Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Jamal Whitehead
Judicial Nominee to the U.S. District Court for the Western District of Washington

1. **In the context of federal case law, what is super precedent?**

   Response: I have never used this term, and to my knowledge, neither the Supreme Court nor the Ninth Circuit has used or defined the term "super precedent." If confirmed, I will faithfully follow all Supreme Court and Ninth Circuit precedent.

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: Lawyers should make decisions about whom they represent and matters they choose to work on in accordance with their ethical obligations.

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

   Response: I am not familiar with now-Justice Jackson's comment or the context in which it was made. Black's Law Dictionary defines "living constitution" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (11th ed. 2019). I do not believe the Constitution's meaning changes over time absent changes through the Article V amendment process. Although the meaning of the Constitution is "fixed," it sets out enduring principles that "must apply to circumstances beyond those the founders specifically anticipated." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

4. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

   Response: Please see my response to Question 2.

5. **Should paying clients be able to influence which pro bono clients engage a law firm?**

   Response: Please see my response to Question 2.

6. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

   Response: Please see my response to Question 2.

7. **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 Judge Reinhardt's comment or the context in which it was made. If confirmed, I would carefully review the factual record before the court and fully and faithfully apply all Supreme Court and Ninth Circuit precedent.

8. **Do you agree with the propositions that some clients don't deserve representation on account of their:**

   a. **Heinous crimes?**

   b. **Political beliefs?**

   c. **Religious beliefs?**

      Response to all subparts: The Sixth Amendment states that in all criminal prosecutions the accused shall have "the assistance of counsel for his defence." U.S. Const. Amend. VI. In *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963), the United States Supreme Court held that the Sixth and Fourteenth Amendments guarantee a right to counsel for indigent defendants accused of a crime in federal and state courts, which would necessarily include crimes considered to be heinous. There is no similar right to counsel in civil matters; lawyers should make decisions about whom they represent and matters they choose to undertake consistent with their ethical obligations.

9. **Should judicial decisions take into consideration principles of social "equity"?**

   Response: Judicial decisions should take into account the factual record before the court, including the text of the Constitutional provision, statute, or regulation that may be at issue in the case, as well as the relevant Supreme Court and Circuit precedent. Judges should decide only the limited issues properly before the court.

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

    Response: The Supreme Court has issued countless well-written and thoughtful decisions over the past 50 years, so I am unable to identify a single decision that exemplifies my judicial philosophy. If confirmed, my philosophy would rest upon an unwavering commitment to impartiality and equal justice under the law. This requires a consistent approach to each case that begins with (1) an exacting review of the record before the court; (2) careful review and consideration of the parties' briefs and oral argument; (3) diligent legal research and independent consideration of the law; (4) open-minded consultation with my colleagues and law clerks; and (5) a clear and cogent written ruling resolving only those narrow issues properly before the court.

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

Response: The Ninth Circuit has issued countless well-written and thoughtful decisions over the past 50 years, so I am unable to identify a single decision that exemplifies my judicial philosophy. If confirmed, my philosophy would rest upon an unwavering commitment to impartiality and equal justice under the law. This requires a consistent approach to each case that begins with (1) an exacting review of the record before the court; (2) careful review and consideration of the parties' briefs and oral argument; (3) diligent legal research and independent consideration of the law; (4) open-minded consultation with my colleagues and law clerks; and (5) a clear and cogent written ruling resolving only those narrow issues properly before the court.

12. 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, 721 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." (internal quotation marks and citations omitted). If confirmed, I would apply the *Glucksberg* test and any other binding precedent from the Supreme Court and Ninth Circuit to analyze any future claim to a fundamental right that the Supreme Court had not already recognized.

13. What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?

Response: The Supreme Court has noted that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Concerning nationwide injunctions, the Ninth Circuit has observed that, "[a]lthough there is no bar against . . . nationwide relief in federal district court or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (internal quotation marks and citations omitted). The Supreme Court has previously upheld nationwide injunctions granted by district courts. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (upholding portion of nationwide preliminary injunction with respect to parties and similarly situated nonparties). But the legal basis for such injunctions is currently the subject of debate. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III."). If confirmed, I would be bound by, and would faithfully and impartially follow, all Supreme Court and Ninth Circuit precedent concerning the proper scope of injunctive relief.

14. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: In *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (citations omitted).

15. Please define implicit bias.

Response: Webster's Dictionary defines "implicit bias" as "a bias or prejudice that is present but not consciously held or recognized." Merriam-Webster.com. 2022. https://www.merriam-webster.com/dictionary/implicit%20bias (Oct. 13, 2022).

16. Is the federal judiciary afflicted with your definition of implicit bias?

Response: This is an important question for policymakers to consider. If confirmed, and faced with a claim of bias or unwarranted disparities in treatment, I would evaluate the claim based on the factual record before the court and all Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

17. Do you have implicit bias?

Response: Broadly speaking, I do not believe anyone is immune from unconscious assumptions or biases. What is most important for judges, however, is to ensure that no biases affect their decisionmaking. Judges must never rely on intuition or "going with your gut," but should approach every case with an open mind, focusing on the factual record in the case and the applicable law above all else.

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

Response: In *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925), the Supreme Court recognized that substantive due process protects "the liberty of parents and guardians to direct the upbringing and education of children under their control."

19. Do you agree that service on an organization's board signifies general agreement with the positions the organization publicly holds? Please explain why or why not.

Response: Not necessarily. Many boards make decisions by majority vote, so it is possible for a board member to show disapproval of a position or proposal by voting against it while still serving on the board.

20. Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?

Response: I have not studied whether the First Amendment is more often a tool of the powerful than the oppressed, nor have I conducted quantitative or qualitative research regarding the same. If confirmed, it would be my job as a judge to make sure that no one involved in a matter before the court is unfairly deprived of the First Amendment's protections.

21. Does illegal immigration impose costs on border communities?

Response: This is an important question for policymakers to consider. If confirmed, and faced with a claim regarding immigration and its impact on border communities like those found along the Washington-Canada border, I would evaluate the claim based on the factual record before the court and all Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

22. Please discuss your criminal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, and how many times you have argued before the court in a criminal matter.

Response: During my 15-year career as a civil litigator, I have handled countless cases, argued before state and federal trial and appellate courts, and tried numerous cases to verdict or final judgement. I have not, however, handled any criminal legal matters.

23. Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:

a. How often have you cited to either of these tomes during the course of your work?

Response: Please see my response to Question 22.

b. How often have you had an opportunity to work within these constructs during the course of your career?

Response: Please see my response to Question 22.

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

Response to all subparts: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. That said, I am sufficiently confident that the constitutionality of *de jure* racial segregation in schools and anti-miscegenation laws are unlikely to be relitigated. So like prior nominees, I can state that I believe *Brown v. Bd. of Educ.* and *Loving v. Virginia* were correctly decided.

25. 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: After I submitted my application for United States District Judge for the Western District of Washington, I spoke with Chris Kang and Jake Faleschini of Demand Justice, who each described various aspects of the federal judicial nomination process generally. At no point did we discuss any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on any such case, issue, or question.

26. 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 attended a virtual workshop hosted by the American Constitution Society concerning the federal judicial nomination process. The workshop was simply intended to inform participants about how the nomination and confirmation process worked.

27. 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.

28. 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.

29. 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: Yes. Please see my response to Question 25.

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

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

Response: No.

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

Response: No.

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

Response: Please see my response to Question 25.

31. 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.

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

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

Response: No.

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

Response: No.

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

Response: No.

33. **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.

34. **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.

35. 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 January 21, 2022, I submitted an application for a position on the United States District Court for the Western District of Washington to the nonpartisan merit selection committee established by Senators Patty Murray and Maria Cantwell. On February 17, 2022, I interviewed with the committee. On March 2, 2022, I interviewed with Senator Murray's staff. On March 9, 2022, I interviewed with Senator Cantwell's staff. On March 10, 2022, I interviewed with Senator Murray. On April 1, 2022, I interviewed with an attorney 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 13, 2022, my nomination was submitted to the Senate.

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

Response: On September 28, 2022, the Department of Justice Office of Legal Policy (OLP) forwarded me the Committee's questions. I shared my draft responses with OLP, which provided feedback. I reviewed and considered OLP's feedback, and then submitted my answers to the Committee.

Questions for the Record for Jamal Norman Whitehead
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
Jamal Whitehead, Nominee to be United States District Court for the Western District of Washington

1. How would you describe your judicial philosophy?

Response: If confirmed, my philosophy would rest upon an unwavering commitment to impartiality and equal justice under the law. This requires a consistent approach to each case that begins with (1) an exacting review of the record before the court; (2) careful review and consideration of the parties' briefs and oral argument; (3) diligent legal research and independent consideration of the law; (4) open-minded consultation with my colleagues and law clerks; and (5) a clear and cogent written ruling resolving only those narrow issues properly before the court.

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

Response: As a starting point for interpreting any statute, I would determine whether there was any binding Supreme Court or Ninth Circuit precedent resolving the issue presented. If neither court had addressed the statute, I would look to the statutory text. As the Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The statutory scheme is another consideration: "If the statutory language is unambiguous and the statutory scheme is coherent and consistent," then "the inquiry ceases." *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotation marks omitted). If ambiguity persisted, however, I would consult Supreme Court and Ninth Circuit precedent interpreting related or analogous statutory provisions to discern an approach to interpreting the statute in controversy, the canons of statutory construction, and persuasive authority from other courts. As a last resort, I would consider legislative history, but only with caution, as the Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp.*, 545 U.S. at 568.

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

Response: As a starting point for interpreting any constitutional provision, I would determine whether there was any binding Supreme Court or Ninth Circuit precedent resolving the issue presented. In the unlikely event that neither court had addressed the provision at issue, I would follow Supreme Court and Ninth Circuit precedent dictating the proper interpretative method to be used regarding the constitutional provision in question. For example, in analyzing the Second Amendment, the Supreme Court has stated, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text."

See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) (internal citation omitted).

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

Response: The text of the Constitution and its original meaning play a critical role in interpreting the Constitution unless Supreme Court or Ninth Circuit precedent hold otherwise. For example, the Supreme Court has placed particular emphasis on the text and original meaning in interpreting the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: Please see my response to Question 2.

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

Response: The text of a statute or constitutional provision should generally be construed "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty*., 140 S. Ct. 1731, 1738 (2020). The Supreme Court has also held that certain statutes or constitutional provisions set forth enduring principles that require reference to social norms or other factors as they evolve. *See, e.g.*, *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574-75 (2002) (analyzing First Amendment).

6. What are the constitutional requirements for standing?

Response: "Standing" refers to a party's capacity to bring suit in federal court, and it enforces Article III's requirement that federal courts adjudicate only "genuine, live dispute[s] between adverse parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). To have standing, a plaintiff must show three things: "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). If these elements are not met, there is no case or controversy for the court to resolve. *Id.*

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), that Supreme Court held that the Necessary and Proper Clause gives Congress authority to enact laws necessary and proper to carrying out Congress's enumerated powers. But the Court has not identified an

exhaustive list of the types of authority the Necessary and Proper Clause provides. *See United States v. Comstock*, 560 U.S. 126, 130 (2010) (holding that Necessary and Proper Clause provided Congress authority to allow district courts to order civil commitment of certain individuals).

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

Response: The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). If Congress lacks authority to pass a challenged law, "that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *Id.* at 535. If confirmed and faced with an issue concerning the scope of congressional power, I would evaluate the record before the court and applicable Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

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

Response: Yes. The Supreme Court has held that the Constitution—through the Due Process Clauses of the Fifth and Fourteenth Amendments—protects various rights that are not expressly enumerated in the Constitution. These are rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Those rights include, among others, the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *Id.* at 720; *but see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (no constitutional right to abortion).

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 recently held that the Constitution does *not* protect the right to an abortion. *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022). The Supreme Court has also held that the Constitution does not protect the rights at stake in *Lochner v. New York*, 198 U.S. 45 (1905). *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937). If confirmed, I would rely on Supreme Court and Ninth Circuit precedents to determine whether substantive due process protects a right.

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

Response: The Commerce Clause of Article I grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. The Supreme Court has "read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 618-19 (2000)). The Supreme Court has also held that whether the activity regulated is "noneconomic" is an important, but not dispositive, factor in assessing whether Congress has exceeded its authority under the Commerce Clause. *See Morrison*, 529 U.S. at 613.

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

Response: A group of people constitutes a "suspect class" if the group shares "the traditional indicia of suspectedness." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). To meet this standard, the Supreme Court inquires whether an allegedly suspect class has an "immutable characteristic determined solely by the accident of birth" or if it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id*. The Supreme Court has determined that race, religion, national origin, and alienage are suspect classes such that laws based on those characteristics are subject to strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

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

Response: Checks and balances and separation of powers are important structural features of the Constitution because they protect liberty by preventing any one branch of government from accumulating excessive power. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988).

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 apply Supreme Court and Ninth Circuit precedent concerning the scope of authority exercised by the co-equal branches of government. "The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)). "The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'" *Id*. at 534-35 (quoting *McCulloch*, 17 U.S. at 405).

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

Response: A judge should resolve each case based upon the record and the governing law, not any personal sympathies, feelings, or beliefs. A judge should be respectful of the parties, the lower bench, and judicial colleagues at all times, and to the extent possible, be aware of the feelings and experiences of others.

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

Response: Neither outcome is acceptable.

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

Response: I have not researched this issue, and I am not aware of any historical or empirical analysis concerning these questions. I do not, therefore, have a sufficient basis to provide an informed opinion.

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

Response: I understand "judicial review" to refer to the judiciary's authority to determine the constitutionality of governmental actions in the course of deciding properly presented cases and controversies. I understand "judicial supremacy" to refer to the concept that the Supreme Court is the ultimate arbiter of the meaning of the Constitution, and that not only lower courts, but other federal and state governmental actors are bound by its holdings interpreting the Constitution.

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

Response: All federal and state legislators, executive officers, and judicial officers are bound by Oath or Affirmation, to support the Constitution. U.S. Const., Art. VI. State officials are bound to follow the decisions of the Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("No state legislator or

executive or judicial officer can war against the Constitution without violating his undertaking to support it.").

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

Response: That statement is an important reminder that federal courts do not share the legislature's power to decide what the law should be or the executive's power to enforce the law. A court's role is limited to interpreting what the law is, and only in cases involving actual controversies that are brought before the court.

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: In all cases, district court judges must follow the holdings of the Supreme Court and their Circuit, without regard to any personal views about the correctness of that precedent. Whether a particular precedent is binding in any given case is a fact- and context-dependent inquiry, and a judge should seek to faithfully apply the principles of analogous binding precedent that bear on issues of first impression.

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: The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a). Those factors do not include an individual defendant's group identities, but Section 3553(a)(6) does instruct sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

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

Response: I am not familiar with the Biden Administration's statement or the context in which it was made, but different dictionaries offer slightly varied definitions of "equity." Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right." (11th ed. 2019).

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

Response: Different dictionaries offer a variety of definitions of both terms. For example, Black's Law Dictionary defines equity as "fairness; impartiality; evenhanded dealing," or "the body of principles constituting what is fair and right," but it defines "equality" as "the quality, state, or condition of being equal" or "likeness in power or political status." (11th ed. 2019).

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

Response: I am not familiar with the Biden Administration's statement or the context in which it was made. The Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. If confirmed, I would follow Supreme Court and Ninth Circuit precedent in analyzing Fourteenth Amendment issues.

27. How do you define "systemic racism?"

Response: I do not have a personal definition, and I am unaware of any Supreme Court or Ninth Circuit cases defining the term. Broadly speaking, I understand the term "systemic racism" to refer to policies or practices that result in or continue unfair or harmful racial disparities.

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." (11th ed. 2019).

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

Response: Please see my responses to Questions 27 and 28.

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

Questions for the Record for Jamal N. Whitehead, Nominee to the United States District Court for the Western District of Washington

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: Congress has enacted various statutes prohibiting racial discrimination in a variety of settings. *See, e.g.*, Title VI and VII of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act. In addition, all race-based classifications imposed by the government are subject to strict scrutiny, which requires a showing that the racial classification is narrowly tailored to meet a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

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, 721 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." (internal quotation marks and citations omitted). If confirmed, I would apply the *Glucksberg* test and any binding precedent from the Supreme Court and Ninth Circuit to analyze any future claim to a fundamental right that the Supreme Court had not already recognized.

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: If confirmed, my philosophy would rest upon an unwavering commitment to impartiality and equal justice under the law. This requires a consistent approach to each case that begins with (1) an exacting review of the record before the court; (2) careful review and consideration of the parties' briefs and oral argument; (3) diligent legal research and independent consideration of the law; (4) open-minded consultation with my colleagues and law clerks; and (5) a clear and cogent written ruling resolving only those narrow issues properly before the court. I have not studied the judicial philosophies of Supreme Court Justices, but I suspect this approach is likely shared by many Justices.

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

Response: Black's Law Dictionary defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." (11th ed. 2019). If confirmed, I would not ascribe to any particular label; rather, Supreme Court and Ninth Circuit precedent would dictate the proper interpretative method to be used in a given case. For example, when analyzing Fourth Amendment issues, the Supreme Court has stated that the "common law in place at the Constitution's founding . . . may be instructive in determining what sorts of searches the

Framers of the Fourth Amendment regarded as reasonable." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (internal quotation marks and citations omitted).

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

Response: Black's Law Dictionary defines "living constitution" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (11th ed. 2019). If confirmed, I would not ascribe to any particular label; rather, Supreme Court and Ninth Circuit precedent would dictate the proper interpretative method to be used in a given case. For example, the Supreme Court has instructed lower courts to consider "contemporary community standards" of decency in certain First Amendment cases. *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574-75 (2002).

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: As a district judge, I would be bound by Supreme Court and Ninth Circuit precedent regarding all matters of constitutional interpretation. In the unlikely event that there were no binding authority addressing the constitutional provision at issue, I would begin by examining the text of the provision in question and any relevant Supreme Court and Ninth Circuit precedent considering similar issues or similarly worded constitutional provisions. If that precedent did not resolve the matter, I would examine any sources the Supreme Court has directed lower courts to consider when analyzing the constitutional provision at issue. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of its ratification.

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 rarely relevant in determining the meaning of a constitutional provision. For example, in analyzing Second Amendment issues, the Supreme Court has held that contemporary understandings of the Constitution that are "inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (emphasis and internal quotation omitted). In some circumstances, however, the Supreme Court has instructed lower courts to consider contemporary understandings, such as in certain First Amendment cases. *See, e.g.*, *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574-75 (2002). Also, to the extent

Congress or the states enacted a statute or amended the Constitution *today*, then the current ordinary public meaning of the provision's terms would be relevant.

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

Response: No, I do not believe the meaning of the Constitution changes over time absent changes through the Article V amendment process. Although the meaning of the Constitution is "fixed," it sets out enduring principles that "must apply to circumstances beyond those the founders specifically anticipated." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: Yes, *Dobbs* is binding precedent that lower courts are bound to follow.

a. Was it correctly decided?

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. *Dobbs* is binding precedent that the lower courts are bound to follow, and if confirmed as a district judge, I would apply its holding faithfully.

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

Response: Yes, *Bruen* is binding precedent that lower courts are bound to follow.

a. Was it correctly decided?

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. *Bruen* is binding precedent that the lower courts are bound to follow, and if confirmed as a district judge, I would apply its holding faithfully.

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

Response: Yes, *Brown* is binding precedent that lower courts are bound to follow.

a. Was it correctly decided?

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. That said, I am sufficiently confident that *Brown*'s holding (i.e., *de jure* racial segregation in schools is unconstitutional) is unlikely to be relitigated. So like prior nominees, I can express an opinion on this case: yes, *Brown* was correctly decided.

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

Response: Under 18 U.S.C. § 3142(e)(2), a rebuttable presumption in favor of pretrial detention is triggered when: (1) the defendant was previously convicted of certain specified offenses, such as offenses for which the maximum sentence is life imprisonment or death and certain drug offenses for which the maximum sentence is 10 years or more; (2) the offense was committed while the defendant was on release pending trial; and (3) the conviction is less than five years old or the defendant was released from prison for that offense in part 1 less than five years ago, whichever is later.

Section 3142(e)(3) also triggers a rebuttable presumption in favor of pretrial detention if "the judicial officer finds that there is probable cause to believe that the person committed" certain drug offenses carrying a maximum term of imprisonment of ten years or more, and certain offenses involving firearms or minor victims, among other enumerated offenses.

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

Response: I am unaware of any Supreme Court or Ninth Circuit precedent discussing the policy rationales underlying the rebuttable presumptions in favor of pretrial detention found in 18 U.S.C. §§ 3142(e)(2) and (3).

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

Response: The Supreme Court has issued many opinions discussing the limits on government's ability to regulate private institutions, including religious organizations and small businesses operated by observant owners. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021) (citation omitted); *Little Sister of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). If confirmed, I would faithfully follow all

Supreme Court and Ninth Circuit precedent addressing what limits government may impose on private institutions.

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

Response: Any governmental policy or law that discriminates on the basis of religion is subject to strict scrutiny under the First Amendment. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). To survive review, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal quotation marks and citations omitted).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court granted a church's and synagogue's applications for a preliminary injunction blocking enforcement of the government's COVID-19 occupancy restrictions on houses of worship. Applying the test for whether a preliminary injunction should issue, the Court held: (1) the religious organizations had made a "strong showing" that the challenged restrictions were not neutral towards religion and, therefore, could not satisfy strict scrutiny; (2) "there can be no question" that the religious organizations would suffer irreparable harm if the challenged restrictions were enforced; (3) it had "not been shown that granting the applications [would] harm the public" or "that public health would be imperiled if less restrictive measures were imposed." *Id.* at 67-68.

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 held that the plaintiffs—people who wished to gather for at-home religious exercise—were entitled to an injunction blocking enforcement of the government's COVID-19 restrictions on private gatherings pending appeal and the outcome of any petition for a writ of certiorari. To get there, the Court reasoned that the challenged restrictions contained many exceptions for comparable secular activities, holding that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). The Court held that an injunction should issue pending appeal because the applicants were likely

to succeed on the merits of their claims; they were irreparably harmed by the loss of free exercise rights "for even minimal periods of time"; and the State had not shown that "public health would be imperiled" by employing less restrictive measures. *Id* at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's (CCRC) conduct in evaluating a cakeshop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause. The Court held that the "neutral and respectful consideration to which [the cakeshop owner] was entitled was compromised" given the CCRC's "treatment of his case," which had "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id*. at 1729. The CCRC's conduct ran afoul of "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id*. at 1731.

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 Constitution protects an individual's religious beliefs even if the person's beliefs are not consistent with those of a specific faith tradition. *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). "[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., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (citations omitted). Instead, courts generally are to evaluate whether an asserted religious belief is "sincere" and based on a religious—and not some other—motivation. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1277-78 (2022).

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: I am unaware of the Catholic Church's "official position" concerning whether abortion is acceptable and morally righteous.

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 Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception," which derives from the First Amendment's religion clauses, prevents courts from intervening in employment disputes involving those holding important positions within churches and other religious institutions. *Id.* at 2060. This is because, the Court held, the "First Amendment protects the right 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 2055 (internal quotations omitted). The Court declined to adopt a rigid test for determining who is a "minister" for purposes of meeting the exception, and held that what matters most is "what an employee does." *Id.* at 2064. The Court found that the teachers in question were covered by the exception because they performed "vital religious duties" at their private Catholic schools. *Id*. at 2066. The Court explained that, among other things, they were entrusted as teachers "most directly with the responsibility of educating their students in the faith" and "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Id.*

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 Phila.*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City's refusal under its non-discrimination policy to contract with a Catholic organization for foster care services unless the organization agreed to certify same-sex couples as foster parents violated the Free Exercise Clause. *Id.* at 1878-82. The Court found that the City's policy was not neutral and generally applicable because it allowed for discretionary exemptions and was thus subject to strict scrutiny. *Id.* (citing *Emp. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990)). The policy did not survive strict scrutiny review because "once properly narrowed," the City's asserted interests were not compelling enough to justify denying the Catholic organization an

exemption for its religious exercise when exemptions were available to others. *Id.*

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 program providing tuition assistance for families sending their children to nonsectarian schools violated the Free Exercise Clause because it barred sectarian schools from the program solely because they were religious. The Court held that the Free Exercise Clause prohibited states from excluding "religious observers from otherwise available public benefits," and that Maine's program could not satisfy strict scrutiny. *Id.* at 1996.

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

Response: In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the free speech and free exercise rights of its high school football coach when it fired him after he knelt at midfield after games for quiet personal prayer. In analyzing the Free Speech aspect of the case, the Court reasoned that the coach's speech was not government speech but rather private expression protected by the First Amendment because, based on the facts of the case, his prayers were not "within the scope" of his duties as a coach. *Id.* at 2424. In analyzing the Free Exercise issues presented, the Court explained that the district admitted it was motivated "at least in part because of" the "religious character" of the coach's actions. *Id.* at 2422. The Court therefore applied heightened scrutiny to the District's actions, and concluded that the District could not meet its burden under any form of heightened scrutiny. *Id.* at 2426. The District argued that it was required to remove the coach to avoid violating the Establishment Clause. But the Court rejected the District's argument, holding that the District had not shown that allowing the coach to pray would have "coerc[ed] students to pray," and further, that the District's other arguments were premised on a misunderstanding of the Establishment Clause. *Id.* at 2428-29.

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

Response: In *Mast v. Fillmore Cty.*, 141 S. Ct. 2430 (2021) (Gorsuch, J., concurring), the Supreme Court vacated a state court judgment requiring the local Amish to install modern septic systems pursuant to a county ordinance, which the Amish contended violated their religion's prohibition against using such technology. *Id.* at 2430-31. The Court remanded the case to the state court for further consideration in light of *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021). Justice Gorsuch wrote separately to emphasize

the ways in which, in his view, the state court misapplied the Religious Land Use and Institutionalized Persons Act (RLUIPA). "Perhaps most notably," Justice Gorsuch explained, the "County and courts below erred by treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community. As *Fulton* explains, strict scrutiny demands 'a more precise analysis.'" *Id.* at 2432 (emphasis in original) (quoting *Fulton*, 141 S. Ct. at 1881). Justice Gorsuch also faulted the County and lower courts for failing to give "due weight to exemptions other groups enjoy" and challenged the County to "offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish." *Id.* Lastly, Justice Gorsuch explained that the County must prove with evidence, as opposed to mere "supposition," that its rules were narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate, which in this case meant proving that the Amish's proposed alternative to septic tanks would *not* work. *Id.* at 2433.

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: If confirmed, I would decide such a case based on the record before the court and binding Supreme Court and Ninth Circuit precedent. As a judicial nominee, I am already subject to the Code of Conduct for United States Judges, so it would be inappropriate for me to comment further on an issue that is likely to come before the courts.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I am not aware of any training in the United States District Court for the Western District of Washington that fits this description, or what role, if any, judges have or have had in designing or approving employee trainings.

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 Supreme Court or Ninth Circuit precedent addressing the factors that a President may or should consider in making political appointments. If I am confirmed, and if such a case were to come before me, I would resolve the case based on the factual record before the court and the applicable law.

30. Is the criminal justice system systemically racist?

Response: Whether certain laws, policies, or practices within our criminal justice system disparately impact any racial group or groups is an important question for Congress and policymakers to consider. If I am confirmed, I will resolve each case impartially, based on the facts and the law before me, and without regard to race or any other personal characteristics of the parties.

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

Response: The Constitution does not establish a fixed number of Supreme Court justices, but vests in Congress the authority to determine the size of the Court. Congress has used this authority in the past, and whether it should do so in the future is a question for the political branches of government to consider. As a judicial nominee, it would be inappropriate for me to comment on whether Congress should alter the number of Justices. If confirmed, I would follow all Supreme Court precedent regardless of the size and composition of the Court.

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 addressed the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and later in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In *Bruen*, the Court stated that, based on its interpretation of the Second Amendment's text and original public meaning, the Amendment protects "the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and "to carry a handgun for self-defense outside the home." 142 S. Ct. at 2122.

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

Response: In *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* at 2126 (internal quotation marks and citations omitted).

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010), the Court held that the right to keep and bear arms is among those "fundamental rights necessary to our system of ordered liberty."

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

Response: The Supreme Court reaffirmed the protections afforded to the Second Amendment in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, striking down the government's "proper cause" standard for granting an unrestricted firearm license. 142 S. Ct. 2111, 2156 (2022). "Like most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). But I am not aware of Supreme Court or Ninth Circuit case law specifically comparing the level of protection afforded to the different rights enumerated in the

Constitution.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." I am not aware of Supreme Court or Ninth Circuit case law comparing the level of protection afforded under the Second Amendment to the level of protection afforded to voting rights 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: Article II of the Constitution commands the Executive Branch to "take care that the laws be faithfully executed." The Supreme Court has held that the Executive Branch generally has "absolute discretion" to decide whether to prosecute or enforce civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Questions regarding the extent to which the Executive Branch can determine enforcement priorities are currently pending before the courts, and the judicial canons advise me as a nominee "not to make public comment on the merits of a matter pending or impending in any court." Code of Conduct for U.S. Judges, Canon 3A(6).

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

Response: Black's Law Dictionary defines "prosecutorial discretion" as a "prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." (11th ed. 2019). Whereas, generally speaking, a "substantive administrative rule" is one that has the "force and effect of law," as distinguished from "interpretive rules," which merely "advise the public of the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs*., 139 S. Ct. 1804, 1811 (2019).

Questions regarding the extent to which the Executive Branch can determine enforcement priorities are currently pending before the courts, and the judicial canons advise me as a nominee "not to make public comment on the merits of a matter pending or impending in any court." Code of Conduct for U.S. Judges, Canon 3A(6).

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

Response: The death penalty is authorized by 18 U.S.C. Ch. 228 as well as various state laws. The President lacks the authority to repeal or unilaterally change federal or state laws.

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

Response: In *Ala. Assoc. of Realtors v. Dep't of Health & Human Servs*., 141 S. Ct. 2485 (2021) (per curiam), the Supreme Court overturned a stay of a district court judgment vacating the Center for Disease Control and Prevention's "nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need." *Id.* at 2486. The Court found that the applicant realtor associations were "virtually certain to succeed on the merits of their argument that the CDC [had] exceeded its authority" and that the "equities do not justify depriving the applicants of the District Court's judgment in their favor." *Id.* at 2486, 2489.

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

Response: The Supreme Court has held that the Equal Protection Clause does not prohibit a university's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. *Grutter v. Bollinger,* 539 U.S. 306, 343 (2003); *see also Fisher v. Univ. of Tex.*, 570 U.S. 297, 310 (2013) ("[S]trict scrutiny must be applied to any admissions program using racial categories or classifications.").

Litigation regarding the extent to which race may be considered in university admission decisions is currently pending before the Supreme Court, and the judicial canons advise me as a nominee "not to make public comment on the merits of a matter pending or impending in any court." Code of Conduct for U.S. Judges, Canon 3A(6).

a. If yes, when will it become inappropriate?

Response: Litigation regarding the extent to which race may be considered in university admission decisions is currently pending before the Supreme Court, and the judicial canons advise me as a nominee "not to make public comment on the merits of a matter pending or impending in any court." Code of Conduct for U.S. Judges, Canon 3A(6).

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

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it would be improper for me to comment publicly about any matter pending before the Supreme Court. *See* Code of Conduct for U.S. Judges, Canon 3A(6). If I am confirmed, I will follow all Supreme Court precedent, including the ultimate ruling

in *Students for Fair Admissions v. Harvard College*.

Senator Ben Sasse
Questions for the Record for Jamal N. Whitehead
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 21, 2022

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

   Response: No.

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

   Response: If confirmed, my philosophy would rest upon an unwavering commitment to impartiality and equal justice under the law. This requires a consistent approach to each case that begins with (1) an exacting review of the record before the court; (2) careful review and consideration of the parties' briefs and oral argument; (3) diligent legal research and independent consideration of the law; (4) open-minded consultation with my colleagues and law clerks; and (5) a clear and cogent written ruling resolving only those narrow issues properly before the court.

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

   Response: If confirmed, I would not ascribe to any particular label; rather, Supreme Court and Ninth Circuit precedent would dictate the proper interpretative method to be used in a given case. For example, when analyzing Fourth Amendment issues, the Supreme Court has stated that the "common law in place at the Constitution's founding … may be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (internal quotation marks and citations omitted).

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

   Response: If confirmed, I would not ascribe to any particular label; rather, Supreme Court and Ninth Circuit precedent would dictate the proper interpretative method to be used in a given case. That said, binding precedent makes clear that the text of the Constitution or a statute is the starting point for any interpretive analysis. *See, e.g.*, *Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text.").

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

Response: Black's Law Dictionary defines "living constitution" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (11th ed. 2019). If confirmed, I would not ascribe to any particular label; rather, Supreme Court and Ninth Circuit precedent would dictate the proper interpretative method to be used in a given case. For example, the Supreme Court has instructed lower courts to assess "contemporary community standards" of decency in certain First Amendment cases. *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574-75 (2002).

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

   Response: I admire many past and current members of the Supreme Court, but my admiration does not flow from their jurisprudence or how they may have voted in any particular case. If confirmed, I will follow all applicable Supreme Court precedent without regard to who authored the majority opinion.

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

   Response: The Ninth Circuit has held that "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001). If confirmed as a district judge, I would be bound to follow all Supreme Court and Ninth Circuit precedent.

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

   Response: Response: The Ninth Circuit has held that "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001). Under Fed. R. App. P. 35(a), the circuit court may sit en banc when a majority of the circuit judges who are in regular active service and who are not disqualified conclude that "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." If confirmed as a district judge, I would be bound to follow all Supreme Court and Ninth Circuit precedent.

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: Statutory interpretation always begins with the text. *See, e.g.*, *Ross v. Blake*, 578 U.S. 632, 638 (2016). If the meaning of the text of a statute is clear, that meaning governs. In cases where the meaning of the text is ambiguous, other indications of the statute's meaning, including legislative history, may be considered to resolve the ambiguity. *See, e.g.*, *Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011). General principles of justice should not play a role in statutory interpretation.

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: The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a). Those factors do not 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, but Section 3553(a)(6) does instruct sentencing courts 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

Jamal Whitehead
Nominee, Western District of Washington

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

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

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

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

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

    Response to all subparts: If confirmed, and a case came before me involving child sexual assault or exploitation, I would review the record, the arguments and recommendations of the parties, Supreme Court and Ninth Circuit precedent, and 18 U.S.C. § 3553(a)'s sentencing factors before imposing an individualized sentence. The Supreme Court has stated that "[t]he district courts, while not bound to apply the [Sentencing] Guidelines, must consult those Guidelines and take them into account when sentencing," in addition to the other factors set forth at 18 U.S.C. § 3553(a). *United States v. Booker*, 543 U.S. 220, 264 (2005).

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

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

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

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

Response to all subparts: Whether the penalties for distribution or receipt of child pornography and possession of child pornography should be aligned or otherwise adjusted is an important question for policymakers to consider, but as a judicial nominee, it would be inappropriate for me to comment on this matter. If confirmed, and a criminal case came before me, I would review the record, the arguments and recommendations of the parties, Supreme Court and Ninth Circuit precedent, and 18 U.S.C. § 3553(a)'s sentencing factors before imposing an individualized sentence.

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

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

      Response: I am not familiar with Justice Marshall's statement or the context in which it was made, but standing alone, I do not agree with this remark. A judge's duty is to fairly and impartially apply the law to the facts at hand.

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

      Response: Consistent with the oath of office and Code of Conduct for United States Judges, judges must set aside their personal views and apply the law to the facts "without fear or favor," regardless of whether the judge—or anyone else—personally considers the outcome "undesirable" or unpopular.

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

   Response: Yes, *Dobbs* is binding Supreme Court precedent.

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

   Response: The Ninth Circuit has recognized several abstention doctrines. The following are frequently applied:

   The *Pullman* abstention doctrine applies in federal court cases that raise both federal constitutional claims and state law claims. *See R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 498 (1941). Under *Pullman*, "federal courts have the power to refrain from hearing cases … in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 716-17 (1996) (citing *Pullman*, 312 U.S. at 496). "Thus, *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).

The *Younger* abstention doctrine generally forbids federal courts from staying or enjoining pending state court proceedings. *Younger v. Harris*, 401 U.S. 37, 41 (1971). *Younger* applies to three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings that are akin to criminal prosecutions; and (3) civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions. *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020). Exceptions to *Younger* abstention exist where there is a "showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982).

The *Burford* abstention doctrine "is concerned with protecting complex state administrative processes from undue federal interference." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 671 (9th Cir. 2004) (internal quotation marks omitted). In the Ninth Circuit, *Burford* abstention is only appropriate where "(1) 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) federal review might disrupt state efforts to establish a coherent policy." *Id.* (internal citations and quotations omitted).

Under the *Colorado River* abstention doctrine, federal courts should not stay a case where there are concurrent state and federal suits addressing the same subject matter unless the "clearest of justifications" shows that a stay would be in the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818-19 (1976). The Ninth Circuit has held that there are "eight factors to be considered in determining whether a *Colorado River* stay is appropriate: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *State Water Res. Control Bd*., 988 F.3d at 1203 (internal citation omitted).

Finally, the *Rooker-Feldman* doctrine prohibits federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). More plainly, *Rooker-Feldman* "stands for the relatively straightforward principle that federal district courts do not have jurisdiction to hear de facto appeals from state court judgments." *Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2010).

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

   Response: No.

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

      Response: Please see my response to Question 6.

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

   Response: The text of the Constitution and its original meaning play a critical role in interpreting the Constitution unless Supreme Court or Ninth Circuit precedent hold otherwise. For example, the Supreme Court has placed particular emphasis on the text and original meaning in interpreting the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

   Response: As a starting point for interpreting any statute, I would determine whether there was any binding Supreme Court or Ninth Circuit precedent resolving the issue presented. If neither court had addressed the statute, I would look to the statutory text. As the Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The statutory scheme is another consideration: "If the statutory language is unambiguous and the statutory scheme is coherent and consistent," then "the inquiry ceases." *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotation marks omitted). If ambiguity persisted, however, I would consult Supreme Court and Ninth Circuit precedent interpreting related or analogous statutory provisions to discern an approach to interpreting the statute in controversy, the canons of statutory construction, and persuasive authority from other courts. As a last resort, I would consider legislative history, but only with caution, as the Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp.*, 545 U.S. at 568.

   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: Apart from the statutory text itself, the Supreme Court has stated that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal quotation marks

omitted). 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." *Id*. The Supreme Court has cautioned against consideration of "postenactment legislative history," explaining that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

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 should be interpreted according to domestic law and authorities. If confirmed, I would look to Supreme Court and Ninth Circuit precedent in interpreting the Constitution.

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

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

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

Response: Yes.

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

Response: No.

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

Response: No.

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

Response: The Supreme Court has held that neutral and generally applicable state laws that burden religious exercise are subject to rational basis review, but strict scrutiny applies if the law or policy at issue is not in fact neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). Several Supreme Court decisions provide guidance on how to conduct this analysis. The Supreme Court has held, for example, that a law is not neutral and generally applicable if the circumstances show that "the object or purpose of the law is suppression of religion or religious conduct," *id.* at 533, if the record shows a facially neutral law has been applied in a particular way out of hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1724 (2018), if the law is subject to discretionary individualized exemptions, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1878 (2021), or if the law treats any "comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

For those categories of state governmental action that are covered by the Religious Land Use and Institutionalized Persons Act (RLUIPA), if the action substantially burdens the free exercise of a sincerely held religious belief, even a neutral and generally applicable action must be (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest. *See, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). Action by the federal government, as opposed to state governmental action, is subject to the same standard under the Religious Freedom Restoration Act (RFRA).

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

Response: Please see my response to Question 13.

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

Response: The Ninth Circuit has stated that a religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). The court's only function in this context is to determine whether the religious belief asserted reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (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 Phila.*, 141 S. Ct. 1868, 1876 (2021), and no part of the inquiry may include the

court's view that an asserted religious belief is "flawed," *Hobby Lobby,* 573 U.S. at 724-25.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), the Supreme Court held that the Second Amendment protects an individual right to possess a firearm untethered to service in a militia, and the right to use that arm for traditionally lawful purposes, such as self-defense within the home.

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

Response: No.

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

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

Response: The meaning of that sentence is best understood in the context of the complete passage in which it is found:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. ... *[A] Constitution is not intended to embody a particular economic theory*, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. *It is made for people of fundamentally differing views*, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (emphasis added). I agree that our Constitution was made for fundamentally differing views and that statutes embodying opinions that run counter to our own are not rendered unconstitutional by that fact alone.

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

Response: The Supreme Court overruled *Lochner* in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937). *See also Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* … has long since been discarded.").

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

a. If so, what are they?

Response: Only the Supreme Court can overrule one of its prior decisions. District judges must follow the holdings of the Supreme Court and their circuit, without regard to any personal views about the correctness of that precedent.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with Judge Learned Hand's statement or the context in which it was made. If confirmed, I will follow all Supreme Court and Ninth Circuit precedent to determine what constitutes a monopoly. For example, the Supreme Court has held that control of "80% to 95%" of a market, "with no readily available substitutes," is sufficient to survive summary judgment under § 2 of the Sherman Act. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). In that case, the Supreme Court also noted that it previously held that company holdings of 87% of the market and "over two-thirds of the market," respectively, constituted monopolies. *Id.* (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). The

Ninth Circuit has found that a "65% market share" typically "establishes a prima facie case" of monopoly power. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997).

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

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

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

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

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

Response: Broadly speaking, I understand federal common law to refer to rules of decision that are formulated by federal courts as part of their Article III authority to decide cases and controversies that come before them. The Supreme Court has long emphasized, however, that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

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

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

Response to all subparts: Generally, when asked to decide questions of state law, federal courts should resolve the question as the highest court of the state would. *See, e.g.*, *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

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

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. That said, I am sufficiently confident that *Brown*'s holding (i.e., *de jure*

racial segregation in schools is unconstitutional) is unlikely to be relitigated. So like prior nominees, I can express an opinion on this case: yes, *Brown* was correctly decided.

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

Response: The Supreme Court has noted that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Concerning nationwide injunctions, the Ninth Circuit has observed that, "[a]lthough there is no bar against . . . nationwide relief in federal district court or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (internal quotation marks and citations omitted). The Supreme Court has previously upheld nationwide injunctions granted by district courts. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (upholding portion of nationwide preliminary injunction with respect to parties and similarly situated nonparties). But the legal basis for such injunctions is currently the subject of debate. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III."). If confirmed, I would be bound by, and would faithfully and impartially follow, all Supreme Court and Ninth Circuit precedent concerning the proper scope of injunctive relief.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

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

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

Response: Please see my response to Question 5.

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

Response: Generally speaking, damages are intended to compensate a party for past harms, while injunctive relief is meant to prevent future or ongoing harm. The advantages and disadvantages of each form of relief is a highly context-driven inquiry.

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

Response. The Supreme Court has held that the Constitution—through the Due Process Clauses of the Fifth and Fourteenth Amendments—protects various rights that are not expressly enumerated in the Constitution. These are rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Those rights include, among others, the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *Id.* at 720; *but see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (no constitutional right to abortion).

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

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

Response: The First Amendment's right to the free exercise of religion is a bedrock protection established by the Founders. Please see my response to Questions 13 and 15 for an overview on the scope of that right.

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 a Supreme Court or Ninth Circuit precedent distinguishing the "free exercise of religion" from the "freedom of worship."

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

Response: Please see my response to Question 13.

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

Response: Please see my response to Question 15.

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

Response: The Supreme Court has stated that, where it applies, "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). If confirmed, I would follow all relevant Supreme Court and Ninth Circuit precedent construing RFRA as it relates to other federal statutes.

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with Justice Scalia's comment or the context in which it was made, but standing alone, I take it to mean that judges must set aside their personal views and apply the law to the facts "without fear or favor," regardless of whether the judge—or anyone else—personally considers the outcome "undesirable" or unpopular.

31. 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: Please see my response to Question 13.

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

Response: To the best of my knowledge, no.

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

Response: I am proud to be an American and I am grateful for the opportunities this country has afforded me and my family. If confirmed as a judge, I would decide cases based on the record, the arguments and recommendations of the parties, and Supreme Court and Ninth Circuit precedent, treating every litigant fairly regardless of their race or ethnicity.

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

Response: Yes.

35. How did you handle the situation?

Response: As an attorney, I represented my clients zealously and within the bounds of the law and the rules of professional conduct, regardless of my personal views.

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: The Supreme Court has not yet addressed that question, but the Court has stated that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). In *Dobbs,* the Supreme Court explained that states have a legitimate interest in "respect for and preservation of prenatal life at all stages of development," and that its decision was "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests" nor "on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." 142 S. Ct. at 2256, 2262, 2284.

Because this is a question that will likely come before the courts, it would be improper for me to express my beliefs as a judicial nominee because it would show prejudgment of the issue on my part.

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

Response: To the best of my recollection, no.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: No.

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

Response: To the best of my recollection, I have not substantially authored or edited a brief that was filed in court without my name on it. On occasion, however, I have proofread and lightly edited the briefs of my colleagues. But I have no recollection of specific cases, and thus, cannot identify them easily.

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

Response: Please see my response to Question 42.

43. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

Response: Please see my response to Question 43.

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

Response: 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 Jamal Norman Whitehead
Nominee to be United States District Judge for the Western District of Washington

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: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." (11th ed. 2019). Judicial activism is inappropriate and undermines the rule of law.

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

   Response: Consistent with the oath of office and Code of Conduct for United States Judges, impartiality is both an expectation and an aspiration.

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: Consistent with the oath of office and Code of Conduct for United States Judges, judges must set aside their personal views and apply the law to the facts "without fear or favor," regardless of whether the judge—or anyone else—personally considers the outcome "undesirable" or unpopular.

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

   Response: No.

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

   Response: If confirmed, I would follow the oath of office and the Code of Conduct for United States Judges and faithfully apply all Supreme Court and Ninth Circuit precedent interpreting the Second Amendment, including the Supreme Court's decisions in *N.Y. State*

Rifle & Pistol Assoc., Inc. v. Bruen, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: In recent years, the Supreme Court has issued several decisions addressing challenges to government imposed COVID-19 restrictions. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). If confirmed and such a case came before me, I would review the record before the court, the arguments of the parties, and Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

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: In *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), the Supreme Court held that officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." There is significant Supreme Court and Ninth Circuit precedent on qualified immunity, and if confirmed, I would analyze and apply that precedent in resolving any case that came before me concerning this issue.

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 is an important question for policymakers to consider. If confirmed, my role as a district judge would be to apply Supreme Court and Ninth Circuit precedent concerning qualified immunity without regard for my personal beliefs on policy matters.

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

    Response: Please see my response to Questions 9 and 10.

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

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. If confirmed, and a patent case came before me, I would review the record before the court, the arguments of the parties, and Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

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

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

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

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

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

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

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

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

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

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

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

Response to all subparts: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me to express a personal opinion—favorable or not—about Supreme Court decisions or matters that are pending or impending before any court. Thus, it would be improper for me to comment on hypotheticals involving questions that are currently being litigated or that could come before me. If confirmed and a patent case came before me, I would review the record before the court, the arguments of the parties, and Supreme Court

and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

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: Whether or not current jurisprudence effectively incentivizes innovation may be an important question for policymakers to consider, since Congress could change the statutes regarding patents if it so chooses. If confirmed, and a patent case came before me, I would review the record, the arguments and recommendations of the parties, and Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

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: During my 15-year career as a civil litigator handling various matters on behalf of corporations, the government, and individual plaintiffs, I have not had occasion to litigate issues involving copyright law.

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

       Response: During my 15-year career as a civil litigator handling various matters on behalf of corporations, the government, and individual plaintiffs, I have not had occasion to litigate issues 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: During my 15-year career as a civil litigator handling various matters on behalf of corporations, the government, and individual plaintiffs, I have not had occasion to litigate issues involving intermediary liability for online service providers.

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

Response: During my 15-year career as a civil litigator handling various matters on behalf of corporations, the government, and individual plaintiffs, I have not had occasion to litigate a case involving the First Amendment and free speech issues.

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: As a starting point for interpreting any statute, I would determine whether there was any binding Supreme Court or Ninth Circuit precedent resolving the issue presented. If neither court had addressed the statute, I would look to the statutory text. As the Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The statutory scheme is another consideration: "If the statutory language is unambiguous and the statutory scheme is coherent and consistent," then "the inquiry ceases." *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotation marks omitted). If ambiguity persisted, however, I would consult Supreme Court and Ninth Circuit precedent interpreting related or analogous statutory provisions to discern an approach to interpreting the statute in controversy, the canons of statutory construction, and persuasive authority from other courts. As a last resort, I would consider legislative history, but only with caution, as the Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp.*, 545 U.S. at 568.

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

    Response: The amount of deference owed to an administrative agency's interpretation of a statute it administers will turn on the circumstances. In the case of the "[c]ompendium of U.S. Copyright Office Practices," the Supreme Court has held that it "is a non-binding administrative manual that at most merits deference under *Skidmore* . . . That means we must follow it only to the extent it has the 'power to persuade.'" *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)).

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

Response: As a judicial nominee, I am already bound by the Code of Conduct for United States Judges, so it is generally inappropriate for me comment on matters that are pending or impending before any court. If confirmed, and if this issue came before me, I would review the record before the court, the arguments of the parties, and Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues properly before the court.

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: Whether the DMCA remains adequate in today's digital environment is an important question for policymakers, but judges must interpret and apply statutes as written.

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

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

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

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

Response: The Ninth Circuit has recognized that "forum shopping . . . hinders the equitable administration of laws." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). This is an important issue for policymakers to consider, but as a judicial

nominee, it would be inappropriate for me to comment on this matter. If confirmed, I will follow the rules about venue and applicable Supreme Court and Ninth Circuit precedents faithfully.

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: District judges preside over the matters that are assigned to them according to the local rules of the district in which they serve. In the Western District of Washington, cases are randomly assigned to judges within the District's two divisions. If confirmed, I would not encourage or discourage the filing of any particular matter or the choice of filing a case in my courtroom.

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

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

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

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

Response: Any person can file a complaint alleging that a judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). What should be done about a judge that continuously flaunts binding case law is an important issue for the Circuit Judicial Council and Judicial Conference to consider, but as a judicial nominee, it would be inappropriate for me to comment on this question.

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

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

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

Response: This is an important issue for policymakers to consider, but as a judicial nominee, it would be inappropriate for me to comment on this matter. If confirmed, I will follow the rules about venue and applicable Supreme Court and Ninth Circuit precedents faithfully.

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

Response: Please see my response to Question 20.

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.

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

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

Response: As a judicial nominee, I am not able to comment on the propriety of the conduct of other judges or how that conduct should be perceived. I do believe, however, that all lower court judges have a duty to follow binding precedent, regardless of any personal views about what the law should require.

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

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