled "When Maria Speaks Spanish: *Hernandez*, the Ninth Circuit, and the Fallacy of Race Neutrality," you argued that the justice system is inherently and systemically racist and explicitly stated, "yes, I am suggesting that the prosecutor will lie and state reasons that are wholly unrelated to the race of the juror [to exclude the potential juror]." Do you also believe that prosecutors lie other stages of criminal prosecutions besides voir dire?

Response: More than 26 years ago, as a law student at UCLA School of Law, I wrote a law review note before I practiced as an attorney or took the oath as a judge. The law review note was an academic article that, like most law students' notes, sought to discuss and analyze a then relatively new case decided by the Supreme Court that raised issues surrounding the potential exclusion of Latinos from participation in our system of justice. That paper reflected my analysis as a law student, but I have since had more than two decades of experience as a practitioner and judge. As an attorney, I have tried over 75 cases and as a judge, I have presided over 57 trials. It has been my experience that judges and practitioners take great pains to adhere to their respective solemn oaths. The quote referenced was not based on the experience I now have. As a U.S. District Court Judge, I approach each case with an open mind and base my decisions, not on comments I made as a law student 26 years ago, but on the facts before me and the law as interpreted in binding Supreme Court and Ninth Circuit precedent, including *Hernandez v. New York*, 500 U.S. 352 (1991).

10. What do you understand the standard of review to be when reviewing a decision from the Board of Immigration Appeals?

Response: The Ninth Circuit has indicated that the court reviews the Board of Immigration Appeals' (BIA) denial of a motion to reopen for abuse of discretion. *Nababan v. Garland*, 18 F.4th 1090, 1994 (9th Cir. 2021). The BIA abuses its discretion when its decision is arbitrary, irrational, or contrary to law. *Id.* Finally, BIA's determinations of purely legal questions are reviewed de novo and the BIA's factual findings are supported for substantial evidence. *Id*. Of note, in *Patel v. Garland*, No. 20-979, --- S. Ct. --- (May 16, 2022), the Supreme Court recently held that federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under an Immigration and Nationality Act (INA) provision.

11. What is your understanding of the Ninth Circuit's law on the admissibility of evidence when considering class certification?

Response: Class certification is governed by Federal Rule of Civil Procedure 23. A plaintiff seeking class certification under this Rule must affirmatively demonstrate "through evidentiary proof that the class meets the prerequisites of Rule 23(a)." *In re Hyundai and Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th Cir. 2018) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). The plaintiff "must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores,*

Inc. v. Dukes, 564 U.S. 338, 350, (2011)). "In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence." *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods*, 31 F.4th 651 (9th Cir. 2022) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454–55 (2016)).

12. Was *Heller* correctly decided?

Response: As a U.S. District Court Judge and a judicial nominee to the Ninth Circuit Court of Appeals, it would be generally inappropriate for me to comment on the correctness of any Supreme Court precedent. It is and would be my duty to follow any binding precedent.

13. Was *Citizens United* correctly decided?

Response: As a U.S. District Court Judge and a judicial nominee to the Ninth Circuit Court of Appeals, it would be generally inappropriate for me to comment on the correctness of any Supreme Court precedent. It is and would be my duty to follow any binding precedent.

14. As a general matter, if a judge encounters unsettled Supreme Court precedent, should he anticipate where the Supreme Court will end up, or simply do his best to apply what the Supreme Court has already held?

Response: As a U.S. District Court Judge and a judicial nominee to the Ninth Circuit Court of Appeals, it is and would be my duty to follow and apply all binding precedent. It is not my role to speculate as to "where the Supreme Court will end up." My duty is to apply then-existing case precedent on the statutes to the facts before me.

15. What is the constitutional basis for the "undue burden" test established in *Planned Parenthood v. Casey*?

Response: In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court stated "[w]e reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*." *Id.* at 875. The Court explained, "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 874. The Court further stated that "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.*

16. What is the constitutional basis for the exclusionary rule found in *Weeks v. United States*?

Response: In *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court determined that evidence obtained in violation of the accused's Fourth Amendment rights may not be used as evidence against the accused at trial. The Court reasoned that failure

to provide the exclusionary rule as a remedy where an accused citizen's Fourth Amendment rights were violated would effectively strike the Fourth Amendment's protections from the Constitution. *Id.* at 394. However, I note that the Supreme Court has since clarified the scope of the exclusionary rule's applicability. *See, e.g.*, *Utah v. Strieff*, 579 U.S. 232 (2016). As the Court noted, "[s]uppression of evidence has always been our last resort, not our first impulse." *Id*. at 237–38. If presented with an issue concerning the exclusionary rule, I would apply all relevant Supreme Court and Ninth Circuit precedent to the facts of the case before me.

17. What is the constitutional basis for qualified immunity found in *Pierson v. Ray*?

Response: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983. Following the passage of Section 1983, the Supreme Court has recognized immunity doctrines that protect government from suit under this statute. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court recognized that a law enforcement officer was immune from suit in his individual capacity where he was "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied." *Id.* at 554. In *Pierson*, the Court reiterated that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 556 (quoting *Monroe v. Pape*, 365 U.S. 167 (1961)).

18. In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification. As a U.S. District Court Judge, I am bound by Supreme Court and Ninth Circuit Court precedent and would follow this analysis.

19. What role should empathy play in interpreting the law?

Response: Empathy should play no role in a judge's consideration of a case. As a sitting judge, I make decisions on the facts, the issue in controversy, and the binding Ninth Circuit and Supreme Court precedent.

20. Are legal doctrine and practice best understood as an objective and defensible scheme of human association? Or are they better understood as being of instrumental use for political ends?

Response: I do not have an opinion on how best to understand legal doctrine and practice, given the two options above. Law, as it is practiced in this country, is an iterative process. With each new case or issue, judges must, without fear or favor, apply the relevant statutes, constitutional provisions, and precedent to the facts before them. As a U.S. District Court Judge and judicial nominee to the Ninth Circuit Court of Appeals, that is what I do and would do in every case.

21. What is the relationship between morality and the law generally?

Response: Moral principles may help inform the laws that policymakers pass, but judges must be concerned with the laws themselves. As a U.S. District Court Judge, I approach each case with an open mind and base my decisions on the facts before me and the law as interpreted in binding Supreme Court and Ninth Circuit Court precedent. If confirmed to the Ninth Circuit Court of Appeals, I will do the same.

22. Is the practice of judicial review defensible absent the existence of neutral legal principles?

Response: I do not have an opinion on whether judicial review is defensible absent the existence of neutral legal principles. As a U.S. District Court Judge, I approach each case with an open mind and base my decisions on the facts before me and the law as interpreted in binding Supreme Court and Ninth Circuit Court precedent. If confirmed to the Ninth Circuit Court of Appeals, I will do the same.

23. In the Ninth Circuit, what is the level of scrutiny a court must apply to a claim arising under the Second Amendment?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms in defense of self and home. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the right is fundamental and applied to the states through the Fourteenth Amendment, though the Court cautioned that the right secured by the Second Amendment is not unlimited. *Id*. at 626. The Court provided examples of valid firearm legislations to include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualification on the commercial sale of arms." *Id.* at 626–27.

Applying *Heller*, the Ninth Circuit has adopted a two-step framework to evaluate whether a government regulation infringes on the Second Amendment right to keep and bear arms. *See Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). First, the

Ninth Circuit determines whether the "challenged law affects conduct that is protected by the Second Amendment" based on the "historical understanding of the scope of the right." *Id.* Thus, these laws will be upheld if they can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope. *Id*. However, if the regulation is within the historical scope of the Second Amendment, or is not presumptively lawful as identified by *Heller*, the Ninth Circuit then determines, at step two, what level of scrutiny should apply to the challenged regulation. *Id*. at 784. In *Young*, the Ninth Circuit explained that it has understood "*Heller* to require one of three levels of scrutiny: If a regulation 'amounts to a destruction of the Second Amendment right,' it is unconstitutional under any level of scrutiny; a law that 'implicates the core of the Second Amendment right and severely burdens that right' receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny." *Id*. If confirmed, I will apply the foregoing precedents.

24. Do minors have rights under the Second Amendment?

Response: As I understand, there is no Ninth Circuit or Supreme Court precedent definitively resolving this issue, though the Seventh Circuit struck down a city regulation that prohibited anyone under the age 18 from entering a shooting range. *See Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017). I also note that the Ninth Circuit has recently commented that "our historical analysis leads us to conclude that young adults have a Second Amendment right to keep and bear arms." *Jones v. Bonta*, No. 20-56174, --- F.4th ---- (May 11, 2022). If this issue comes before me, I will apply all relevant Supreme Court and Ninth Circuit precedent.

25. Is it more important for the law to be certain or for it to be correct?

Response: As a U.S. District Court Judge, I strive for both correctness and certainty in my legal decisions, in that I carefully apply Supreme Court and Ninth Circuit precedent in the cases before me and strive to make my decisions clear and well-reasoned.

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

Response: The Ninth Circuit has "long held that there is 'no constitutional right to counsel in a civil case.'" *Adir Int'l., LLC v. Starr Indemn. And Liab. Co.*, 994 F.3d 1032, (9th Cir. 2021) (quoting *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986)). However, while "'there is no right of subsidized access' in civil cases like there is in the Sixth Amendment context," certain due process protections are triggered when a civil litigant hires a lawyer. *Id.* (quoting *Guajardo-Palma v. Martinson*, 622 F.2d 801, 803 (7th Cir. 2010)).

27. 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 *Downes v. Bidwell* correctly decided?
b. Was *Gideon v. Wainwright* correctly decided?
c. Was *Miranda v. Arizona* correctly decided?
d. Was *Dickerson v. United States* correctly decided?
e. Was *Meyer v. Nebraska* correctly decided?
f. Was *Griswold v. Connecticut* correctly decided?
g. Was *Roe v. Wade* correctly decided?
h. Was *Planned Parenthood v. Casey* correctly decided?
i. Was *Gonzales v. Carhart* correctly decided?
j. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
k. Was *Sturgeon v. Frost* correctly decided?
l. Was *Rust v. Sullivan* correctly decided?

Response: As a U.S. District Court Judge and a judicial nominee to the Ninth Circuit Court of Appeals, it would be generally inappropriate for me to comment on the correctness of Supreme Court precedent. It is and would be my duty to follow any binding precedent.

28. Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?

Response: In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. If confronted with this issue, I would apply this standard, as well as any other relevant Supreme Court and Ninth Circuit precedent.

29. Do the following qualify as public health emergencies? Please explain why or why not:

a. Racism?
b. Gun violence?

Response: Whether racism or gun violence constitute public health emergencies is a question for policymakers to consider and a matter of public debate. To the extent these are ever legally relevant determinations, as a U.S. District Court Judge and judicial nominee for the Ninth Circuit Court of Appeals, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before me.

30. Do you think the Supreme Court should be expanded?

Response: Whether to expand the Supreme Court is a question for policymakers to consider and are matters of public debate. I would apply Supreme Court precedent regardless of the composition of the Court.

31. If the Justice Department determines that a prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain why or why not.

Response: As a U.S. District Court Judge, I have never appointed an amicus to continue the prosecution of a Justice Department case, and this is not an issue I have considered as a part of an appeals panel. If confronted with this issue, I would apply all relevant Supreme Court and Ninth Circuit precedent to the facts of the case before me.

32. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."

a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: No, except Christopher Kang was an attorney at the Office of White House Counsel in 2013 during the Obama administration when I was interviewed for the District Court position. I communicated with him during the process of my District Court nomination, but I have not communicated with him since that time.

33. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."

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

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

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

Response: No.

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

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

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.

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.

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

a. Has anyone associated with Open Society 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?

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

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

Response: No.

36. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**
c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: No.

37. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary, which purports to "combat[] damaging right-wing court capture to restore progressive federal courts" and to "counter illegitimate right-wing dominated courts."**
    a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**
    c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

    Response: I have been in contact with two individuals at the Raben Group: Robert Raben and Dylan Tureff. I briefly communicated with these individuals to coordinate my interview with the Hispanic National Bar Association (HNBA). I interviewed with the HNBA after President Biden nominated me so that it could decide whether to endorse my nomination. I am not currently in contact with anyone associated with the Raben Group. The Raben Group has not requested I provide any services. As far as I am aware, I have never been in contact with anyone in their role as a member of the Committee for a Fair Judiciary.

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

Response: On January 18, 2022, I submitted a letter to Senator Patty Murray expressing my interest in serving on the United States Court of Appeals for the Ninth Circuit. On

January 23, 2022, Senator Murray's staff asked me to submit additional information. On January 26, 2022, I provided the requested information. On February 7, 2022, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On April 13, 2022, the President announced his intent to nominate me. On April 25, 2022, the President sent my nomination to the United States Senate.

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

Response: No.

40. 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: No.

41. 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.

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

Response: No.

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

Response: No.

44. 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: Please see my response to Question 37.

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

Response: On May 18, 2022, I received the questions from the Office of Legal Policy (OLP). After I reviewed the questions and conducted research, I prepared substantive responses on my own. I obtained the assistance of my law clerks to check case citations and make non-substantive, general edits. I received feedback from OLP on my responses. I considered their feedback and submitted my final answers to the Committee.

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

Questions for the Record for Salvador Mendoza, Nominee for the Ninth Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Discrimination on the basis of race is illegal under many state and federal laws. Additionally, Supreme Court precedent has established that laws involving suspect class classifications such as race are subject to strict scrutiny.

2. **Is critical race theory taught in K-12 schools?**

   a. **If it is not, should it be, in your opinion?**

   Response: As a U.S. District Court Judge, I am not aware whether critical race theory is taught in K-12 schools. The question of what subjects and curricula are appropriate for specific schools and age groups is a question for policymakers and educational institutions to consider.

3. **Have you personally or professionally or in an academic setting, advocated for race reparations?**

Response: No.

4. **In 1996, while in law school, you wrote a law review comment, entitled "When Maria Speaks Spanish: Hernandez, the Ninth Circuit, and the Fallacy of Race Neutrality" arguing the Supreme Court's decision in *Hernandez v. New York* was wrongfully decided and questioning the integrity of prosecutors. Specifically, you wrote, "Yes, I am suggesting that the prosecutor will lie and state reasons that are wholly unrelated to the race of the juror." Do you still believe in your statement from 1996?**

Response: More than 26 years ago, as a law student at UCLA School of Law, I wrote a law review note before I practiced as an attorney or took the oath as a judge. The law review note was an academic article that, like most law students' notes, sought to discuss and analyze a then relatively new case decided by the Supreme Court that raised issues surrounding the potential exclusion of Latinos from participation in our system of justice. That paper reflected my analysis as a law student, but I have since had more than two decades of experience as a practitioner and judge. As an attorney, I have tried over 75 cases and as a Judge, I have presided over 57 trials. It has been my experience that judges and practitioners take great pains to adhere to their respective solemn oaths. Now, as a U.S. District Court Judge, I deal with issues of race in the context of legal claims, not academic theory and analysis. I apply the statutes and Supreme Court and Ninth Circuit precedent to those mattes. When presiding over all matters, I faithfully adhere to the core principle of equal justice under law. I approach each case with an open mind and base my decisions, not on comments I made as a law student 26 years ago, but on the facts before me and the law as interpreted in binding Supreme Court and Ninth Circuit Court precedent, including *Hernandez v. New York*, 500 U.S. 352 (1991).

5. **Is the United States systematically racist?**

Response: As a U.S. District Court Judge, I deal with the issue of race or racism in the context of claims brought by litigants in employment discrimination cases along with

other allegation of specific violations of laws prohibiting racial discrimination. I carefully consider those claims and apply binding Ninth Circuit and Supreme Court precedent. The question of whether the United States is systematically racist is a question for policymakers and others to consider. But I would note that, as the son of immigrants, I have been educated at some of the best institutions, supported by teachers, professors, lawyers, judges, and community members, and now have been nominated by two Presidents to the federal judiciary. This is a testament to people and the opportunities in this country.

6. **Are any of the states in the Ninth Circuit systemically racist?**

Response: Please see my answer to Question 5.

7. **Do you believe that border security policies that advocate for building a border wall are grounded in white supremacy?**

Response: Border security policies are important questions for other institutions of government to appropriately address and are matters of ongoing public debate. As a judge, it is inappropriate for me to discuss this policy matter.

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

Response: As I indicated at the confirmation hearing, I have not carefully studied the judicial philosophies of the current and former justices. As such, I cannot single out one judicial philosophy that is most analogous to mine. As a U.S. District Court Judge, I have issued over 9,000 orders or opinions. My approach is to begin each case with an open mind and to evaluate any questions presented by applying the statutes and the binding case precedent to the facts. If the issues would be clarified with oral argument, I set the matter for a hearing. Then, I proceed to write an opinion that answers the question before me and explains in detail my methodology and decision. I am committed to the principle of equal justice under law.

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

Response: Black's Law Dictionary defines originalism as "[t]he 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." *Originalism*, Black's Law Dictionary (10th ed. 2014).
I do not characterize myself by any particular label. Instead, I begin each case with an open mind and a commitment to applying the Ninth Circuit and Supreme Court precedent to the specific facts before me.

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

Response: Black's Law Dictionary defines living constitutionalism as "[t]he doctrine that

the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living constitutionalism*, Black's Law Dictionary (10th ed. 2014). I do not characterize myself by any particular label. Instead, I begin each case with an open mind and a commitment to applying the Ninth Circuit and Supreme Court precedent to the specific facts before me.

11. **In 2013, when you submitted your application for a state judicial vacancy, you commented on the retiring judge vacating the seat, stating he "mak[es] a decision based on what he thinks is right." Do you believe this is a constitutional way to make a judicial decision, why or why not?**

Response: I don't recall this quote or its context. As a U.S. District Court Judge, I make my decisions on the specific question before me after applying binding Supreme Court and Ninth Circuit precedents to the relevant facts in the record. At the time I issue my decisions, I believe I have made a decision based on what I think is "right"—that is, I believe my decision represents the best application of binding Supreme Court and Ninth Circuit precedent to the facts of the case before me, such that I believe my opinion represents the best interpretation of the law.

12. **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: As a U.S. District Court Judge, I am bound by and apply Supreme Court and Ninth Circuit Court precedent to the cases before me. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification.

13. **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: As a U.S. District Court Judge, I am bound by Supreme Court and Ninth Circuit Court precedent. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification. In *Bostock v. Clayton Cty*., 140 S. Ct. 1731(2020), the Court again stated that "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738.

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

Response: No. The Constitution is an enduring document that adapts to present day circumstances.

15. **Are there identifiable limits to what government may impose—or may require—of**

private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: Yes. The First Amendment of the United States Constitution prohibits the government from promoting one religion over others or restricting an individual's religious practices. The Supreme Court has indicated that the Free Exercise Clause generally does not excuse an individual from complying with laws that are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520 (1993); *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990).

However, laws that are not neutral or generally applicable receive strict scrutiny and must be justified by a compelling governmental interest and narrowly tailored to advance that interest. Recently, the Supreme Court has struck down laws that were not neutral and generally applicable. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Also, in *Masterpiece Cakeshop*, the Court invalidated an order from the Colorado Civil Rights Commission based on state anti-discrimination laws against a bakery owner who refused to bake a wedding cake for the marriage of a gay couple. The Court concluded that the Commission violated the Free Exercise Clause because it was not religiously neutral. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

In the employment context, the Free Exercise Clause also prohibits enforcement of certain employment laws in a manner that would interfere with a religious institution's employment of certain of its key employees, including ministers and teachers entrusted "with the responsibility of educating and forming students in the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). The Supreme Court has explained that to hold otherwise would "intrude[] upon more than a mere employment decision" and "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to share its own faith and mission through its appointments." *Id.* Giving "the state the power to decide who will minister to the faithful," the Court explained, "also violates the Establish Clause."

Additionally, with respect to the federal government, the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] 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." 42 U.S.C. §§ 2000bb–1(a), (b). The Supreme Court has explained that RFRA protects religious organizations like Little Sisters of the Poor and businesses operated by observant owners. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

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

Response: Please see my response to Question 15.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the religious institutions met the requirements for a preliminary injunction against the challenged government regulations. As the Court noted, the institutions were likely to prevail on the merits of their First Amendment claims because they had made a "strong" showing that the regulations were not neutral to religion and "single out houses of worship for especially harsh treatment." *Id.* at 66. The Court applied the strict scrutiny standard and found that the regulations were not narrowly tailored to achieve the compelling interest of reducing the spread of COVID-19. *Id.* at 67. Also, the Court found that the applicants would be irreparably harmed without the injunction, and there was no evidence that granting the injunction would be harmful to the public. *Id.* at 67–68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted injunctive relief, pending appeal and disposition of a petition for a writ of certiorari, barring enforcement of California's restrictions on private gatherings during the COVID-19 pandemic. The Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. at 1296. The Court explained that the state's restrictions contained various exceptions and accommodations for secular activities that were comparable to religious activities. The Court reasoned that a government law is not neutral or generally applicable if it treats certain secular activity more favorably than religious activity and explained that the standard for comparing such activity was to determine the risks, not the reasons why people gather. The Court also found that the government failed to show how prohibited religious activities posed greater risks for the spread of COVID-19 than secular activities. Further, the regulation would only survive strict scrutiny if the religious exercise at issue was shown to be more dangerous than secular activities, even when the same precautions were applied. Finally, the Court concluded that the plaintiffs were likely to succeed on the merits, would be irreparably harmed by the loss of their free exercise rights, and that the issuance of the injunction did not counter the interest of the public.

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

Response: Yes.

20. **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), the Supreme Court held that the State of Colorado had violated the Free Exercise Clause when it failed to neutrally apply a facially neutral public accommodations law where the transcript from commission meetings showed a religious animus against the cakeshop owner's sincerely held religious beliefs.

21. **In 2019, you presided over *Washington v. Arlene's Flowers Ind.* as a state court judge, which went all the way to the Supreme Court where certioriari was granted, the lower court's decision was vacated, and the case was remanded for further proceedings consistent with *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Do you believe *Arlene's Flowers* was rightfully decided, why or why not?**

Response: As a U.S. District Court Judge and a judicial nominee to the Ninth Circuit Court of Appeals, it would be inappropriate for me to comment on Supreme Court precedent. It is and would be my duty to follow any binding precedent. I note that I presided over *Arlene's Flowers* at preliminary stages of the proceedings before any constitutional issues were reached. If this issue came before me, I would apply *Masterpiece Cakeshop* and any other binding precedent.

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

Response: Yes. The Supreme Court has held that the inquiry is limited to whether the beliefs at issue are sincerely held, irrespective of whether those beliefs are consistent with any religious doctrine. *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981). Courts do not determine whether religious beliefs are mistaken or insubstantial; they simply determine whether they are honest convictions. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

Response: If presented with such an issue, my approach would be to carefully apply the Supreme Court and the Ninth Circuit precedent on the point. The Court has indicated, however, that the inquiry is not into whether an individual correctly applied particular religious tenants but rather into whether the individual sincerely held those beliefs. *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989).

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

Response: Please see my response on Question 22(a).

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

Response: As a U.S. District Court Judge and a judicial nominee to the Ninth Circuit Court of Appeals, it would be inappropriate for me to opine on the official position of

any religious organization.

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

Response: The Supreme Court has held that both the Free Exercise Clause and the Establishment Clause prohibit governmental interference with a religious institution or school's employment of ministerial employees in religious settings. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 191 (2012). In *Our Lady of Guadalupe*, the plaintiffs sued their employer under the Americans with Disabilities Act and the Age Discrimination Act. The case centered on whether the teachers qualified as ministers allowing religious institutions to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" under the so-called "ministerial exception." *Id*. at 2055. The Court reasoned that the classification under the ministerial exception mattered less on the person's title, and more on what the employee's duties were. *Id*. at 2064. The Court reasoned that educating young people on the teachings of the faith and teaching religious values are "at the very core of the mission of a private religious school." *Id*. Because these teachers performed "vital religious duties," and were expected to carry out the school's mission, their employment claims fell within the ministerial exception. *Id*. at 2066.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia's policy refusing to contract with state-licensed foster care agencies affiliated with religious organizations who did not certify same-sex couples as foster parents unconstitutionally burdened the agencies' free exercise of religion by endorsing practices inconsistent with their religious beliefs. The Court reasoned that the restrictions on religious entities permitting individual exemptions was not generally applicable and, therefore, subject to strict scrutiny. Because the City of Philadelphia failed to establish a compelling interest in denying the exception to the religious organization, the policy did not survive strict scrutiny.

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

Response: In *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430 (2021), a case brought under the Religious Land Use and Institutionalized Persons Act, Justice Gorsuch concurred, indicating that there were additional factors that authorities should consider in their attempt to enforce regulations requiring Amish houses to have septic systems to dispose of used water. He indicated that the courts had erred by "treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." *Id*. at 2432. Additionally, Justice Gorsuch indicated that the courts failed to consider exceptions available for other groups, such as

owners of rustic cabins and campers. The County had not demonstrated, he wrote, why "the same flexibility" had not been "extended to the Amish." *Id*. at 2433. At the core, Justice Gorsuch emphasized that a "compelling" state interest should not be so generally defined.

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: I am unaware of what trainings the Ninth Circuit may have for its employees or what role judges play in overseeing those trainings. It is my general expectation that all court trainings must adhere to federal law.

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: Please see my answer to Question 26.

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

Response: As a U.S. District Court Judge, I deal with the issue of race or racism in the context of claims brought by litigants in employment discrimination cases along with other allegations of specific violations of laws prohibiting racial discrimination. I carefully consider these claims and apply binding Ninth Circuit and Supreme Court precedent. The question of whether the criminal justice system is systematically racist is a question for policymakers and others to consider. I would note that in my courtroom, I strive to treat every litigant that comes before me fairly and free from any bias.

29. **Does America suffer from "systemic sexism?"**

Response: As a U.S. District Court Judge, I deal with the issues involving sex discrimination in the context of claims brought by litigants in employment discrimination cases along with other allegations of specific violations of laws prohibiting sex discrimination. I carefully consider those claims and apply binding Supreme Court and Ninth Circuit precedent. The question of whether America suffers from systemic sexism is a question for policymakers and others to consider. I would note that in my courtroom, I strive to treat every litigant that comes before me fairly and free from any bias.

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

Response: If this issue comes before me, I will carefully review the facts and apply any applicable Supreme Court and Ninth Circuit precedent. As a U.S. District Court Judge and judicial nominee for the Ninth Circuit Court of Appeals, it would be inappropriate for me to comment on whether such political considerations are constitutional.

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

Response: Yes. I will continue to select and hire staff based on their qualifications for the position.

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

Response: As a sitting U.S. District Court Judge it would be inappropriate for me to comment on the Court's size or composition which has also been the subject of continued public debate. It is for policymakers to determine the merit of this consideration consistent with the authority under the Constitution.

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

Response: *In District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms in defense of self and home. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the right is fundamental and applied to the states through the Fourteenth Amendment, though the Court cautioned that the right secured by the Second Amendment is not unlimited. *Id*. at 626. The Court provided examples of valid firearm legislations to include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualification on the commercial sale of arms." *Id.* at 626–27.

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

Response: Please see my answer to Question 33. Additionally, I am unaware of any Supreme Court or Ninth Circuit precedent indicating that this right receives less protection than other individual rights enumerated in the Constitution.

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

Response: Please see my answer to Question 34.

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

Response: As a U.S. District Court Judge and judicial nominee for the Ninth Circuit Court

of Appeals, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. However, I will apply Supreme Court and Ninth Circuit precedent to this issue if it comes before me.

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

Response: Generally speaking, the executive branch has the authority to use its discretion within its constitutional authority. As a former Deputy Prosecutor in Franklin County Washington, I understood that I had the discretion to prosecute cases based on the facts and the evidence of the specific cases before me, though, I also took into account the enforcement priorities set forth by my boss, the elected prosecutor. In federal court, I understand United States Attorneys to exercise their discretion with respect to prosecuting particular cases based on the facts and evidence before them, though again, the United States Attorney General may set certain enforcement priorities.

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

Response: No. The federal death penalty is permitted by 18 U.S.C. § 3591. As with any act of Congress, the President is without constitutional authority to unilaterally repeal the law.

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

Response: In *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control lacked authority to enforce an eviction moratorium during the COVID-19 pandemic and that the plaintiffs had a substantial likelihood of success in the underlying case. *Id*. at 2488. Further, the Court held that the plaintiffs were at risk of irreparable harm and that in balancing the equities, the plaintiffs were favored. *Id*. at 2489. While the public interest was strong, the Court indicated that our system of government does not allow agencies to act unlawfully in the pursuit of noble or desired ends. *Id*. at 2490.

Senator Josh Hawley
Questions for the Record

Salvador Mendoza
Nominee, U.S. Court of Appeals for the Ninth Circuit

1. **Judge Ketanji Brown Jackson, who has been nominated to the Supreme Court, has refused 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 you have used them in the past to increase the sentence you imposed on a child pornography offender. Please provide citations:**

   Response: When sentencing any defendant, I refer to the Sentencing Guidelines. I have applied each of these enhancements in various cases.

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

      Response: I applied this enhancement in the following matters:
      United States v. Mann, No. 4:20-CR-06040-SMJ-1 (E.D. Wash);
      United States v. Lynch, No. 1:20-CR-02021-SMJ-1 (E.D. Wash);
      United States v. Sandoval-Guerrero, No. 4:20-CR-06009-SMJ-1 (E.D. Wash);
      United States v. Barrett, No. 4:18-CR-06050-SMJ-1 (E.D. Wash);
      United States v. Haskin, No. 4:19-CR-00046-SMJ-1 (E.D. Wash);
      United States v. Stephens, No. 1:19-CR-02012-SMJ-1 (E.D. Wash);
      United States v. Alexander, No. 4:17-CR-06035-SMJ-1 (E.D. Wash);
      United States v. Grifford, No. 2:19-CR-00071-SMJ-1 (E.D. Wash);
      United States v. Huffman, No. 1:18-CR-02066-SMJ-1 (E.D. Wash);
      United States v. Pinter, No. 2:17-CR-00205-SMJ-1 (E.D. Wash);
      United States v. Cox, No. 4:17-CR-06036-SMJ-1 (E.D. Wash);
      United States v. Ehli, No. 2:18-CR-00038-SMJ-1 (E.D. Wash);
      United States v. Murray, No. 2:17-CR-00198-SMJ-1 (E.D. Wash);
      United States v. Antrup, No. 1:16-CR-02022-SMJ-1 (E.D. Wash);
      United States v. Harris, No. 2:15-CR-00135-SMJ-1 (E.D. Wash);
      United States v. Gutierrez, No. 2:15-CR-00131-SMJ-1 (E.D. Wash);
      United States v. Fillback, No. 2:14-CR-00127-SMJ-1 (E.D. Wash);
      United States v. Challe, No. 4:15-CR-06002-SMJ-1 (E.D. Wash);
      United States v. Alvarado, No. 1:14-CR-02040-SMJ-1 (E.D. Wash);
      United States v. Grifford, No. 2:14-CR-00144-SMJ-1 (E.D. Wash); and
      United States v. Soto, No. 2:14-CR-00110-SMJ-1 (E.D. Wash).

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

Response: I applied this enhancement in the following matters:
United States v. Mann, No. 4:20-CR-06040-SMJ-1 (E.D. Wash);
United States v. Barrett, No. 4:18-CR-06050-SMJ-1 (E.D. Wash);
United States v. Haskin, No. 4:19-CR-00046-SMJ-1 (E.D. Wash);
United States v. Alexander, No. 4:17-CR-06035-SMJ-1 (E.D. Wash);
United States v. Grifford, No. 2:19-CR-00071-SMJ-1 (E.D. Wash);
United States v. Huffman, No. 1:18-CR-02066-SMJ-1 (E.D. Wash);
United States v. Pinter, No. 2:17-CR-00205-SMJ-1 (E.D. Wash);
United States v. Cox, No. 4:17-CR-06036-SMJ-1 (E.D. Wash);
United States v. Ehli, No. 2:18-CR-00038-SMJ-1 (E.D. Wash);
United States v. Murray, No. 2:17-CR-00198-SMJ-1 (E.D. Wash);
United States v. Adams, No. 4:16-CR-06051-SMJ-1 (E.D. Wash);
United States v. Antrup, No. 1:16-CR-02022-SMJ-1 (E.D. Wash);
United States v. Harris, No. 2:15-CR-00135-SMJ-1 (E.D. Wash);
United States v. Fillback, No. 2:14-CR-00127-SMJ-1 (E.D. Wash);
United States v. Alvarado, No. 1:14-CR-02040-SMJ-1 (E.D. Wash); and
United States v. Grifford, No. 2:14-CR-00144-SMJ-1 (E.D. Wash).

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

Response: I applied this enhancement in the following matters:
United States v. Mann, No. 4:20-CR-06040-SMJ-1 (E.D. Wash);
United States v. Lynch, No. 1:20-CR-02021-SMJ-1 (E.D. Wash);
United States v. Sandoval-Guerrero, No. 4:20-CR-06009-SMJ-1 (E.D. Wash);
United States v. Upton, No. 4:17-CR-06041-SMJ-1 (E.D. Wash);
United States v. Barrett, No. 4:18-CR-06050-SMJ-1 (E.D. Wash);
United States v. Haskin, No. 4:19-CR-00046-SMJ-1 (E.D. Wash);
United States v. Stephens, No. 1:19-CR-02012-SMJ-1 (E.D. Wash);
United States v. Alexander, No. 4:17-CR-06035-SMJ-1 (E.D. Wash);
United States v. Grifford, No. 2:19-CR-00071-SMJ-1 (E.D. Wash);
United States v. Huffman, No. 1:18-CR-02066-SMJ-1 (E.D. Wash);
United States v. Barbre, No. 4:17-CR-06040-SMJ-1 (E.D. Wash);
United States v. Holden, No. 4:18-CR-06036-SMJ-1 (E.D. Wash);
United States v. Pinter, No. 2:17-CR-00205-SMJ-1 (E.D. Wash);
United States v. Cox, No. 4:17-CR-06036-SMJ-1 (E.D. Wash);
United States v. Ehli, No. 2:18-CR-00038-SMJ-1 (E.D. Wash);
United States v. Murray, No. 2:17-CR-00198-SMJ-1 (E.D. Wash);
United States v. Perez, No. 2:16-CR-00063-SMJ-1 (E.D. Wash);
United States v. Adams, No. 4:16-CR-06051-SMJ-1 (E.D. Wash);
United States v. Magana, No. 4:15-CR-06036-SMJ-1 (E.D. Wash);
United States v. Piturachsatit, No. 2:16-CR-00071-SMJ-1 (E.D. Wash);
United States v. Antrup, No. 1:16-CR-02022-SMJ-1 (E.D. Wash);
United States v. Mendoza, No. 2:16-CR-0009-SMJ-1 (E.D. Wash);

United States v. Harris, No. 2:15-CR-00135-SMJ-1 (E.D. Wash);
United States v. Gutierrez, No. 2:15-CR-00131-SMJ-1 (E.D. Wash);
United States v. Fillback, No. 2:14-CR-00127-SMJ-1 (E.D. Wash);
United States v. Alvarado, No. 1:14-CR-02040-SMJ-1 (E.D. Wash); and
United States v. Grifford, No. 2:14-CR-00144-SMJ-1 (E.D. Wash).

d. The enhancements for the number of images involved

Response: I applied this enhancement in the following matters:
United States v. Mann, No. 4:20-CR-06040-SMJ-1 (E.D. Wash);
United States v. Lynch, No. 1:20-CR-02021-SMJ-1 (E.D. Wash);
United States v. Barrett, No. 4:18-CR-06050-SMJ-1 (E.D. Wash);
United States v. Haskin, No. 4:19-CR-00046-SMJ-1 (E.D. Wash);
United States v. Stephens, No. 1:19-CR-02012-SMJ-1 (E.D. Wash);
United States v. Alexander, No. 4:17-CR-06035-SMJ-1 (E.D. Wash);
United States v. Grifford, No. 2:19-CR-00071-SMJ-1 (E.D. Wash);
United States v. Huffman, No. 1:18-CR-02066-SMJ-1 (E.D. Wash);
United States v. Pinter, No. 2:17-CR-00205-SMJ-1 (E.D. Wash);
United States v. Cox, No. 4:17-CR-06036-SMJ-1 (E.D. Wash);
United States v. Ehli, No. 2:18-CR-00038-SMJ-1 (E.D. Wash);
United States v. Murray, No. 2:17-CR-00198-SMJ-1 (E.D. Wash);
United States v. Piturachsatit, No. 2:16-CR-00071-SMJ-1 (E.D. Wash);
United States v. Antrup, No. 1:16-CR-02022-SMJ-1 (E.D. Wash);
United States v. Fillback, No. 2:14-CR-00127-SMJ-1 (E.D. Wash);
United States v. Alvarado, No. 1:14-CR-02040-SMJ-1 (E.D. Wash); and
United States v. Grifford, No. 2:14-CR-00144-SMJ-1 (E.D. Wash).

2. 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 the quote or its context. As a U.S. District Court Judge, I do not apply that stated philosophy.

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

Response: Federal judges swear an oath to "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 . . . under the Constitution and laws of the United States." As a U.S. District Court Judge, I faithfully adhere to this oath and apply Ninth Circuit and Supreme Court precedent.

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

Response: Under the *Younger* abstention doctrine, federal courts are required to abstain from hearing cases involving federal issues being litigated in pending state court proceedings. *See Younger v. Harris*, 401 U.S. 37, 54 (1971). The Ninth Circuit applies the *Younger* abstention doctrine to three categories of state court 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), *quoting Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78–79 (2013) (internal quotation marks omitted).

Additionally, under the *Pullman* abstention doctrine, federal courts have the power to refrain from hearing cases involving federal issues already being litigated in the state courts. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). The Ninth Circuit has held that "*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).

Under the *Rooker-Feldman* abstention doctrine, federal courts must refrain from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.*, 544 U.S. 280, 284 (2005).

Under the *Burford* abstention doctrine, 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 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Ninth Circuit held that the *Burford* abstention doctrine applies when the party seeking to invoke 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 Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

Under the *Colorado River* abstention doctrine, federal courts may stay proceedings in cases involving concurrent state and federal suits addressing the same subject matter. *See Colo. 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 applies 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).

4. **Have you ever worked on a legal case or representation in which you 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: I have not.

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

    Response: As a U.S. District Court Judge, I am bound by and faithfully apply Supreme Court and Ninth Circuit precedent to the cases before me. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification. If any binding precedent indicates that I should examine the original public meaning of a provision, I will apply that precedent to the matter before me.

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

    Response: As a U.S. District Court Judge in the Eastern District of Washington, when faced with a question of interpreting legal text, I begin by analyzing the text itself and any binding precedent from the Supreme Court and the Ninth Circuit. If the text is clear, the inquiry should end. However, if the text is ambiguous, I look to other factors, such as principles of statutory interpretation and persuasive authority from other federal courts. Ultimately, if the statute is still unclear, the Supreme Court has directed that I should look at guidance from legislative history. *See, e.g.*, *Milner v. Dep't of the Navy,* 562 U.S. 562, 572 (2011).

    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: The Supreme Court has indicated that committee reports may be more probative because they contain the considered and collective understanding of members of Congress involved in the drafting and studying of the proposed legislation. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations 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: Generally, I do not think it is appropriate to consult foreign law to interpret any provision of the United States Constitution, and I have never done so.

7. 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 establish an Eighth Amendment violation, the Supreme Court has held that a prisoner must first demonstrate that the proposed method of execution creates a "substantial risk of harm," meaning an "objectively intolerable risk of harm that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008). To show this "objectively intolerable risk of harm," the Court has clarified that "prisoners must identify an alternative" to the default method of execution "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze*, 553 U.S. at 52). The Court acknowledged that "[s]ome risk of pain is inherent in any method of execution," so "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. 47. Further, the Court has indicated that only those methods of executions that "cruelly superadds pain to the death sentence" are inconsistent with the original meaning of the Eighth Amendment. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123–24 (2019). The Ninth Circuit must apply these controlling standards. *See, e.g.*, *Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (citing *Baze*, 553 U.S. at 50).

8. 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. *See Glossip v. Gross*, 576 U.S. 863, 878 (2015).

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

   Response: In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–74 (2009), the Supreme Court held that there is no freestanding due process right (procedural or substantive) to access DNA evidence for a habeas petitioner. The Ninth Circuit is bound by this Supreme Court precedent.

10. **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.

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

    Response: The Supreme Court has indicated that laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). The law is not neutral when "the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. In evaluating a statute's "neutrality," courts must also determine whether the enactment or enforcement was motivated by religious animus. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that Colorado's application of a facially neutral public accommodations law violated the Free Exercise Clause because of hostile statements by officials in public meetings showed that the law was motivated by religious animus. *Id.* at 1729–31 (2018). Additionally, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021). I note that I assume from the question that it is focused on state governmental action only. The federal government has additional legal obligations under the Religious Freedom Restoration Act of 1993.

12. **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 27(e).

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

Response: A religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). A sincerely held religious belief need not be based on a "tenet, belief or teaching of an established religious body" and may instead be based on personal religious conviction. *Frazee v. Illinois Dept. of Employment Sec*., 489 U.S. 829, 831–33 (1989); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (emphasizing that "it is not for [the Court] to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, [the Court's] 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction'" (citation omitted)).

14. 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 in *Heller* held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The Court in *McDonald* further stated that Second Amendment right to keep and bear arms is a fundamental right and applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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.

15. 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: As a United States District Judge, I have not sufficiently studied Justice Holmes' dissenting opinion such that I feel comfortable expressing an opinion about its meaning or stating whether I agree with it. However, it is generally understood to mean that it is not the role of the courts to insert their views about commercial theories and regulations over those of elected legislators and the will of the majority.

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

Response: The Supreme Court abrogated *Lochner v. New York*, 198 U.S. 45 (1905), in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Since *Lochner* is no longer good law, I would not apply that decision.

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

a. If so, what are they?

Response: As a U.S. District Court Judge and judicial nominee for the Ninth Circuit Court of Appeals, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court.

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

Response: I will continue to apply all Supreme Court precedents faithfully and impartially.

17. 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?

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

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

Response: The Supreme Court held that evidence that a party holds more than an 80% share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). Further, the *Kodak* Court also cited Supreme Court precedent for the proposition that "over two-thirds of the market is a monopoly." *Id*. (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). Thus, the Ninth Circuit has concluded 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). Meanwhile, "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). Of note, the Ninth Circuit also has held that a company with less than 50% market share may have monopoly power if "entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id*. at 438. I do not have a view on the opinion of Judge Learned Hand nor is it relevant to my judicial decision-making. If confirmed, I will follow Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has held that there is no federal general common law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). However, in limited areas such as admiralty and certain controversies between states, the Supreme Court has indicated that federal common law might exist. *See, e.g.*, *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713 (2020).

19. 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?

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

Response: Federal courts must interpret state constitutional provisions in accordance with state law and defer to the decision of the highest court in that state whose constitution the federal court is interpreting.

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

Response: State constitutional provisions can provide greater protections than similarly or identically worded federal constitutional provisions.

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

Response: As a judge and judicial nominee for the Ninth Circuit Court of Appeals, it would be generally inappropriate to comment on the reasoning or correctness of any Supreme Court precedent or issue that might come before me. I believe *Brown v. Board of Education*, however, is an exception to this general rule. The Supreme Court's decision in *Brown* is unlikely to be revisited or overruled. As such, I will state, as many prior nominees have, that *Brown* was correctly decided. If I am confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

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

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

Response: Federal Rule of Civil Procedure 65 authorizes a court to grant injunctive relief. National injunctions are equitable remedies that bind the federal government in its relations with parties and nonparties. The Supreme Court has cautioned that the relief granted should "be no more burdensome to the defendant than necessary to provide complete relief to the [plaintiff]." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). There is an ongoing dispute about the legal basis for nationwide injunctions, as illustrated by the opinions in *Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). If confirmed as a circuit judge, I will follow Ninth Circuit and Supreme Court precedent on the matter.

22. 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: The Supreme Court cautions that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). However, the Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant complete relief to the parties. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017). Injunctions are an equitable remedy that "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).

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

Response: In *Bond v. United States*, 564 U.S. 211, 221 (2011), the Supreme Court explained that "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived."

24. 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 3.

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

Response: As a U.S. District Court Judge, the availability of damages and/or injunctive relief is dependent on the particular facts and circumstances of each case. As such, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997) the Supreme Court indicated "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, '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.'" *Id. at* 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Court noted that there must be a "careful description" of that liberty interest. *Id.* at 721. The Court also explained that it has "held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Se. Pa. v.*] *Casey* [505 U.S. 833 (1992)], . . . and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan* [*v. Dir., Mo. Dep't of Health*], 497 U.S. [261,] 278–279 . . ." *Glucksberg*, 521 U.S. at

720. Since *Glucksberg*, the Court has confirmed other fundamental rights to include a right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

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

Response: Please see my response to Question 11.

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

Response: Yes, the terms are often used analogously.

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: The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723 (2014), identified two factors to determine if the free exercise of religion was substantially burdened: (1) non-compliance with the contraceptive mandate would cause "severe" economic consequences for the plaintiffs and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs.

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

Response: Please see my response to Question 13.

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

Response: The Religious Freedom Restoration Act (RFRA) applies to federal laws and requires courts to apply strict scrutiny when laws impose a substantial burden on religious practice, even if the law is a neutral rule of general applicability. 42 U.S.C. § 2000bb-1(a). The Supreme Court has held that both

the Free Exercise Clause and the Establishment Clause prohibit governmental interference with a religious institution's employment of certain of its key employees, including ministers and teachers entrusted "with the responsibility of educating and forming students in the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). The Supreme Court has explained that to hold otherwise would "intrude[] upon more than a mere employment decision" and interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. *Hosanna-Tabor*, 565 U.S. at 188. "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to share its own faith and mission through its appointments." *Id.* Giving "the state the power to decide who will minister to the faithful," the Court explained, "also violates the Establish Clause." *Id.* at 189.

Additionally, the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] 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." 42 U.S.C. §§ 2000bb–1(a), (b). The Supreme Court has explained that RFRA protects religious organizations like Little Sisters of the Poor and businesses operated by observant owners. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

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

Response: I have issued a decision adjudicating a claim under the Religious Land Use and Institutionalized Person Act in the following matters:

Jackson v. Patzkowski, No. 4:17-CV-05189-SMJ, 2018 WL 11145994 (E.D. Wash. Sept. 11, 2018); and
Jackson v. Patzkowski, 468 F. Supp. 3d 1328 (E.D. Wash. 2019).

I have issued a decision adjudicating a claim under the Free Exercise Clause in the following matters:

Jackson v. Patzkowski, 468 F. Supp. 3d 1328 (E.D. Wash. 2019); and *Blais v. Hunter*, 493 F. Supp. 3d 984 (E.D. Wash. 2020).

28. 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 do not know the context of this statement, however, I understand the statement to mean that as a judge, one should apply the facts to the law and not be influenced by one's own personal views.

29. 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: As an attorney, I do not recall any specific case in which I took this position. As a judge, I have never taken this position.

30. 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.

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

Response: As a U.S. District Court Judge, I deal with the issue of race or racism in the context of claims brought by litigants in employment discrimination cases along with other allegation of specific violations of laws prohibiting racial discrimination. I carefully consider those claims and apply binding Ninth Circuit and Supreme Court precedent. The question of whether America is systematically racist is a question for policymakers and others to consider. But I would note that, as the son of immigrants, I have been educated at some of the best institutions, supported by teachers, professors, lawyers, judges, and community members, and now have been nominated by two Presidents to the federal judiciary. This is a testament to people and the opportunities in this country.

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

Response: Yes. As a criminal defense lawyer, I represented hundreds of defendants accused of various crimes. I discharged my oath to zealously represent their interests regardless of my personal views on a matter.

33. How did you handle the situation?

Response: Please see my response to Question 32.

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

Response: As a U.S. District Court judge, I have taken an oath to apply the law equally, without fear or favor, to all who appear before me. If confirmed to the Ninth Circuit Court of Appeals, I will continue to apply the law in this manner.

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

Response: My views on the law have not been shaped by any one particular Federalist Paper.

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

Response: My understanding is that neither the Ninth Circuit nor the Supreme Court has squarely addressed whether an unborn child is a human being. As a U.S. District Court Judge and a nominee to the Ninth Circuit Court of Appeals, it would be inappropriate for me to comment on an issue that is pending or might come before me.

37. 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: Yes. Approximately 15 years ago, I generally recall that I was called to testify by a deputy prosecutor in a Franklin County Washington criminal case involving my former client who was seeking to withdraw his guilty plea. At the conclusion of the hearing, the Court denied the defendant's motion. I do not have any notes, transcripts, or other details regarding the matter.

38. 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.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: I do not hold shares in any of the companies listed above.

40. 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: No.

41. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: To the best of my recollection, no.

42. 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: Nominees take the oath and swear to tell the truth before testifying at the confirmation hearing and to provide truthful information. I further understand that the duty of candor that I have is to provide the Senate Judiciary Committee with all information requested so that they may fulfill their constitutional role of advice and consent.

Senator Mike Lee
Questions for the Record
Salvador Mendoza, Nominee to be United States Circuit Judge for the Ninth Circuit

1. How would you describe your judicial philosophy?

Response: As a U.S. District Court Judge, I have issued over 9,000 orders. My approach is to begin each case with an open mind and to evaluate the question presented before me by applying the statutes and the binding case precedent to the facts in the record. If the issues would be clarified with oral argument, I set the matter for a hearing. Then, I proceed to write an opinion that answers the questions before me and explains in detail my methodology and decision. In every case that comes before me, I am committed to the principle of equal justice under law.

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

Response: As a U.S. District Court Judge, I first determine whether the Supreme Court or the Ninth Circuit have interpreted the federal statute and apply that binding precedent. If there is no precedent interpreting the federal statute, I begin by looking at the text of the statute. When the meaning of the statute is clear, that should end the inquiry. However, when the meaning of the statute is unclear, I consider other methods of statutory construction or persuasive authority from other circuits or district courts. The Supreme Court has indicated that if ambiguity persists after considering those sources, courts can be guided by the legislative history. *See, e.g.*, *Milner v. Dep't of the Navy,* 562 U.S. 562, 572 (2011). Of note, the Supreme Court has indicated that committee reports may be more probative because they contain the considered and collective understanding of members of Congress involved in the drafting and studying of the proposed legislation. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted).

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

Response: As a U.S. District Court Judge, I apply binding Supreme Court and Ninth Circuit precedent.

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

Response: In the context of the Second Amendment, the Supreme Court has conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text at the time of ratification. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In

any case requiring the interpretation of a constitutional provision, I will follow the Supreme Court's analysis of that provision.

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

Response: As a U.S. District Court Judge, when faced with a question of interpreting a statute, I begin by analyzing the text itself and any binding precedent from the Supreme Court and the Ninth Circuit. If the text is clear, the inquiry should end. However, if the text is ambiguous, I look to other factors, such as principles of statutory interpretation and persuasive authority from other federal courts. Ultimately, if the statute is still unclear, the Supreme Court has indicated that courts may look at legislative history. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011).

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

Response: The Supreme Court has indicated that the plain or "ordinary" meaning refers to the public understanding of the text at the time of its enactment. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: There are three requirements that a plaintiff must show: (1) the plaintiff has suffered an "injury in fact;" (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envt'l Srvs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

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

Response: Yes. The Supreme Court in *McCullough v. Maryland*, 17 U.S. 316 (1819), held that the Necessary and Proper Clause grants Congress powers that are necessary to implement its enumerated powers.

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

Response: I would start by looking at Supreme Court and Ninth Circuit precedent to determine if Congress is enacting a law within its constitutional authority. The Supreme Court has indicated that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995); *United States v. Harris*, 106 U.S. 629, 635 (1883)). Thus, I would look at

whether the law is inconsistent with any other provisions of the Constitution or binding precedent.

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

Response: Yes. In *Washington v. Glucksberg*, 521 U.S. 702 (1997) the Supreme court indicated "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, '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.'" *Id. at* 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Court noted that there must be a "careful description" of that liberty interest. *Id*. at 721. The Court also explained that it has "held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Se. Pa. v.*] *Casey* [505 U.S. 833 (1992)], . . . and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan* [*v. Dir., Mo. Dep't of Health*], 497 U.S. [261,] 278–279 . . ." *Glucksberg*, 521 U.S. at 720. Since *Glucksberg*, the Court has confirmed other fundamental rights to include a right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *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: As a U.S. District Court Judge, I follow both Supreme Court and Ninth Circuit precedent. The Supreme Court determined that the economic rights at issue in *Lochner v. New York* were not entitled to heightened scrutiny under the Due Process Clause, *see, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), but the Court has identified some personal rights under a substantive due process theory (please see my response to Question 9). As a U.S. District Court Judge and a nominee to the Ninth Circuit Court of Appeals, it would be inappropriate for me to comment on the

basis on which I distinguish these types of rights. However, if presented with the issue, I would apply any binding precedent from the Supreme Court or Ninth Circuit.

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

Response: Under the Commerce Clause of Article I, Congress has the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. The Supreme Court has "read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (citing *United States v. Morrison*, 529 U.S. 598, 618–19 (2000)). The Court cautioned that Congress may not use the Commerce Clause to "compel[] individuals to become active in commerce by purchasing a product." *Id*. at 552.

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 indicated that a "suspect class" is a group of people that has "the traditional indicia of suspectedness." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). The Court elaborated that these suspect classes include those groups that have "an immutable characteristic determined solely by the accident of birth" or are "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." *Id*. The Supreme Court has ruled that groups classified by race, religion, national origin, or alienage are suspect classes. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The framers of the United States Constitution, in order to preserve individual liberty, designed our government in a way that balances power between the branches of government as a check and safeguard against any one branch becoming too powerful. The Supreme Court has emphasized that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (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: As a U.S. District Court Judge, I would look to Supreme Court and Ninth Circuit precedent to resolve the conflict.

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

Response: Empathy should play no role in a judge's consideration of a case. As a sitting judge, I make decisions on the facts, the issue in controversy, and the binding Ninth Circuit and Supreme Court precedent.

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

Response: As a judge, I aim to avoid both scenarios.

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

Response: As a U.S. District Court Judge and judicial nominee to the Ninth Circuit Court of Appeals, I have not studied this question. As such, I have not formed an opinion about this topic.

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

Response: Judicial review refers to the judicial branch's constitutional authority to determine the legality of actions taken by the legislative and executive branch. *See Marbury v. Madison*, 1 Cranch 137 (1803). Judicial supremacy is "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Judicial supremacy*, Black's Law Dictionary (10th ed. 2014).

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: The framers of the United States Constitution anticipated the push and pull between the branches of government. Nonetheless, it is the duty of the judiciary to interpret the laws pursuant to its constitutional authority. *See Marbury v. Madison*, 1 Cranch 137 (1803). Elected officials must adhere to, and respect said authority consistent with the United States Constitution and the Supreme Court's interpretation of it.

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: I understand Federalist 78 to mean that judges have a limited role when addressing the cases before them. As a judge, my role is limited to applying the law, including binding precedent, to the facts before me.

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

Response: Lower court judges must apply Supreme Court precedent interpreting the United States Constitution. Lower courts should evaluate each new case on the record before them and apply the binding relevant Court of Appeals and Supreme Court 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: As a United States District Court Judge, I do not consider whether a defendant belongs to any of the above-listed identity groups when I sentence them for a crime they have committed. Instead, I begin by considering the United States Sentencing Guidelines and apply that to the facts. I then apply the 18 U.S.C. § 3553(a) factors to the facts of the case before me. Specifically, I consider (1) the nature and circumstance of the offense; (2) the individual characteristics of the defendant; (3) the need to deter said conduct; (4) avoiding sentence disparities; (5) that the sentenced be sufficient but not greater than necessary; (6) need to protect the public; and (7) to provide the defendant with the needed vocation, medical, or other training applicable. Finally, I listen intently to the parties, the victims, and the defendant before rendering my judgment.

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 above-referenced statement. However, Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (10th ed. 2014).

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

Response: Yes. As noted above, "equity" is defined as "[f]airness; impartiality; evenhanded dealing" while "equality" is defined as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." *Equity/Equality*, Black's Law Dictionary (10th ed. 2014).

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

Response: The Equal Protection Clause of the Fourteenth Amendment indicates that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. As a U.S. District Court Judge and nominee to the Ninth Circuit Court of Appeals, I will apply this and all clauses of the United States Constitution consistent with the Supreme Court and Ninth Circuit precedent.

27. How do you define "systemic racism?"

Response: As a U.S. District Court Judge, I have not independently researched or formulated a definition for the term systemic racism.

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

Response: I understand critical race theory to mean "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered minorities" and "observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism." *Critical race theory*, Black's Law Dictionary (10th ed. 2014).

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

Response: As a U.S. District Court Judge, I have not compared "critical race theory" to "systemic racism." If confronted with the question in a case before me, I would evaluate the terms and apply any relevant statutes and precedent from the Supreme Court and Ninth Circuit.

30. What is the purpose of a standards of review?

Response: The standards of review are intended to ensure that appellate courts focus their expertise in areas they are best suited to handle while paying appropriate deference to trial courts or administrative agencies, which are ordinarily in better positions to make fact-finding decisions. If confirmed, I will apply the appropriate standard of review, as determined by Supreme Court and Ninth Circuit precedent, to each matter before me

31. Would it be appropriate for a circuit court, reviewing a district court for abuse of discretion, to reverse the lower court "absent a *definite and firm conviction* that the district court committed a *clear error* of judgment in the conclusion it reached upon a weighing of relevant facts"? [This is quoted from training materials on the Ninth Circuit's website.]

Response: Under Ninth Circuit precedent, a court reviewing for abuse of discretion "may not reverse a district court's exercise of its discretion unless [it has] a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *S.E.C. v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). If confirmed, I will apply this precedent, as well as any applicable Supreme Court precedent.

32. Does a review under abuse of discretion give Circuit judges the opportunity to substitute their views and opinions on the case for the judgement of the fact-finder in a lower court?

Response: Please see my answer to Question 31.

33. When reviewing the Board of Immigration Appeals, can "changed personal circumstances" alone sustain the burden of required to reexamine a removal decision? What if the petitioner had no choice in the changed personal circumstance?

Response: The Ninth Circuit has held that "while changes in personal circumstances may be *relevant* to a motion to reopen based on changed country conditions, a petitioner cannot succeed on such a motion that 'relies *solely* on a change in personal circumstances,' without also providing sufficient evidence of related changed country conditions." *Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) (quoting *Chandra v. Holder*, 751 F.3d 1034, 1037) (emphasis in original)). Regarding the second question, as a U.S. District Court Judge and judicial nominee for the Ninth

Circuit Court of Appeals, it would be inappropriate to comment on any issue that might come before me.

34. In the case *Kaur v. Garland* you reviewed a Board of Immigration Appeal's denial of a petitioner's appeal to reopen her removal proceedings. Can you please explain to us what facts led to your "definite and firm conviction that the district court had committed a *clear error* of judgment in the conclusion it reached upon a weighing of relevant facts"?

Response: In this matter, the panel concluded that the Board of Immigration Appeals erred in denying Plaintiff Kaur's motion to reopen removal proceedings. *Kaur v. Garland*, 2 F.4th 823 (9th Cir. 2021). Specifically, the panel determined that the BIA erred in determining that Ms. Kaur did not establish material changed country conditions, as she presented evidence showing a material uptick in human rights violations in India. *Id.* at 833. The panel also determined that the BIA erred in determining that Ms. Kaur did not establish a prima facie case of entitlement to asylum or withholding of removal, finding that Ms. Kaur's membership in her husband's family was more than an incidental reason for her persecution. *Id.* at 835–836. Finally, the panel determined that the BIA applied the wrong standard for determining whether Ms. Kaur had established a prima facie case for protection under the Convention Against Torture. *Id.* at 837.

35. If you are confirmed, will you confine yourself to respecting the judgment of the lower court judges in matters of discretion?

Response: Please see my response to Question 31.

36. While in law school you made this statement: "Practical experience strongly suggests the prosecutor is not going to standup in a court of justice and articulate a racially discriminatory reason for excluding the jurors. Yes, I am suggesting that the prosecutor will lie and state reasons that are wholly unrelated to the race of the juror." Do you stand by this statement?

Response: More than 26 years ago, as a law student at UCLA School of Law, I wrote a law review note before I practiced as an attorney or took the oath as a judge. The law review note was an academic article that, like most law students' notes, sought to discuss and analyze a then relatively new case decided by the Supreme Court that raised issues surrounding the potential exclusion of Latinos from participation in our system of justice. That paper reflected my analysis as a law student, and I have since had more than two decades of experience as a practitioner and judge. As an attorney, I have tried over 75 cases and as a Judge, I have presided over 57 trials. It has been my experience that judges and practitioners take great pains to adhere to their respective solemn oaths. The quote referenced was not based on the experience I now have. As a U.S. District Court Judge, I approach each case with an open mind and base my decisions, not on comments I made as a law student 26 years ago, but on the

facts before me and the law as interpreted in binding Supreme Court and Ninth Circuit precedent, including *Hernandez v. New York*, 500 U.S. 352 (1991).

Senator Ben Sasse
Questions for the Record for Salvador Mendoza, Jr.
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 11, 2022

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

   Response: No.

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

   Response: As a U.S. District Court Judge, I have issued over 9,000 orders. My approach is to begin each case with an open mind and to evaluate the question presented before me by applying the statutes and the binding case precedent to the facts in the record. If the issues would be clarified with oral argument, I set the matter for a hearing. Then, I proceed to write an opinion that answers the questions before me and explains in detail my methodology and decision. In every case that comes before me, I am committed to the principle of equal justice under law.

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

   Response: I do not characterize myself by any particular label. Instead, I begin each case with an open mind and a commitment to applying Supreme Court and Ninth Circuit precedent to the specific facts before me. Where the Supreme Court has looked to the original public meaning of a constitutional provision, I would apply that precedent.

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

   Response: I do not characterize myself by any particular label. Instead, I begin each case with an open mind and a commitment to applying Supreme Court and Ninth Circuit precedent to the specific facts before me. I would note that in cases of statutory interpretation, I begin by looking to Supreme Court and Ninth Circuit precedent if precedent has already interpreted the provision at issue. But in a case of first impression, I would always begin with the text of the statute.

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

   Response: No. The meaning of the Constitution is fixed. As a U.S. District Court Judge, I interpret the Constitution consistent with the Supreme Court and Ninth Circuit precedent, including precedent that sets out the frameworks of constitutional interpretation.

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 have not studied all the jurisprudence of the Justices appointed since January 20, 1953. However, at the confirmation hearing, I mentioned my admiration of Justice Sonia Sotomayor. After taking the Supreme Court bench, Justice Sonia Sotomayor agreed to participate in an introductory video for students as part of the Tri-Cities Youth and Justice Forum in Pasco, Washington that I coordinate. I admire Justice Sonia Sotomayor for her illustrated commitment to inspiring our youth to pursue careers in the legal profession.

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: If I were confirmed as a Ninth Circuit judge, I would be bound by its precedent which may be overruled only by the court sitting *en banc*. Federal Rule of Appellate Procedure 35(a) controls the *en banc* procedure. The rule indicates that *en banc* review "ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

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: As a U.S. District Court Judge, when faced with a question of interpreting legal text, I begin by analyzing the text itself. If the text is clear, the inquiry should end. However, if the text is ambiguous, I would look to other factors, such as principles of statutory interpretation or persuasive authority from district courts or other circuits. Ultimately, if the statute is still unclear, the Supreme Court has directed that I may look at guidance from legislative history. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). The Court has indicated that committee reports may be more probative because they contain the considered and collective understanding of members of Congress involved in the drafting and studying of the proposed legislation. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted). As a U.S. District Court Judge, I have not looked to "general principles of justice" to guide my decision making.

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: As a U.S. District Court Judge, I do not consider the race or ethnicity of the defendant when I sentence them for a crime that they have committed. Moreover, Section 5H1.10 of the Sentencing Guidelines Manual states that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." Instead, I begin by considering the United States Sentencing Guidelines that apply that to the charge and facts in the case. I then apply the 18 U.S.C. § 3553(a) factors to the facts of the case before me. Specifically, I consider (1) the nature and circumstance of the offense; (2) the individual characteristics of the defendant; (3) the need to deter said conduct; (4) avoiding sentence disparities; (5) that the sentenced be sufficient but not greater than necessary; (6) need to protect the public; and (7) to provide the defendant with the needed vocation, medical, or other training applicable. Finally, I listen intently to the parties, the victims, and the defendant before rendering my judgment.

Questions from Senator Thom Tillis
for Salvador Mendoza
Nominee to be United States Circuit Judge for the Ninth Circuit

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

   Response: Yes.

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

   Response: I understand judicial activism as referring to when judges insert their own views and opinions into cases and controversies they are deciding. I believe this approach discredits the judge's opinion and weakens the integrity of the judicial branch. As such, I do not agree with this approach. I see my role as deciding the case before me based on the facts, statutes, and binding Supreme Court and Ninth Circuit precedent.

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

   Response: It is the expectation and duty of every judge to hold true to their oath. Federal judges swear an oath to "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…under the Constitution and laws of the United States." As a U.S. District Court Judge I faithfully adhere to this oath and apply Supreme Court and Ninth Circuit precedent.

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

   Response: No. Judges are not policymakers. Our role is to interpret the law and apply the controlling precedent to the facts before us.

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

   Response: Yes. As a U.S. District Court Judge, I make decisions that may at times be perceived as having undesirable outcomes. However, judges are not in the business of making decisions based on a particular outcome. Instead, the role of a judge is to apply the law and precedent to the facts irrespective of the outcome. It is with this commitment that the judiciary can gain public confidence in the rule of law, not the rule of outcomes.

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

   Response: No.

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

   Response: My role as a U.S. District Court Judge and, if confirmed, as a Ninth Circuit Court Judge, is to apply Supreme Court and Ninth Circuit precedent addressing the scope

of American's Second Amendment rights. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the United States Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms in defense of self and home. The Court indicated that the right secured by the Second Amendment is not unlimited. *Id.* at 626. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the right is fundamental and applied to the states through the Fourteenth Amendment.

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

   Response: As a U.S. District Court Judge and judicial nominee for the Ninth Circuit Court of Appeals, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before me. I would look at binding precedent like *Heller* and *McDonald*, as well as precedent related to other pandemic restrictions such as *Tandon* and any other Supreme Court or Ninth Circuit precedent.

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: Qualified immunity applies to government officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has specified a two-part test to determine if qualified immunity applies: (1) whether there is a violation of 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). As a U.S. District Court Judge, when the issue of qualified immunity arises in a case over which I am presiding, I apply the Supreme Court and Ninth Circuit precedent on the issue to all government officials, including law enforcement personnel.

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

    Response: The question of whether qualified immunity jurisprudence sufficiently protects law enforcement is an important question for policymakers. However, as a U.S. District Court Judge, I am prohibited from commenting on matters of policy.

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

    Response: Please see my response to Question 10.

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

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

Response: I have limited experience with copyright law.

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

Response: None.

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

Response: None.

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

Response: As a U.S. District Court Judge, I have handled a number of cases and authored opinions involving issues of free speech and the First Amendment. However, these cases did not involve intellectual property right issues.

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

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

Response: As a U.S. District Court Judge, when faced with a question of interpreting legal text, I begin by analyzing the text itself. If the text is clear, the inquiry should end. However, if the text is ambiguous, I would look to other factors, such as principles of statutory interpretation, persuasive authority from my district courts or other circuits. Ultimately, if the statute is still unclear, the Supreme Court has directed that I should look at guidance from legislative history. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). The Court has indicated that committee reports may be more probative because they contain the considered and collective understanding of members of Congress involved in the drafting and studying of the proposed legislation. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted).

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

Response: The Supreme Court has set out the standard on judicial deference to an agency's statutory interpretation in several precedents. In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Court established a two-part test to determine if agency deference is appropriate. First, the reviewing court must determine if Congress has directly spoken of the matter in question. If it has, that will end judicial review. If, on the other hand, the statute is silent or ambiguous on the matter, the court must look at whether the agency interpretation is reasonable. If so, reviewing courts must grant deference to that agency's interpretation.

Additionally, the Supreme Court has indicated agency deference, known as *Skidmore* deference, is sometimes owed to agency interpretations involving the agency's own policy statements, manuals, and enforcement guidelines containing its own agency interpretation of a statute that it administers. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This deference is the narrowest form of court deference to agency interpretations, as such interpretations are "entitled to respect," but only to the extent that they are persuasive. *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The Supreme Court has also held that, in some circumstances, it is appropriate for a Court to defer to an agency's reasonable interpretation of its own genuinely ambiguous regulation. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). This practice is known as *Auer* deference or, sometimes, *Seminole Rock* deference. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

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 U.S. District Court Judge, I have not faced this issue in any of my cases. If I am confirmed and this issue comes before me, I will review the relevant Supreme Court and Ninth Circuit precedent and apply the facts in the record to reach a decision.

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

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

Response: As a U.S. District Court Judge I am not sufficiently familiar with the issues of copyright infringement raised by this question to provide a response. However, when faced with the questions involving laws like the DMCA, I will analyze the issue by researching then existing statutes and Supreme Court and Ninth Circuit precedent.

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: Throughout history, courts have continued to rely on precedents, even as ever-changing technological developments seem to outpace legislative enactments. Our system of government endures not because technology changes, but because we hold true to the principles of our Constitution. Ultimately, faith in our system of justice and adherence its principles have triumphed in our democracy.

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

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

Response: As a U.S. District Court Judge, I have not studied this issue. I will state it is inappropriate for parties to judge- or forum-shop with the goal of attaining a particular result. It would undermine the perception of fairness and is antithetical to the notion of equal justice under law. I would note that in the Eastern District of Washington, cases are assigned at random.

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

Response: Yes. Judges should be mindful of this practice and discourage this conduct.

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

Response: No.

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

Response: As a U.S. District Court Judge, I have not studied the other 93 judicial districts such that I can formulate an adequate response. Under Article I of the United States Constitution, Congress is authorized to create such lower courts as necessary. As a sitting judge, it is inappropriate for me to comment on Congress' authority on this matter. However, I will state it is inappropriate for parties to judge- or forum-shop with the goal of attaining a particular result. It would undermine the perception of fairness and is antithetical to the notion of equal justice under law.

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

Response: As a U.S. District Court Judge, I have not sufficiently researched the issue and therefore cannot provide a substantive opinion.

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

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

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

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

Response: As a U.S. District Court Judge and judicial nominee for the Ninth Circuit Court of Appeals, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before me.

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

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