Senator Chuck Grassley, Ranking Member
Questions for the Record
Justice Adrienne C. Nelson
Judicial Nominee to the United States District Court for the District of Oregon

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

   Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court explained that the court may find that an unenumerated fundamental right exists within the Constitution where the carefully defined liberty interest is objectively deeply rooted in the nation's history and tradition. If confirmed, I would follow all Supreme Court and Ninth Circuit precedent relating to the existence of unenumerated rights.

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

   Response: I disagree.

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

   Response: I am not familiar with this statement. As a sitting state court judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

   Response: According to Black's Law Dictionary (11th ed. 2019), living constitutionalism is "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." If confirmed, I would faithfully apply the constitutional interpretation that is appropriate given the circumstances and any relevant Supreme Court and Ninth Circuit precedent.

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

   Response: Decisions regarding election integrity are a question for policymakers. As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on issues which may come before me in the future. As a sitting state court

judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: I am not familiar with Justice Jackson's statement or the context within which the statement was made. I believe that the Constitution may be changed only through the Article V amendment process. While I believe that the meaning of the Constitution is fixed, I recognize that the Constitution contains enduring principles that are broad enough to apply to new circumstances. *N.Y State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the founders specifically anticipated.") As a sitting state court judge and federal judicial nominee, if confirmed, I would follow the text of the Constitution as well as Supreme Court and Ninth Circuit precedent.

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

Response: I am not familiar with all the decisions issued by the Supreme Court in the last fifty years.

For the sixteen years that I have been a sitting state judge, my judicial philosophy has been guided by several principles. I understand that my role is to be a neutral arbiter in any case that comes before me, to treat all parties that come before me with respect, fairness, and impartiality, irrespective of their race, gender, religion, or national origin. I carefully review all evidence presented, I listen carefully to the arguments of the parties and faithfully follow any precedent when applying the law to the facts and record before me. I never let my personal beliefs or opinions influence my judicial decisions. If confirmed, I will continue to act in this manner and will recognize my obligation to follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: I am not familiar with all the decisions issued by the Ninth Circuit in the last fifty years.

For the sixteen years that I have been a sitting state judge, my judicial philosophy has been guided by several principles. I understand that my role is to be a neutral arbiter in any case that comes before me, to treat all that come before me with respect, fairness, and impartiality, irrespective of their race, gender, religion, or national origin. I carefully review all evidence presented, I listen carefully to the arguments of the parties and faithfully follow any precedent when applying the law to the facts and record before

me. I never let my personal beliefs or opinions influence my judicial decisions. If confirmed, I will continue to act in this manner and will recognize my obligation to follow all binding Supreme Court and Ninth Circuit precedent.

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

   Response: Decisions regarding increasing or decreasing the funding provided to law enforcement agencies are a question for policymakers. As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on issues which may come before me in the future. In all cases, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit and apply the law to the facts of the case before me.

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

    Response: Yes, it is protected by the First Amendment of the U.S. Constitution where it states "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."

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

    Response: Empathy should not play a role in sentencing. If I were confirmed, my approach to sentencing would begin with 18 U.S.C. § 3553, which calls for considering, among other things, "the nature and circumstances of the offense." I would also consult the Sentencing Guidelines Manual. The outcome in any one case would largely depend on the factual circumstances.

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

    Response: The Supreme Court has held that the Constitution requires providing lawyers in criminal cases. As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on issues which may come before me in the future. In all cases, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit and apply the law to the facts of the case before me.

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

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

Response: Although it is generally inappropriate for a federal judicial nominee and sitting state court judge to state whether they believe a case was correctly decided, *Brown v. Board of Education* represents an exception to that rule. Given that *Brown* is fundamental to American jurisprudence and unlikely to ever be relitigated, I am comfortable stating that it was correctly decided. If confirmed, I would follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: Although it is generally inappropriate for a federal judicial nominee and sitting state court judge to state whether they believe a case was correctly decided, *Loving v. Virginia* represents an exception to that rule. Given that *Loving* is fundamental to American jurisprudence and unlikely to ever be relitigated, I am comfortable stating that it was correctly decided. If confirmed, I would follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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

Response: The Supreme Court overturned *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to state whether Supreme Court precedent was correctly decided. As a sitting judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to state whether Supreme Court precedent was correctly decided. As a sitting judge and federal judicial nominee, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to state whether Supreme Court precedent was correctly

decided. As a sitting judge, I follow all binding Supreme Court precedents without regard to any personal beliefs or opinions. If confirmed, I will follow all binding Supreme Court precedent.

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to state whether Supreme Court precedent was correctly decided. As a sitting judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to state whether Supreme Court precedent was correctly decided. As a sitting judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to state whether Supreme Court precedent was correctly decided. As a sitting judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: It is wrong to threaten violence against any Supreme Court justice. Under 18 U.S.C. § 115, it is a crime to threaten, assault, kidnap, or murder a United States official, United States judge, or Federal law enforcement officer, with the intent to impede, intimidate, or interfere with their official duties.

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

Response: 18 U.S.C. § 1507, titled Picketing or Parading, states, "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or

imprisoned not more than one year, or both." The statute states that any person who pickets or parade in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness or court officer, or with such intent uses a sound-truck or similar device or resorts to any other demonstration in or near any such building or residence and does so with the intent of interfering with, obstructing or impeding the administration of justice or with the intent of influencing any judge, juror, witness, or court officer shall be fined or imprisoned. The text of the statute states my understanding.

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

Response: It is my understanding that neither the Supreme Court nor the Ninth Circuit have ruled on the constitutionality of 18 U.S.C. § 1507. As a sitting state judge and federal judicial nominee, it would be inappropriate for me to comment on current or future cases. In all cases, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), established the fighting words doctrine, a type of speech or communication not protected by the First Amendment. After *Chaplinsky,* the Supreme Court elaborated on the fighting words doctrine in *Terminiello v. Chicago*, 337 U.S. 1 (1949), by narrowing the scope of what constitutes fighting words. The Court found that words which produce a clear and present danger are unprotected by the First Amendment (and are considered fighting words), but words which invite dispute and even cause unrest are protected (and are not considered fighting words). In *Feiner v. People of State of New York*, 240 U.S. 315 (1951), the Supreme Court held that akin to the fighting words doctrine, an incitement of a riot which creates a clear and present danger is also not protected by the First Amendment. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Supreme Court redefined the scope of the fighting words doctrine to mean words that are "a direct personal insult or an invitation to exchange fisticuffs." There, the Court held that the burning of a United States flag, which was considered symbolic speech, did not constitute fighting words. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court found that the "First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed."

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

Response: Statements are not protected free speech under the true threats doctrine where the speaker's purpose is to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

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

    Response: No.

20. **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.

21. **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: I communicated with an individual associated with the American Constitution Society regarding the judicial application process in February and March 2021. Since then, there have no been no further communications with anyone from the American Constitution Society.

22. **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.

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

    Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: In late May and June 2020, I communicated with Myesha Braden, formerly of the Alliance for Justice, about an Alliance for Justice sponsored panel in which I participated. The panel was entitled "May I Approach: Courts and the Power of Inclusion - The Impact of Black Women as Appellate Judges" panel and I sat on the panel on July 1, 2020.

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

Response: No.

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

Response: No.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

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

    Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On March 10, 2021, I interviewed with the judicial selection committee established by Senators Ron Wyden and Jeff Merkley and the Senators' staffs for the judicial vacancies on the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit. On June 30, 2021, I was informed by Senators Wyden and Merkley that my name was being submitted to the White House for further consideration for a position on the District Court for the District of Oregon. On July 9, 2021, 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 July 14, 2022, my nomination was submitted to the Senate.

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

Response: In the late afternoon of October 19, 2022, the Office of Legal Policy sent me your questions. I reviewed the questions, reviewed my Senate Judiciary Questionnaire, reviewed public filings, conducted the necessary legal research of the applicable statutes and constitutional provisions as well as any precedent provided by the Supreme Court and the Ninth Circuit. I provided my responses to the Office of Legal Policy which provided feedback on some of my responses. I considered that feedback and then finalized my answers.

Questions for the Record for Adrienne C. Nelson
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Adrienne Nelson, Nominee to the United States District Court for the District of Oregon

1. How would you describe your judicial philosophy?

Response: For the sixteen years I have been a sitting state judge, my judicial philosophy has been guided by several principles. I understand that my role is to be a neutral arbiter in any case that comes before me, to treat all parties that come before me with respect, fairness and impartiality irrespective of their race, gender, religion, or national origin. I carefully review all evidence presented, I listen carefully to the arguments of the parties, and faithfully follow precedent when applying the law to the facts and record before me. I never let my personal beliefs or opinions influence my judicial decisions. If confirmed, I will continue to act in this manner and will recognize my obligation to follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: If confirmed, I would follow the precedent of the Supreme Court and the Ninth Circuit regarding any statutory interpretation. In the absence of precedent, if the text is unambiguous, the analysis ends because the plain meaning of the text controls. If the text is ambiguous, I would then consider canons of statutory construction, persuasive precedent from other circuits, and, if necessary, legislative history (such as committee reports) that may provide clear evidence of congressional intent.

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

Response: My analysis would start with the text of the constitutional provision. I would apply the plain language of the constitutional provision in conjunction with binding Supreme Court and Ninth Circuit precedent. If the plain meaning of the text was ambiguous and there was no binding precedent clarifying the issue, I would look to persuasive authority from other circuits.

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

Response: The text of the Constitution is the beginning of any analysis. The Supreme Court has held that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I would follow the binding precedent of the Supreme Court and the Ninth Circuit regarding constitutional interpretation.

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

Response: Please see my response to Question 2.

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

Response: A court should generally interpret a statute "in accordance with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731, 1738 (2020). When interpreting a constitutional provision, judges should look to the plain meaning of the terms contained in the provision within the historical context of their meaning at the time the provision was written. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

6. What are the constitutional requirements for standing?

Response: Pursuant to *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021), the requirements for Article III standing are: 1) the plaintiff must have suffered an injury in fact, 2) the injury is fairly traceable to the challenged conduct of the defendant, and 3) the injury will be redressed by a favorable judicial decision.

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

Response: In *McCulloch v. Maryland,* 17 U.S. 316 (1819), the Supreme Court recognized that Congress has implied powers beyond those that are specifically enumerated in the Constitution. Congress has authority to carry out these powers through the Necessary and Proper Clause.

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

Response: If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent to evaluate the constitutionality of a law that Congress has enacted.

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

Response: Generally speaking, a fundamental right that is not enumerated in the Constitution may be protected by the Due Process Clause of the Fourteenth Amendment if it passes the *Glucksberg* test: The right must be (1) "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations

and quotations omitted). The Supreme Court recently applied this test in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). I would follow all binding Ninth Circuit and Supreme Court precedent to determine whether a party's asserted right is a fundamental right.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that unenumerated rights are recognized under the Due Process Clause of the Fourteenth amendment where that carefully defined liberty interest is objectively deeply rooted in the nation's history and tradition. Using this standard, the Supreme Court has identified certain protected rights which are not expressly enumerated in the constitution, including the right to marry (*Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015)), and the right to interstate travel (*Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 342 n. 13 (1972); *Memorial Hospital v. Maricopa Cnty*., 415 U.S. 250, 254 (1974)).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The Supreme Court held in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), that the right to abortion is not protected by the Constitution. Additionally, the Court has abrogated *Lochner v. New York*, 198 U.S. 45 (1905) and has since held that "[t]he doctrine that prevailed in Lochner...has long been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1937). If confirmed, I would follow all binding Supreme Court and Ninth Circuit precedent regarding substantive due process. My personal beliefs and opinions are irrelevant to my interpretations of laws or applications of laws to particular facts.

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

Response: The Supreme Court has held that the Commerce Clause empowers Congress to regulate 1) the channels of interstate commerce 2) the instrumentalities of interstate commerce, and 3) those activities having a substantial relation to interstate commerce. *Gonzales v. Raich*, 545 U.S. 1 (2005).

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 held that race, religion, national origin, and alienage are suspect classes that must survive the strict scrutiny analysis.

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

Response: Checks and balances and the separation of powers are safeguards to ensure that power is not concentrated in any one branch of government. These principles are reflected in Articles I, II and III of the Constitution. "…'The Framers recognized that,…structural protections against abuse of power were critical to preserving liberty.' Their solution to governmental power and its perils was simple: divide it." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2202 (2020) (citation omitted). "Separation- of-powers principle are intended, in part, to protect each branch of government from incursion by the others." *Bond v. United States*, 546 U.S. 211, 222 (2011).

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

Response: If confirmed, I would review the text of the Constitution to determine the scope of authority granted to that particular branch of government. I would then apply any precedent provided by the Supreme Court and Ninth Circuit to determine if the branch of government at issue has exceeded the scope of its constitutional power.

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

Response: Empathy should not play any role in a judge's consideration of the case. If confirmed, I will continue to treat all parties with fairness and respect and apply the relevant law to the facts of the case.

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

Response: Both circumstances should be avoided, as they are undesirable outcomes.

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

Response: I do not have any opinion because I have not conducted any research or analysis of this issue.

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

Response: Black's Law Dictionary defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government; [especially], the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

I understand judicial review to refer to the courts' ability to consider the lawfulness of government action. I understand judicial supremacy to refer to the principle that the Supreme Court's interpretation of the Constitution is binding on all lower courts, state governments, and federal governments.

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

Response: Elected state and federal legislators and executive officers take an oath to uphold the Constitution. They are bound to follow the decisions of the Supreme Court interpreting the Constitution. How elected officials should balance their obligation to follow the Constitution and respect judicial decisions is a question best left to those officials and policymakers. As a sitting state judge and federal judicial nominee, it would not be appropriate for me to comment on the weight elected officials give judicial decisions.

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

Response: Judges should not consider their own personal views or beliefs when making deciding a case or making rulings. Judges are bound to only consider the facts and evidence related to a case and the applicable law in making their decisions.

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

the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Only the Supreme Court may overturn its own precedent. Only the Supreme Court or the Ninth Circuit sitting *en banc* may overturn Ninth Circuit precedent. A lower court judge must apply binding precedent. If confirmed, I will follow Supreme Court and Ninth Circuit precedent.

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

Response: None.

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

Response: I am unfamiliar with the context in which the Biden Administration has developed this definition. Black's Law Dictionary defines "equity" in relevant part as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). My personal opinion is irrelevant to my interpretation of the law when deciding a case or making rulings. I am bound to only consider the facts and evidence related to a case and the applicable law in making my decision. If confirmed, I would follow all binding precedent of the Supreme Court and the Ninth Circuit if the meaning of the term "equity" is ever relevant to a case before me.

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

Response: Black's Law Dictionary defines "equity" in relevant part as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." Black's Law Dictionary (11th ed. 2019). My personal opinion is irrelevant to my interpretation of the law when deciding a case or making rulings. I am bound to only consider the facts and evidence related to a case and the applicable law in making my decision. If confirmed, I would follow all binding precedent of the Supreme Court and the Ninth Circuit if the meaning of the terms "equity" and "equality" are ever relevant to a case before me.

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

Response: The word "equity" does not appear within the text of the Fourteenth Amendment. The Equal Protection Clause states "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

27. How do you define "systemic racism?"

Response: Black's Law Dictionary does not define "systemic racism," but it defines "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." Black's Law Dictionary (11th ed. 2019).

My general understanding is that the phrase "systemic racism" refers to statistical disparities in how certain protected classes are treated in various institutions in our society such as the criminal justice system and education system.

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

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

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

Response: I have not researched the concepts of systemic racism and critical race theory in a way that would allow me to distinguish between the two concepts. I have also not had such a case before me that required me to define those terms.

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

Questions for the Record for Adrienne C. Nelson, nominated to be United States District Judge for the District of Oregon

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: The Supreme Court has held that racial discrimination is illegal. The Supreme Court has held that race-based government action is analyzed under strict scrutiny, and, as such, is only permissible when narrowly tailored to achieve a compelling government interest. Congress has prohibited discrimination based on race through federal laws, such as Title VI and VII of the Civil Rights Act.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court explained that the Court may find that an unenumerated fundamental right exists within the Constitution where the carefully defined liberty interest is objectively deeply rooted in the nation's history and tradition. As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on issues which may come before me in the future. If confirmed, I would follow all Supreme Court and Ninth Circuit precedent relating to the existence of unenumerated rights.

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

Response: For the sixteen years that I have been a sitting state judge, my judicial philosophy has been guided by several principles. I understand that my role is to be a neutral arbiter in any case that comes before me, to treat all that come before me with respect, fairness and impartiality irrespective of their race, gender, religion, or national origin. I carefully review all evidence presented, I listen carefully to the arguments of the parties and faithfully follow any precedent when applying the law to the facts and record before me. I never let my personal beliefs or opinions influence my judicial decisions. If confirmed, I will continue to act in this manner and will recognize my obligation to follow all binding Supreme Court and Ninth Circuit precedent.

I have not researched the judicial philosophies of individual United States Supreme Court Justices on the Warren, Burger, Rehnquist, and Roberts Courts, and so I cannot comment on whose philosophy is most analogous with mine.

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

Response: According to Black's Law Dictionary (11th ed. 2019), originalism is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted, specifically, 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." I have never identified myself as an originalist or applied any other label related to a specific theory of constitutional interpretation to myself. If confirmed, I would faithfully apply the constitutional interpretation that is appropriate given the circumstances and precedent set by the Supreme

Court and Ninth Circuit.

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

Response: According to Black's Law Dictionary (11th ed. 2019), living constitutionalism is "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I have never identified myself as a living constitutionalist or applied any other label related to a specific theory of constitutional interpretation to myself. If confirmed, I would faithfully apply the constitutional interpretation that is appropriate given the circumstances and precedent set by the Supreme Court and Ninth Circuit.

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

Response: Yes. In my role as a judge, I would faithfully apply all binding Supreme Court and Ninth Circuit precedent. If no precedent controls, I would be bound to follow the plain text of the Constitution. If the plain text were unclear, I would then look to the original public meaning of the Constitution. If the original public meaning of the Constitution was clear and resolved the issue, my legal analysis would end, and I would adopt that original public meaning.

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

Response: The public's current understanding of the Constitution or a statute is usually not relevant to a jurist's work in determining the meaning of the Constitution or a statute. If confirmed, I would faithfully apply the constitutional interpretation that is appropriate given the circumstances and set by the Supreme Court and Ninth Circuit precedent.

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

Response: The Constitution is an enduring document that can only be amended when the requirements of Article V have been met.

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

Response: Yes, it is binding precedent.

a. **Was it correctly decided?**

Response: As a sitting state judge and federal judicial nominee, it would not be appropriate for me to comment on whether the Supreme Court correctly decided a case. If confirmed, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit, including *Dobbs v. Jackson Women's Health Organization*.

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

Response: Yes, it is binding precedent.

a. **Was it correctly decided?**

Response: As a sitting state judge and federal judicial nominee, it would not be appropriate for me to comment on whether the Supreme Court correctly decided a case. If confirmed, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit, including *New York Rifle & Pistol Association v. Bruen.*

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

Response: Yes, it is binding precedent.

a. **Was it correctly decided?**

Response: Although it is generally inappropriate for a judicial nominee to state whether they believe a case was rightly or wrongly decided, *Brown v. Board of Education* represents an exception to that rule. Given that *Brown* is fundamental to American jurisprudence and unlikely to ever be relitigated, I am comfortable stating that it was correctly decided. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent.

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

Response: 18 U.S.C. § 3142(e)(3) establishes that in certain types of cases a rebuttable presumption of detention arises that no release conditions will reasonably assure the defendant's appearance in court and the safety of the community. These types of cases include certain drug offenses carrying maximum penalties of at least ten years of incarceration, certain acts of terrorism, acts involving slavery or human trafficking, many crimes including minor victims, and enumerated offenses.

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

Response: The rule itself states that where "the judicial officer finds that there is probable cause to believe that the person committed" one of the enumerated offenses, "it shall be presumed that no conditions or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). Beyond that assertion, I am unaware of the policy rationales underlying this presumption.

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

Response: Yes. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) the Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA) covers both religious organizations and small businesses operated by observant owners. In cases in

which RFRA applies, it provides that the government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

When RFRA does not apply, the Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs or affected citizens," or "acts[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at 1878, or if the law treats any "comparable secular activity more favorable than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral or not generally applicable, strict scrutiny applies.

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

Response: Under the Free Exercise Clause of the First Amendment, laws that burden the free exercise of religion are first analyzed to determine whether they are both neutral and generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). The government is only permitted to regulate religious activity in a manner different than comparable secular activity if the discriminatory law or regulation is narrowly tailored to achieve a compelling governmental interest. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Further, the federal government is subject to the restrictions of the Religious Freedom Restoration Act (RFRA).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020), the church and synagogues were entitled to a preliminary injunction because they were: (1) likely to succeed on the merits of their First Amendment claims; (2) the COVID-19 restrictions imposed would cause irreparable harm by not allowing individuals to worship in person for minimal periods of time, and (3) there was insufficient evidence that granting the injunction would further the spread of COVID-19. *Id.*

16. **Please explain the U.S. 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 because the State of California's COVID-19 restrictions could not survive a strict scrutiny analysis where governmental action would need to be narrowly tailored to further a compelling governmental interest. *Id.* The Court further held that the State of California's governmental action was not neutral and generally applicable because it treated secular gatherings more favorably than religious activities.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), a baker refused to make a cake for a same-sex couple's wedding because doing so would violate his religious beliefs. The same-sex couple filed suit, alleging that the baker had impermissibly discriminated against them. The Colorado Civil Rights Commission concluded that the baker violated Colorado's anti-discrimination laws and ordered the baker to make their cake. The case was appealed to the Supreme Court. The Court found that Colorado's anti-discrimination law was not being applied in a neutral manner with regard to religion. The Court held the Commission was motivated by hostility toward the sincerely held religious beliefs of the cakeshop owner.

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

Response: The Supreme Court has held that an individual's religious beliefs are protected even if the beliefs are not consistent with those of a faith tradition. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). "[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp. Div. Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (citations omitted).

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the morality of the Catholic Church's position on particular issues.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court addressed the application of "ministerial exception" to teachers at religious schools. The Court held that the "ministerial exception" protects the rights of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 2052. The Court explained that although the teachers at issue in this case were not given the title "minister", they performed vital religious duties and their roles were part of the "core of the school's mission." *Id.* at 2055. Because the teachers fell within the ministerial exception, they were barred from bringing employment discrimination claims against the school. *Id.* at 2060.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court held, under a strict scrutiny analysis, that the City's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents violated the Free Exercise Clause because the non-discrimination requirement was not neutral and generally applicable. The Court also held that the City could not show that its refusal to contract with the organization was narrowly tailored to advance a compelling governmental interest.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that a Maine public-benefits program that provided tuition assistance for private schools violated the Free Exercise Clause because it barred religious schools from receiving tuition assistance solely because they are religious. This holding is consistent with *Trinity*

Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

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

Response: The Supreme Court held that a school district violated the First Amendment rights of a public high school football coach by firing him for kneeling on the field in prayer. *Kennedy v. Bremerton School Dist*., 142 S. Ct. 2047, 2415 (2022). The school's policy prohibiting his conduct was not neutral or generally applicable, so it was subject to strict scrutiny. The Court found that the school's policy was not narrowly tailored to further a compelling governmental interest.

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

Response: Justice Gorsuch explained that the court had not properly applied strict scrutiny by failing to analyze whether the County had a compelling interest in denying an exemption to the complainants specifically and by "treating the County's general interest in sanitation regulations as 'compelling' without reference to the specific application of those rules to this community." *Mast v. Fillmore Cnty*., 141 S. Ct. 2430, 2432 (2021).

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on hypotheticals or issues which may come before me in the future. In all cases, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit and apply the law to the facts of the case before me.

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 not familiar with the employment training programs offered by the United States District Court for the District of Oregon or other federal courts. Trainings should comply with the Constitution and 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: I am not aware of any training being offered as described, nor do I know what role judges play in developing those trainings. Trainings should comply with the Constitution and federal law.

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

Response: Yes.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent addressing this issue. As a state court judge and federal judicial nominee, it would not be appropriate for me to comment on current or future cases. In all cases, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit.

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

Response: Congress has addressed and is addressing this issue. As a sitting state judge, my role is to be a neutral arbiter in any case that comes before me, to treat all that come before me fairly and impartially irrespective of their race, gender, religion or national origin. I will follow all precedent and faithfully apply the law to the facts and record before me.

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

Response: Whether Congress should alter the number of justices on the U.S. Supreme Court is a question for the policymakers to decide. If confirmed, I will faithfully follow all precedent established by the Supreme Court and the Ninth Circuit.

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

illegitimate?

Response: No.

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

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

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), that possessions of handguns for self-protection is a fundamental constitutional right. In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2132 (2022), the Supreme Court held that states do not have the authority to prohibit the possession of handguns outside of the home for self-protection. Additionally, in *Bruen*, the Court provided the analysis for determining the validity of firearm regulations.

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

Response: Yes, the Supreme Court has held that an individual has a right to bear arms and extended that right to include carrying a firearm in public. *See New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that has held that the right to own a firearm should receive less protection than any other individual rights under the Constitution.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent that has held that the right to own a firearm should receive less protection than the right to vote under the Constitution.

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

Response: As a state court judge and federal judicial nominee, it would not be appropriate for me to comment on current or future cases. In all cases, I will faithfully follow all precedent established by the Supreme Court and Ninth Circuit.

39. **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 and discretion as to who, when, and how to prosecute individual cases.

As a state court judge for over sixteen years, my experience has been that criminal cases come through an indictment or information, there is prosecutorial discretion as to seeking indictments from the grand jury and later prosecuting any of the charges in the indictment, whether by guilty plea or trial. The prosecutor also has discretion as to the dismissal of charges.

I have not had the opportunity to consider this issue. If confirmed, I would follow the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: No. The President has no authority to unilaterally repeal a statute. Congress and the states have the authority to prescribe the death penalty for capital offenses. The Supreme Court has upheld the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

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

Response: During the pandemic, the Centers for Disease Control (CDC) imposed a nationwide moratorium on evictions. The Alabama Association of Realtors and other plaintiffs obtained a judgment from the United States District Court for the District of Columbia vacating an eviction moratorium on the ground that it was unlawful. Pending appeal, the district court stayed its judgment. Thereafter, the Supreme Court vacated the stay rendering the judgment unenforceable on the basis that the statute on which the CDC relied did not give it the broad sweeping authority it claimed.

42. **In 2020, in an article for the *Oregon Appellate Almanac* you wrote that there is "racial disparity in every system and sector in America since the inception of this country," and that this disparity "is and was intentional."**

a. **Is America a systemically racist country?**

Response: I deeply believe in America, and I feel blessed to live in this country with my family. America continues to strive to live up to the ideals of "equal justice under law" that is emblazoned on the U.S. Supreme Court building. I believe there are numerous different understandings of the term "systemic racism," and that questions regarding it implicate important policy considerations for policymakers. As a sitting state court judge, my role has been to be a neutral arbiter in any case that comes before me, to treat all that come before me fairly and impartially irrespective of their race, gender, religion, or national origin. If I am fortunate to confirmed, I will continue to view each case impartially and I will follow all precedent and faithfully apply the law to the facts and record before me.

b. **Why is the "racial disparity in every system and sector in America" intentional?**

Response: As a judge, I do not address systems; I address individual cases. In every case that comes before me, I treat everyone fairly and impartially irrespective of their race, gender, religion, or national origin. I will follow all precedent and faithfully apply the law to the facts and record before me.

c. **Who is responsible for perpetuating this disparity?**

Response: Congress has addressed the issue and is addressing the issues related to racial disparities. As a judge, I do not address systems; I address individual cases.

d. **You also wrote that "[j]ustice may be accomplished even in the face of systematic injustice." Is the American legal system systematically unjust?**

Response: Congress has addressed the issue and is addressing the issues related to racial disparities and criminal justice. As a judge, I do not address systems; I address individual cases. In every case that comes before me, I treat everyone fairly and impartially irrespective of their race, gender, religion, or national origin. I will follow all precedent and faithfully apply the law to the facts and record before me.

e. **If the legal system is "systematically unjust," as you noted, please explain your choice to remain a member of that system.**

Response: I deeply believe in our legal system, and, in my experience, members of our legal systems are constantly striving to reinforce the promises of independence, fairness, and equal justice under the law.

43. **You have given multiple presentations on "impact bias."**

a. **Do you believe everyone harbors implicit bias?**

Response: My understanding is that social science research has indicated that we all have unconscious assumptions and stereotypes. It is part of the shared human condition that we must acknowledge, learn more about, including ways to address it in our daily lives, and manage. As a judge, I have always striven to ensure that my judicial decision-making is impartial and free from any bias.

b. **Have you taken an implicit bias test?**

Response: Yes.

c. **If so, please describe the results of that test.**

Response: The results of the test indicated that I, like everyone else, am part of the shared human condition and have unconscious assumptions and stereotypes that I have to learn more about, including ways to address it in our daily lives, and manage. I address and manage this in my daily life by approaching every case with an open mind, listening to the lawyers in the case, meaningfully engaging with my colleagues, focusing on the record and the applicable laws, and taking the time to ensure that the legal result I reach in every case is not informed by any bias.

Senator Ben Sasse
Questions for the Record for Adrienne C. Nelson
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
October 12, 2022

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

   Response: No.

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

   Response: For the sixteen years that I have been a sitting state judge, my judicial philosophy has been guided by several principles. I understand that my role is to be a neutral arbiter in any case that comes before me, to treat all that come before me with respect, fairness, and impartiality irrespective of their race, gender, religion, or national origin. I carefully review all evidence presented, I listen carefully to the arguments of the parties, and faithfully follow any precedent when applying the law to the facts and record before me. I never let my personal beliefs or opinions influence my judicial decisions. If confirmed, I will continue to act in this manner and will recognize my obligation to follow all binding Supreme Court and Ninth Circuit precedent.

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

   Response: According to Black's Law Dictionary (11th ed. 2019), originalism is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted, specifically, 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." I have never identified myself as an originalist or applied any other label related to a specific theory of constitutional interpretation to myself. If confirmed, I would faithfully apply the constitutional interpretation that is appropriate given the circumstances and precedent set by the Supreme Court and Ninth Circuit.

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

   Response: According to Black's Law Dictionary (11th ed. 2019), textualism is "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." I have never identified myself as a textualist or applied any other label related to a specific theory of constitutional interpretation to myself. The starting point for statutory interpretation is the text of the statute. If confirmed, I would faithfully apply the constitutional interpretation that is

appropriate given the circumstances and precedent set by the Supreme Court and Ninth Circuit.

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

   Response: According to Black's Law Dictionary (11th ed. 2019), living constitutionalism is "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I believe that the Constitution may be changed only through the Article V amendment process. While I believe that the meaning of the Constitution is fixed, I recognize that the Constitution contains enduring principles that are broad enough to apply to new circumstances. *N.Y State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the founders specifically anticipated.") As a sitting state court judge and federal judicial nominee, if confirmed, I would follow the text of the Constitution as well as Supreme Court and Ninth Circuit precedent.

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

   Response: While there are many different qualities that I admire about many Justices, I cannot name any Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence I most admire. If confirmed, I will follow all applicable Supreme Court precedent.

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: As a judge in the District of Oregon, I would be required to follow the precedent set by the Ninth Circuit. A federal circuit court is required to follow its own precedent and that of the United States Supreme Court and can only overrule its own precedent when it sits *en banc*.

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

   Response: Please see my response to Question 7.

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

Response: If confirmed, I would follow the precedent of the Supreme Court and the Ninth Circuit. The starting point for statutory interpretation is the text of the statute. If the text is clear and unambiguous, the analysis ends because the plain meaning of the text controls. If the text is unclear or ambiguous, I would then consider canons of statutory construction, persuasive precedent from other circuits, and, if necessary, legislative history that the Supreme Court and the Ninth Circuit have identified as reliable.

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: If confirmed, I would apply the factors in 18 U.S.C. § 3553(a) as well as the sentencing guidelines. Neither include whether defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups. In 18 U.S.C. § 3553(a)(6), a sentencing court is instructed to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Senator Josh Hawley
Questions for the Record

Adrienne Nelson
Nominee, U.S. District Court for the District of Oregon

1. **You have commented extensively on issues of "structural racism" and "implicit bias."**

    a. **Leading Critical Race Theorist Ibram X. Kendi has argued that "The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination." Do you agree with Kendi's approach to combating racial disparities?**

    Response: I am not familiar with this statement and therefore cannot offer any comment. As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to comment on hypotheticals or issues which may come before me in the future.

    As a sitting state court judge, I follow all binding Supreme Court and Ninth Circuit precedent. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

    The Supreme Court has held that racial discrimination is illegal. The Supreme Court has held that race-based government action is analyzed under strict scrutiny, and, as such, is only permissible when narrowly tailored to achieve a compelling government interest. Congress has prohibited discrimination based on race through federal laws, such as Title VI and VII of the Civil Rights Act.

    b. **In past presentations on implicit bias, you've identified the phrase "I believe that the most qualified person should get the job" as an example of implicit bias. Do you stand by that position today?**

    Response: As a matter of context and clarification, I did not make that identification as described. In those presentations, there is a slide of six examples where the participants are asked to apply what has been learned about implicit bias. Most qualified is a relative statement because it means different things to different people and is measured in different ways using different information and data points.

c. **You have argued that the death of George Floyd is part of "a continuum of slavery that has been reverberating through every generation in this country for 401 years." Counting back 401 years from when you wrote that—in 2020—brings us to 1619. Do you agree with the core factual and interpretive claims of the *New York Times*' 1619 Project series?**

Response: The New York Times' 1619 project is not relevant to my judicial decision-making. As a judge, I do not address systems; I address individual cases. In every case that comes before me, I treat everyone fairly and impartially irrespective of their race, gender, religion, or national origin. I will follow all precedent and faithfully apply the law to the facts and record before me.

2. **In March 2021, you wrote an article for the *Portland Business Journal* addressing the rioting and unrest in Portland, Oregon in 2020. You stated in that article that "we should face the longstanding and growing discontent in Portland today and not be overwhelmed or silenced by it. Nor should we be afraid of stepping outside our comfort zones—although we are what we are exposed to and we don't trust what we don't understand."**

a. **In your view, should "stepping outside our comfort zones" involve tolerating riots, looting, and the destruction of innocent people's property?**

Response: To be clear, my comments in no way endorse conduct that violates federal or state law.

b. **In your view, should "stepping outside our comfort zones" involve tolerating so-called protesters setting fire to the police union headquarters?**

Response: To be clear, my comments in no way endorse conduct that violates federal or state law.

c. **In your view, should "stepping outside our comfort zones" involve defunding the police and getting rid of cash bail?**

Response: To be clear, my comments did not take a position on either of these issues. Issues related to law enforcement funding and the existence of cash bail are properly considered by policymakers.

3. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following**

Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.

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

Response: As a sitting state court judge and federal judicial nominee, it would be inappropriate for me to comment on issues which may come before me in the future.

If confirmed, I would analyze each case that would come before me based on its specific facts and circumstances. At sentencing, I would consider all binding precedent of the Supreme Court and Ninth Circuit, as well as the federal sentencing guidelines and the relevant 18 U.S.C. § 3553(a) sentencing factors, as Congress has instructed.

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

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

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

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

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

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

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

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

Response: This is an important issue for policymakers to consider.

As a sitting state court judge and federal judicial nominee, I do not believe that it would be proper for me to comment or give an opinion on this issue. If confirmed, I will follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Question 4(a).

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

a. Do you agree with that philosophy?

Response: As a state court judge for the past sixteen years, I have applied the law to the facts in each case before me. If I am confirmed to serve in the District of Oregon, I will continue to do the same.

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

Response**:** I am not familiar with this statement or the context in which it was made, so I cannot offer any comment in the abstract.

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

Response: If confirmed as a District Court Judge for the District of Oregon, there are a number of abstention doctrines that would be binding upon me:

R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941): Under the *Pullman* abstention doctrine, if the resolution of a state law claim might obviate a federal constitutional claim, and the state law issue is unclear, the federal court should abstain from deciding the case. "*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).

Burford v. Sun Oil Co., 319 U.S. 315 (1943): "*Burford* is concerned with protecting complex state administrative processes from undue federal interference" in instances where the states are attempting to resolve an "'essentially local problem.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989) (citation omitted). The Ninth Circuit "requires certain factors to be present for [*Burford*] abstention to apply: (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a

coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

Younger v. Harris, 401 U.S. 37 (1971): *Younger* abstention prohibits federal courts from acting to enjoin certain pending state court proceedings. In *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013), the Supreme Court reaffirmed that only "exceptional circumstances . . . justify a federal court's refusal to decide a case in deference to the States." (Internal quotation marks and citation omitted). "First, *Younger* preclude[s] federal intrusion into ongoing state criminal prosecutions. . . . Second, certain civil enforcement proceedings warrant[ ] abstention. . . . Finally, federal courts refrain[ ] from interfering with pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* (internal quotation marks and citations omitted).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976): "*Colorado River* and its progeny provide a multi-pronged test for determining whether 'exceptional circumstances' exist warranting federal abstention from concurrent federal and state proceedings." *Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017). The Ninth Circuit applies an eight-part test for evaluating the appropriateness of such abstention:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Id. at 841-42.

Rooker-Feldman (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983)): "The *Rooker–Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: 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 Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003) ("[T]he Supreme Court's decisions in *Rooker* and *Feldman*, and our seven decisions applying the *Rooker–Feldman* doctrine to deny jurisdiction, fall into a relatively clear pattern: It is a forbidden de facto appeal

under *Rooker–Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court.").

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

   Response: No.

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

      Response: N/A.

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

   Response: If confirmed, I will apply all relevant Supreme Court and Ninth Circuit precedent involving the interpretation of particular constitutional provisions. If that precedent directs me to interpret a provision according to the original public meaning of the Constitution's text, including *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 544 U.S. 570 (2008), then I will faithfully do so.

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

   Response: If confirmed, I would follow the precedent of the Supreme Court and the Ninth Circuit. If there was no binding precedent regarding a particular statutory interpretation issue, then I would look to the text of the statute. If the text is clear and unambiguous, the analysis ends because the plain meaning of the text controls. If the text is unclear or ambiguous, I would then consider canons of statutory construction, persuasive precedent from other circuits, and, lastly, if necessary, legislative history (such as committee reports).

   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: According to Supreme Court jurisprudence, not all legislative history is the same. The Supreme Court has explained that, as a general matter, committee reports are more probative of legislative intent than "passing comments of one Member" or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The Constitution is a domestic document, and the courts are not bound by the laws or judicial decisions of other nations. The Supreme Court has at times, however, held that the meaning of certain constitutional provisions is informed by English law around or before the founding of the United States. *See, e.g., New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2135-42 (2022) (Second Amendment) and *District of Columbia v. Heller*, 554 U.S. 570, 592-95 (2008) (Second Amendment). If confirmed, I would look to Supreme Court and Ninth Circuit precedent to interpret the Constitution as well as whether it is appropriate and prudent to consult the laws of a foreign nation in a given case.

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

Response: As the Supreme Court held in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019), "where . . . the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."

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

Response: Yes.

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

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

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

Response: No.

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

Response: Under Supreme Court precedent, a law violates the Free Exercise Clause of the First Amendment if a law's burden upon an individual's free exercise of religion is not neutral or generally applicable to all individuals regardless of their religion and the law is not narrowly tailored to meet a compelling government interest (i.e., the law must survive strict scrutiny because religion is a suspect classification). *See generally Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: Please see my response to Question 14.

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

Response: The Ninth Circuit has held that "the First Amendment does not extend to 'obvious[ ] shams and absurdities.'" *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (citation omitted). Moreover, a free exercise claim "must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id.* It is not, however, for the courts to say whether "religious beliefs . . . are mistaken or unreasonable." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014). The question is rather whether an individual's beliefs reflect "'an honest conviction.'" *Id.* (citation omitted); *see also Welsh v. United States*, 398 U.S. 333, 339 (1970) (holding that "'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect'" can "come within the meaning of 'religious belief'") (citation omitted).

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

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

Response: The *Heller* Court held that the District of Columbia's law banning individuals from possessing handguns in the homme unconstitutionally burdened an individual's Second Amendment right to keep and bear arms.

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: To the best of my recollection, I have not.

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

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

Response: It is my understanding that Justice Holmes was stating that the Constitution does not codify the theories in Mr. Herbert Spencer's Social Statics or any economic theory.

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

Response: As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on this issue.

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

Response: I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court that are no longer good law. If confirmed, I will faithfully apply all binding precedent of the Supreme Court and the Ninth Circuit.

a. If so, what are they?

Response: N/A.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed, I will follow all precedent established by the Supreme Court and Ninth Circuit regarding what constitutes a monopoly.

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

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

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

Response: The Supreme Court held in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), that evidence of control of 80% of a market was "sufficient to survive summary judgment under" the standard for finding a monopoly. If a case involving an alleged monopoly were to come before me, I would carefully consider the arguments presented by the parties, and research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

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

Response: Black's Law Dictionary defines "federal common law" as "a group of laws established by the federal courts that is not influenced by laws and decisions of state courts." Black's Law Dictionary (11th ed. 2019).

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

Response: With respect to the interpretation of a state constitutional provision, federal courts must defer to the interpretation of the highest court in the state at issue.

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

Response: Federal law requires that identical texts should be interpreted identically, and consistent with binding federal precedent. However, states have the freedom to interpret their own constitution as they choose. Therefore, it is possible that federal and state constitutional provisions could be written identically but interpreted differently.

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

Response: A state constitution may provide broader protections for its citizens than the United States Constitution.

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

Response: Although it is generally inappropriate for a federal judicial nominee and sitting state court judge to state whether they believe a case was correctly decided, *Brown v. Board of Education* represents an exception to that rule. Given that *Brown* is fundamental to American jurisprudence and unlikely to ever be relitigated, I am comfortable stating that it was correctly decided. If confirmed, I would follow all binding Supreme Court and Ninth Circuit precedent.

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

Response: The authority to issue injunctions is a power found in Federal Rule of Civil Procedure 65 which sets forth the procedures for issuing an injunction. The crafting of an injunction "is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). While there has been great debate among policy makers about a District Court's authority to issue nationwide injunctions, it is my understanding that the Supreme Court has not squarely addressed this issue.

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

Response: Please see my response to Question 24.

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

Response: Please see my response to Question 24.

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

Response: Please see my response to Question 24.

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

Response: Federalism refers to the system of government that recognizes the division of power between the state and federal governments. The Constitution, most clearly outlined in the Tenth Amendment, provides specific enumerated powers to the federal government, and the states or the people are afforded all other rights that are not delegated to the federal government in the Constitution or prohibited by it. Federalism permits the states to provide broader protection to its citizens than those afforded by the United States Constitution.

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

Response: Please see my response to Question 6.

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

Response: Generally, injunctive relief addresses and prevents future harm, while damages generally remedy past harms. Determining which type of relief is available and appropriate in each case would require an analysis of the facts in the specific case.

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

Response: In its last term, in *Dobbs*, the Supreme Court reaffirmed that certain substantive rights, though not enumerated in the Constitution, nevertheless enjoy due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson*

Women's Health Org., 142 S. Ct. 228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted.))

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

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

Response: The "free exercise of religion" means the right to believe and profess whatever religious doctrine one desires." *Emp. Div. Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990).

The Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs or affected citizens," or "act[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at 1878, or if the law treats any "comparable secular activity more favorable than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral and generally not applicable, strict scrutiny applies.

Under the Religious Freedom Restoration Act (RFRA), if any federal law places a substantial burden on a person's exercise of religion, the government must show that the burden "(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.

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

Response: I am not aware of Supreme Court or Ninth Circuit precedent that distinguishes between the "free exercise of religion" and "freedom of worship." The "freedom of worship" generally refers to a person's right to participate in religious services. The First Amendment protects both the freedom to believe and freedom to act, including the freedom to live out one's faith in their daily life. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-304 (1940).

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 has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). A law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if the record shows that the government seeks to "impose regulations that are hostile to the religious beliefs or affected citizens," or "acts[s] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). A law is not generally applicable if it is subject to discretionary individualized exemptions, *Fulton*, 141 S. Ct. at 1878, or if the law treats any "comparable secular activity more favorable than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). If the law is neutral and generally applicable, rational basis review applies. If the law is not neutral and generally not applicable, strict scrutiny applies.

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: The Supreme Court has held that the court's only function "in this context is to determine" whether the person's religious belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724-25 (2014). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

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 Supreme Court has held that the Religious Freedom Restoration Act applies to all federal law. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: Although I am not familiar with the context in which this statement was made, I understand this statement to mean that a judge should apply the law to the facts of a case and that a judge's personal opinion or belief has no role in decision-making.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: N/A.

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

Response: No.

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

Response: I deeply believe in America, and I feel blessed to live in this country with my family. America continues to strive to live up to the ideals of "equal justice under law" that is emblazoned on the U.S. Supreme Court building. I believe there are numerous different understandings of the term "systemic racism," and that questions regarding it implicate important policy considerations for policymakers. As a sitting state court judge, my role has been to be a neutral arbiter in any case that comes before me, to treat all that come before me fairly and impartially irrespective of their race, gender, religion, or national origin. If I am fortunate to confirmed, I will continue to view each case impartially and I will follow all precedent and faithfully apply the law to the facts and record before me.

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

Response: Yes, I have.

36. How did you handle the situation?

Response: Regardless of personal views, attorneys are bound to zealously advocate for their clients, within the bounds of the law and ethical obligations.

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

Response: Yes.

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

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

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

Response: As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on issues which may come before me in the future. In all cases, I will faithfully follow all precedent established by the Supreme and Ninth Circuit and apply the law to the facts of the case before me.

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: Yes.

b. Amazon?

Response: Yes.

c. Google?

Response: Yes.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No.

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

44. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

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

Response: Judicial nominees swear an oath to tell the truth to this Committee and to provide complete and truthful answers to the Committee's questions to the best of their ability, consistent with their ethical and professional obligations.

Questions from Senator Thom Tillis
for Adrienne Camille Nelson
Nominee to be United States District Judge for the District of Oregon

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: According to Black's Law Dictionary (11th ed. 2019), judicial activism is defined as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Judicial activism is not appropriate.

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

   Response: I believe impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: As a sitting state court judge, I have always endeavored to faithfully apply to the law to the facts of the case before me without regard to any one participant's desire for a specific outcome or my personal opinions or beliefs.

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

   Response: No.

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

   Response: If confirmed, I will faithfully apply all binding Supreme Court and Ninth Circuit precedent when faced with an issue relating to an individual's Second Amendment rights, including *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 544 U.S. 570 (2008).

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

   Response: It is for policymakers to consider how local officials should respond to crises such as COVID-19. As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on a hypothetical case or issues which may come before me in the future. In all cases relating to potential limitations to an individual's Second Amendment rights, I would apply all relevant Supreme Court and Ninth Circuit precedent, including *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 544 U.S. 570 (2008).

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

   Response: The Supreme Court has established that law enforcement personnel are entitled to qualified immunity from civil liability whenever their conduct does not violate a federal statutory or constitutional right which was clearly established at the time of its violation. *See Saucier v. Katz*, 533 U.S. 1994 (2001); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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: This question is an important consideration for policymakers. As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on the current or future cases. If confirmed, I would apply Supreme Court and Ninth Circuit precedent.

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

    Response: The proper scope of qualified immunity protections for law enforcement is a question for policymakers to consider. If confirmed, I will follow all precedent of the Supreme Court and Ninth Circuit.

12. **Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in**

abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: Under 35 U.S.C. § 101, laws of nature, natural phenomena, and abstract ideas are generally not patentable. However, applications of abstract concepts to a new and useful end remain eligible for patent protection. *See Alice Corp Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

As a sitting state court judge and federal judicial nominee, it would not be appropriate for me to comment on the current state of the Supreme Court's jurisprudence on a particular issue which may come before me in the future.

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

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent to the particular facts of any case before me.

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

Response: If confirmed, I would apply the Patent Act, 35 U.S.C. § 101, and all binding Supreme Court and Ninth Circuit precedent on all patent cases before me. Whether the current state of the Supreme Court's eligibility tests requires amendment to the Patent Act, 35 U.S.C. §101 is a question for policymakers.

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

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

    Response: In my career as an Associate Justice on the Oregon Supreme Court, a Multnomah County Circuit Court Judge, and civil and criminal litigator, I do not recall ever having the opportunity to handle any matters involving copyright law.

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

    Response: In my career as an Associate Justice on the Oregon Supreme Court, a Multnomah County Circuit Court Judge, and civil and criminal litigator, I do not recall ever having the opportunity to handle any matters involving the Digital Millennium Copyright Act.

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

    Response: In my career as an Associate Justice on the Oregon Supreme Court, a Multnomah County Circuit Court Judge, and civil and criminal litigator, I do not recall ever having the opportunity to handle any matters involving intermediary liability for online service providers that host unlawful content posted by users.

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

    Response: In my career as an Associate Justice on the Oregon Supreme Court, a Multnomah County Circuit Court Judge, and civil and criminal litigator, I do not recall ever having the opportunity to handle any matters involving intellectual property issues, including copyright. I have participated in cases that involved free speech, but not involving copyright, as both an Associate Justice on the Oregon Supreme Court and a Multnomah County Circuit Court Judge.

16. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the**

statute...” It also reported that courts have made the traditional common law standard for “willful blindness” harder to meet in copyright cases.

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

Response: If confirmed, I would follow the precedent of the Supreme Court and the Ninth Circuit. If there was no binding precedent regarding a particular statutory interpretation issue, then I would look to the text of the statute. If the text is clear and unambiguous, the analysis ends because the plain meaning of the text controls. If the text is unclear or ambiguous, I would then consider canons of statutory construction, persuasive precedent from other circuits, and, lastly, if necessary, legislative history (such as committee reports).

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

Response: If confirmed, I would follow the precedent of the Supreme Court and the Ninth Circuit. Generally, courts must give *Chevron* deference to an agency’s interpretations from formal adjudications or notice and comment rule-making. Opinion letters, policy statements, agency manuals, and enforcement guidelines are not controlling or binding, but may be given deference if they are persuasive. *Christensen v. Harris Cnty.*, 529 U.S. 576, 578 (2000).

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

Response: This is a question for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment on how issues that might come before the courts should be resolved. If confirmed, I will apply the precedent of the Supreme Court and the Ninth Circuit in evaluating this type of claim.

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

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

Response: Judges are obligated to apply the precedent of the Supreme Court and the relevant circuit court regarding specific statutes. If confirmed, I would faithfully apply all currently binding statutory law and Supreme Court and Ninth Circuit precedent. Whether laws like the DMCA should be updated is a question for policymakers to consider.

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

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

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

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

Response: These are very important issues for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment on this matter. It is my understanding that cases in the District of Oregon are randomly assigned to the district judges, and therefore, parties cannot forum shop by filing in a particular division in the District of Oregon.

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

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

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

Response: No.

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

Response: Yes, I commit to abiding by the rules and procedures of the Ninth Circuit and the District of Oregon.

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

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

Response: As a sitting state court judge and federal judicial nominee, it would be generally inappropriate for me to comment on this issue.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on how issues that might come before the courts should be resolved.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on this policy issue.

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 judicial nominee, it would be inappropriate for me to comment on this policy issue.

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

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

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

mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

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

   Response: This is a question for policymakers to consider. As a judicial nominee, it would be inappropriate for me to comment on this issue.

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

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