Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Sherilyn Peace Garnett
Judicial Nominee to the United States District Court for the Central District of California

1. **In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?**

   Response: During my career as an attorney and currently as sitting judge on the Los Angeles County Superior Court, I have not encountered or used the term "super precedent." Nor am I aware of that term being used by the United States Supreme Court or the Ninth Circuit Court of Appeals.

2. **You can answer the following questions yes or no:**

   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Planned Parenthood v. Casey* correctly decided?**
   f. **Was *Gonzales v. Carhart* correctly decided?**
   g. **Was *District of Columbia v. Heller* correctly decided?**
   h. **Was *McDonald v. City of Chicago* correctly decided?**
   i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
   j. **Was *Sturgeon v. Frost* correctly decided?**
   k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

   Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on whether binding legal precedent was correctly decided. Instead, I am duty-bound to apply all binding precedent and remain open-minded, fair, and impartial in each case. However, I do agree with prior judicial nominees that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided, as those cases established legal principles that are foundational and are unlikely to be litigated in any case that comes before me.

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 aware of Judge Jackson's statement or the context in which it was made. Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism as follows: "The doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values.

While many authorities use the terms living constitutionalism and nonoriginalism interchangeably, others view living constitutionalism as a form of nonoriginalism that values interpretive conformity with changed circumstances and norms more greatly than do other forms of nonoriginalism." Rather than subscribe to a particular label, the approach that I take as a sitting Los Angeles Superior Court Judge and the approach I will take if confirmed as a federal district court judge is to apply binding legal precedent when interpreting a constitutional provision, as well as the approach such precedent has used to interpret the provision.

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

   Response: I am not familiar with the term "social equity." Nor am I aware of the term being used by the Supreme Court or the Ninth Circuit Court of Appeals. My duty as a sitting Los Angeles County Superior Court Judge, is to decide cases and controversies based on the law and facts presented and not based on personal views, if any, regarding the equities associated with a case or controversy. If confirmed to the federal district court, I would continue to abide by that duty.

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

   Response: I am not familiar with this statement, the identity of the person who made the statement, or the context in which it was made. As a sitting Los Angeles County Superior Court Judge, I reach the decision that the law, as applied to the facts of each case, dictates. If confirmed as a federal district court judge, I would continue to do the same, without regard to any personal views and opinions.

6. **Is climate change real?**

   Response: I am aware that climate change is a topic of public discussion. Notwithstanding, as a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on the topic, nor do I have the scientific or historical knowledge to do so. Additionally, it is not appropriate for me to prejudge any issue that may come before me in a case or controversy. If confirmed as a federal district court judge and if presented with a case or controversy raising this question, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: Yes, according to binding Supreme Court precedent. The Supreme Court has explained, "More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534 - 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'" *Id*.

8. Is whether a specific substance causes cancer in humans a scientific question?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this issue or prejudge any issue that might come before me. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

9. Is when a "fetus is viable" a scientific question?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this issue or prejudge any issue that might come before me. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

10. Is when a human life begins a scientific question?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this question or prejudge any issue that might come before me. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

11. Can someone change his or her biological sex?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this question or prejudge any issue that might come before me. If confirmed as a federal district court judge

and if presented with a case or controversy raising this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

12. Is threatening Supreme Court justices right or wrong?

Response: Title 18, United States Code, Section 115(a)(1)(B) provides:

> Whoever—
> . . .
> (B) threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer . . ., or an official whose killing would be a crime under such section,
>
> with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

13. Does the president have the power to remove senior officials at his pleasure?

Response: In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court stated that, as a general matter, Article II of the Constitution "gives the President the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 2191 (internal quotations and citations omitted). The Supreme Court has recognized two exceptions to the President's removal power: (1) Congress can create "expert agencies led by a group of principal officers removable by the President only for good cause;" and (2) Congress can "provide tenure protections to certain inferior officers with narrowly defined duties." *Id.* at 2192.

14. Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.

Response: It is for policy makers to decide the funding for police departments and law enforcement agencies. As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this issue or prejudge any issue that might come before me. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I

will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: It is for policy makers to decide the funding of police departments and other support services. As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this issue or prejudge any issue that might come before me. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

16. What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?

Response: If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I would consider the factors set forth in Title 18, United States Code, Section 3582(c), concerning the modification of an existing term of imprisonment, and also apply the sentencing factors set forth in Title 18, United States Code, Section 3553(a). In addition, I would consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: If confirmed as a federal district court judge in the Central District of California, I would be bound by and would faithfully and impartially apply binding precedent from the Supreme Court and Ninth Circuit Court of Appeals. After the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*") and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Ninth Circuit has described the two-part framework to review Second Amendment challenges: "First, we ask if the challenged law affects conduct that is protected by the Second Amendment, . . . bas[ing] that determination on the historical understanding of the scope of the right." *Young v. Hawaii*, 992 F.3d 765, 783 (citations and internal quotation marks omitted). "If the challenged restriction burdens conduct protected by the Second Amendment—either because 'the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful'—we move to the second step of the analysis and determine the

appropriate level of scrutiny." *Id*. at 784 (citation omitted.) "We have understood *Heller* to require one of three levels of scrutiny: If a regulation 'amounts to a destruction of the Second Amendment right,' it is unconstitutional under any level of scrutiny; a law that 'implicates the core of the Second Amendment right and severely burdens that right' receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny." *Id*. (citation omitted.)

18. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

Response: I am not aware of any United States Supreme Court or Ninth Circuit precedent that definitively answers this question, and this specific issue has not come before me during the almost eight years I have served as a Los Angeles County Superior Court Judge.

19. Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?

Response: I am not aware of any United States Supreme Court or Ninth Circuit precedent that definitively answers this question. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I would look to the legal framework provided by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833(1992), *Gonzales v. Carhart*, 550 U.S. 124 (2007), and other binding precedent concerning abortion restrictions. I would also consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

20. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: In a case or controversy under this or any other statute, the court presiding over the matter would make the decision on whether the claim is sufficient under the law.

b. How is a burden deemed to be "substantial[]" under current caselaw?

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court analyzed whether a Health and Human Services (HHS) "contraceptive mandate 'substantially burden[s]' the exercise of religion." The Supreme Court stated, "[w]e have little trouble concluding that it does." (*Id*. at

719.) The Supreme Court observed, "the HHS mandate demands that [the closely held corporations and their owners] engage in conduct that seriously violates their religious beliefs," that, if they "do not yield to this demand, the economic consequences will be severe," an alternative course "would also entail substantial economic consequences," and the remaining options would be "costly." *Id*. at 720 - 722. The Supreme Court also noted, "We doubt that the Congress that enacted [Religious Freedom Restoration Act of 1993] —or, for that matter, [Affordable Care Act] —would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans." *Id*. at 723.

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

Response: I am not familiar with Judge Reinhardt's statement or the circumstances or context in which he made the statement. My duty as a Los Angeles County Superior Court judge is to strictly adhere to the rule of law and to fairly and impartially apply binding appellate and Supreme Court precedent in every case. If confirmed as a federal district court judge, I will continue to abide by that duty.

22. 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: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to comment on whether some civil clients do not deserve representation because of their identity. My duty as a judge is to fairly and impartially apply the law to the facts of each case or controversy presented, without regard to any personal views and opinions.

23. Do Blaine Amendments violate the Constitution?

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the United States Supreme Court considered whether a state-based scholarship program that provided public funds for students to attend private schools but prohibited families from using the funds at religiously affiliated schools was constitutional. The Supreme Court held "[t]he application of the no-aid provision discriminated against religious schools and the families whose children attend or hope to attend them in violation of the Free Exercise Clause of the Federal Constitution." *Id*. at 2249. In the decision, the Supreme Court explained, the Blaine Amendments of the 1870s, a "proposal – which Congress nearly passed – would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding 'sectarian' schools." *Id*. at 2259 (citation omitted). "The Blaine Amendment was 'born of bigotry' and 'arose at a time of

pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree'" and "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id*. at 2259 (citations omitted).

24. Is the right to petition the government a constitutionally protected right?

Response: Yes. In *McDonald v. Smith*, 472 U.S. 479, 482 (1985), the Supreme Court explained, "The First Amendment guarantees 'the right of the people ... to petition the Government for a redress of grievances" and "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression."

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

Response: In *Cohen v. California*, 403 U.S. 15, 20 (1971), citing to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court observed "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."

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

Response: The Supreme Court has defined "true threats" to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). *See also Watts v. United States*, 394 U.S. 705, 708 (1969). The Supreme Court further stated: "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Virginia v. Black*, 538 U.S. at 359 - 360 (internal quotations and citations omitted). In addition, the Court stated, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

Response: No.

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

Response: No.

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

Response: No.

30. 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.

31. 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.

32. 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 December 16, 2020, I submitted an application for a position on the United States District Court for the Central District of California to the State Chair of Senator Dianne Feinstein's Judicial Advisory Committee. On January 20, 2021, I resubmitted my application to the State Chair. On February 21, 2021, I submitted my application to the State Chair of Senator Alex Padilla's Judicial Advisory Committee. On April 26, 2021, I interviewed with Senator Feinstein's Central District Judicial Advisory Committee. On May 20, 2021, I interviewed with the Statewide Chair for Senator Feinstein's Judicial Advisory Committee. On August 25, 2021, I interviewed with attorneys from the White House Counsel's Office. From August 25, 2021, until my nomination on December 15, 2021, I was in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the United States Department of Justice.

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

Response: No.

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

Response: No.

35. 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, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

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

Response: No.

38. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.

Response: On August 26, 2021, I interviewed with attorneys from the White House Counsel's Office. From August 26, 2021, until my nomination on December 15, 2021, I was in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the United States Department of Justice. On December 15, 2021, my nomination was submitted to the Senate. Since my nomination date, I have been in contact with lawyers from the Office of Legal Policy and the White House Counsel's Office regarding my confirmation hearing and the ongoing process. On February 23,

2022, I received Questions for the Record from an official from the Office of Legal Policy.

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

Response: I received these questions during the afternoon on February 23, 2022. I drafted answers to each question based on conducting legal research and based on my own knowledge. Thereafter, I submitted a draft of my answers to the U.S. Department of Justice Office of Legal Policy to receive feedback and, after considering the feedback I received, I submitted my finalized answers for submission on February 28, 2022.

Nomination of Sherilyn Peace Garnett
to be United States District Judge for the Central District of California Questions for the Record
Submitted February 23, 2022

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

   Response: I received the questions on February 23, 2022. I prepared answers based on my own knowledge and legal research. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on February 28, 2022.

4. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

   Response: No.

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

Questions for the Record for Sherilyn Peace Garnett, Nominee for the Central District of California

I. Directions

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

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

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

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

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

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

II. Questions

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

Response: As a sitting Los Angeles County Superior Court Judge, I apply the same methodology in every case, as follows: (1) To ensure individuals and attorneys who appear before me feel they are being heard and treated fairly, I carefully listen to their arguments, engage with them to understand the issues presented, and keep an open mind;

(2) to ensure I understand the applicable rule of law, I diligently research the applicable law; (3) to ensure fairness and impartiality, I decide cases and controversies that come before me based upon applicable binding precedent as applied to the material facts of each case and not based on any personal views; and (4) I treat each person who comes before me with dignity and respect. I have not studied the judicial philosophies of the named Justices in the question above and thus cannot identify which philosophy is most analogous to my methodology.

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

Response: Black's Law Dictionary (11th ed. 2019) defines the term "originalism" as follows: "1. The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect . . . . 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, I do not subscribe to a particular label. Instead, my duty is to fairly and impartially apply binding precedent from the higher courts to the material facts presented in cases and controversies that come before me without regard to any personal beliefs. If confirmed to the district court, I will continue to abide by that duty and apply binding Supreme Court and Ninth Circuit precedent, as well as the methods of interpretation and canons of instruction used by these higher courts when interpreting Constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 - 77 (2008), the Supreme Court evaluated the relevant text of the Second Amendment by looking to the original public meaning at the time of the founding.

3. 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 (11th ed. 2019) defines the term "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values. While many authorities use the terms living constitutionalism and nonoriginalism interchangeably, others view living constitutionalism as a form of nonoriginalism that values interpretive conformity with changed circumstances and norms more greatly than do other forms of nonoriginalism." As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, I do not subscribe to a particular label. Instead, my duty is to fairly and impartially apply binding precedent from the higher courts to the material facts presented in cases and controversies that come before me without regard to any personal beliefs. If confirmed to the district court, I will continue to abide by that duty and apply binding Supreme Court and Ninth Circuit

precedent, as well as the methods of interpretation and canons of instruction used by these higher courts when interpreting Constitutional provisions.

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

Response: If confirmed as a federal district court judge in the Central District of California, I would be bound by Supreme Court and Ninth Circuit precedent in deciding constitutional issues. In the rare instance where I was confronted with a question of first impression involving a constitutional provision that had not yet been interpreted by the Supreme Court or Ninth Circuit, I would still look to such precedent to obtain the framework for analyzing the issue. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning of the Second Amendment. *Id.* at 576 - 577 ("[i]n interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.") (internal quotations and citations omitted).

5. 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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated, "[i]n interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* at 576 - 577 (internal quotations and citations omitted). Moreover, in analyzing the text of the Second Amendment, the Supreme Court, as part of that analysis, referenced the contemporary dictionary meaning of the term "bear" to discern its meaning at the time of the founding. *See e.g.*, *Id.* at 584 ("At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation.").

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

Response: Absent changes through the Article V amendment process, the Constitution is an enduring document with a fixed quality to it.

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

Response: Yes, the Supreme Court has interpreted the Free Exercise and Establishment Clauses to draw limits on what the government may impose or require. *See e.g.*, *Tandon v. Newsom*, 142 S. Ct. 1294, 1296 (2021) (stating "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 favorable than religious exercise.") (emphasis in original); *Hosanna -Tabor Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 184 (2012) ("The Establishment Clause prevents the Government from appointing ministers, and the Freedom of Exercise Clause prevents it from interfering with the freedom of religious groups to appoint their own."); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("[T]he 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.") (internal quotations omitted); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (internal citations omitted). In addition, Congress has prescribed limits on what government may impose or require. *See e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 - 695 (2014) ("In order to ensure broad protection for religious liberty, [the Religious Freedom Restoration Act] provides that 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.' § 2000bb–1(a).")

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

Response: The United States Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), stated, "[a]t a minimum, the protection of the Free Exercise Clause pertains if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Further, it stated:

> Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of

> course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

Id. at 533 (internal citations omitted). Even if a law does not discriminate on its face, it is not "neutral" if its enactment or enforcement is motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 - 1732 (2018) (state civil rights commissioners' hostile comments toward religion during public meetings were sufficient to show religious animus). *Lukumi*, 508 U.S. at 534 - 542 (city ordinances were not neutral because they were enacted due to concern about church's religious practices).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the church and synagogue applicants were entitled to a preliminary injunction. *Id*. at 66. The Court explained, "[t]he applicants … clearly established their entitlement to relief pending appellate review," and "[t]hey have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Id*. The Supreme Court observed that "[b]ecause the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Id*. at 67. The Supreme Court found "it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'" *Id*. Further, it stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. The high court also found, "it has not been shown that granting the applications will harm the public." *Id*. at 68.

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

Response: *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held the following: First, "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). Further, "it is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* Second, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* In *Tandon*, the Supreme Court stated that, instead of requiring the state "to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities," the appellate court "erroneously declared that such measures might not 'translate readily' to the home." *Id.* at 1297. Third, "the government has the burden to establish that the challenged law satisfies strict scrutiny." *Id.* In reviewing the state's showing, the Supreme Court determined the state did not show "that 'public health would be imperiled' by employing less restrictive measures." *Id.* Finally, the Supreme Court held "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." If the litigants "remain under a constant threat" that the challenged restrictions will be reinstated, litigants who are otherwise entitled to injunctive relief will remain entitled to such relief. *Id.* at 1297. The Court thus held the applicants were entitled to injunctive relief. *Id.*

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

Response: Yes, based on binding Supreme Court precedent and federal law *See e.g., Religious Land Use and Institutionalized Persons Act of 2000* (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.; Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 672 (2014) ("In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.' § 2000cc–5(7)(A). And Congress mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.' § 2000cc–3(g)"). *See also Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

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

Response: *In Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held the Colorado Civil Rights Commission did not comply with the Free Exercise Clause's requirement of religious neutrality in a matter arising from a cakeshop's refusal to sell a wedding cake to a same-sex couple on religious grounds. The Supreme Court determined state civil rights commissioners' hostile comments toward religion during public meetings were sufficient to show religious animus. The Court stated, "[t]he Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id*. at 1732. The Supreme Court noted, "the government, if it is to respect the

Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," and "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Id*. at 1731.

13. 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: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 fn. 28, 724 (2014), the Supreme Court stated that, "[t]o qualify for RFRA's protection, an asserted belief must be sincere," and that "the federal courts have no business addressing" "whether the religious belief asserted in a RFRA case is reasonable." In *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 832 - 835 (1989), the Supreme Court held an individual's sincerely held religious belief is constitutionally protected even if that person's belief does not represent an accepted belief of the person's religious organization. In *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 713 - 14 (1981) (footnote omitted), the Supreme Court described protection of religious beliefs:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. *Sherbert v. Verner*, *supra*; *Wisconsin v. Yoder*, 406 U.S. 205, 215 - 216, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972). The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

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

Response: In *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 832 - 835 (1989), the Supreme Court held an individual's sincerely held religious belief is constitutionally protected even if that person's belief does not represent an accepted belief of the person's religious organization. However, "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause," and "[p]urely secular views do not suffice." *Id*. at 833.

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

Response: Please see my responses to Question 13.

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

Response: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, it is not appropriate for me opine on what the official position of a religious organization may be. Nor do I have the religious expertise of knowledge of the Catholic Church's position to do so.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court addressed the issue presented by two teacher employment discrimination claims of whether "the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith." *Id.* at 2055. Applying the ministerial exception set forth in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* 565 U.S. 171 (2012) to the teachers' claims, the Court held that the teachers claims were barred. *Id*. at 2066. The Court stated, under the ministerial exception, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* at 2060. Further, it recognized that "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. In determining the application of the ministerial exception, the Supreme Court instructed that "[s]imply giving and employee the title of 'minister' is not enough to justify the exception;" the relevant inquiry is what the employee does. *Id*. at 2063 - 2064. It stated, "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* 2064. Courts must "take all relevant circumstances into account" and determine whether a position implicates the fundamental purpose of the exception. *Id*. at 2067.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871 (2021), the Supreme Court held "[t]he refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless CSS agrees to certify same-sex couples as foster

parents violates the Free Exercise Clause of the First Amendment." The Supreme Court stated that the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id*. at 1877. In addition, "[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id*. (citation and internal quotation marks omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*.

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

Response: The Supreme Court's decision in *Mast v. Fillmore County*, 141 S. Ct. 2430 (Mem) (2021), arose out of what Justice Gorsuch described as a "long-running litigation" in which county officials were insisting that members of the Amish community adopt the use of modern septic tanks for the disposal of so-called "gray water," or risk jail, fines, and loss of their farms. *Id.* at 2430 - 2431. The Amish filed suit seeking a declaratory judgment, but the lower court sided with county officials on the merits, which was affirmed on appeal. *Id.* at 2431- 2432. After granting the Amish's petition for review, the Supreme Court vacated the lower court's decisions and remanded the case for further proceedings in light of the Court's decision in *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1871 (2021). In his concurrence, Justice Gorsuch wrote to highlight certain issues the lower court should consider on remand. He first noted "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." *Id*. at 2432. Second, he observed "the County and lower courts erred by failing to give due weight to exemptions other groups enjoy." *Id*. Finally, Justice Gorsuch concluded that the lower courts erred by failing to give sufficient weight to how other jurisdictions handle the sanitation issue. In particular, he stated that under strict scrutiny it was the government's burden to show why these alternatives would not work, not the Amish's burden to show that they would. *Id*.

17. Is 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: I am not aware of any such training at my court. All training provided by the court should be consistent with the United States Constitution, California Constitution and laws, and laws of the United States.

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

Response: Please see my answer above to Question 17a.

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

Response: Please see my answer above to Question 17a.

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

Response: Please see my answer above to Question 17a.

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

Response: Please see my answer above to Question 17a.

19. Is the criminal justice system systemically racist?

Response: I am aware of public commentary and debate concerning perceived racial biases, disparities, and discrimination in the criminal justice system. I also am aware that the Supreme Court acknowledged in *Kimbrough v. United States*, 552 U.S. 85 (2007), the United States Sentencing Commission's conclusion that the 100 to 1 ratio, which treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine for sentencing purposes, "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." Id. at 96 (internal quotation marks omitted). If confirmed to the federal district court and presented with a case or controversy involving claims of systemic racism or racial discrimination, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent. Further, as a sitting Los Angeles Superior Court Judge, I have treated every individual who has come before me fairly and impartially, without regard to their race, and will continue to do so if confirmed as a federal district court judge.

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

Response: To the extent this question implicates decisions made by a President, under Article II, the President has the authority to make certain political appointments with the advice and consent of the Senate. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021); U.S. Const. art. II, § 2, cl. 2. As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is improper for me to opine on such

policy matters. To the extent this question implicates the policy decisions of any politician, as a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is improper for me to opine on such matters or to prejudge and issue that may come before me, If confirmed as a federal district court judge and if presented with a case or controversy involving such issues, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not for me to opine on what Congress should do. That decision is for policy makers.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms. In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Court held that the right that the Second Amendment guarantees is a fundamental right extended to the States. These cases are binding Supreme Court precedent. If confirmed to the federal district court, I will apply Supreme Court and Ninth Circuit binding precedent on cases or controversies involving Second Amendment issues.

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

Response: No.

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

Response: No.

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

Response: The Constitution states the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3; *see also Myers v. U.S.*, 272 U.S. 52, 60 (1926) (stating "[t]he vesting of the executive power in the President was essentially a grant of the power to execute the laws"). The Supreme Court has stated "…the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a

case…" *United States v. Nixon*, 418 U.S. 683, 693 (1974). In *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) the Supreme Court stated "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

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

Response: In *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 – 302 (1979), the Supreme Court determined the term "substantive rule" is not defined in the Administrative Procedures Act, "and other authoritative sources essentially offer definitions by negative inference." However, the Court noted, "a characteristic inherent in the concept of a substantive rule," is that it affects "individual rights and obligations." *Id.* at 302. Once an agency rule or regulation has been determined to be "substantive," it nevertheless will not have "the force and effect of law" unless its promulgation conforms "with any procedural requirements imposed by Congress." *Id.* at 303. Federal courts continue to grapple with what administrative activity falls within the definition of substantive rulemaking. *See e.g.*, *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). Because the question of the difference between a substantive rule change and an act of prosecutorial discretion is being decided by federal courts, it is not appropriate for me to opine on this issue.

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

Response: The President does not have the authority to abolish the death penalty; only Congress has that authority.

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

Response: In *Alabama Association of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court addressed whether it should vacate the stay, pending appeal, of a judgment obtained by an association of realtors and other plaintiffs ending the Centers for Disease Control and Prevention's (CDC) nationwide moratorium on evictions during the COVID-19 pandemic. *Id.* at 2486. The trial court stayed the judgment while the CDC pursued the appeal. *Id.* In vacating the district court's stay, the Supreme Court determined the CDC did not have the statutory authority to impose the moratorium. The Court concluded that the plaintiffs had a substantial likelihood of exceeding on the merits, the plaintiffs would be at risk of irreparable harm without a stay because the moratorium deprives them of rent payments, the government's interests had decreased, and that although "the public has a strong interest in combating the spread of the COVID-19 Delta variant," the CDC could not combat that spread unlawfully. *Id.* at 2488 - 90. The Supreme Court concluded, "If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it." *Id*. at 2490.

Senator Josh Hawley
Questions for the Record

Sherilyn Peace Garnett
Nominee, U.S. District Court for the Central District of California

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

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

    Response: I am not familiar with the above quote or its context. Judges are duty-bound to decide cases and controversies based on the law as applied to the facts of each case and controversy, without regard to personal beliefs or opinions. As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, that is the approach I have followed. If confirmed, I will continue to do the same.

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

    Response: The judicial oath requires a judge to faithfully and impartially follow the law. I am not familiar with the quote above or its context, and it would be inappropriate for me to opine on whether the quote is a violation of the judicial oath.

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

Response: Federal courts have a duty to exercise the jurisdiction conferred upon them. However, under principles of comity between the state and federal courts, federal courts may decline to exercise their jurisdiction in otherwise exceptional circumstances where denying a federal forum would serve an important countervailing interest. I understand the standards for the various abstention doctrines to be the following in the Ninth Circuit:

The *Younger* abstention doctrine provides that a federal court may abstain from interfering with a state proceeding when: (1) there is an ongoing state criminal proceeding or civil proceeding that is either a quasi-criminal enforcement action or involves a state's interest in enforcing the orders and judgments of its courts; (2) the state proceeding implicates an important state interest; and (3) the state proceeding provides an adequate opportunity for raising federal challenges. *See ReadyLink*

Healthcare, Inc. v. State Compensation Ins. Fund, 754 F.3d 754, 759 (9th Cir. 2014); *Younger v. Harris*, 401 U.S. 37 (1971); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (9th Cir. 1982).

The *Pullman* abstention doctrine provides that a federal court may refrain from deciding federal issues where those issues depend on the resolution of unresolved state law questions. *See Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003).

The *Burford* abstention doctrine provides that a federal court should abstain from exercising jurisdiction where: (1) "the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court;" (2) "federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence;" and (3) "federal review might disrupt state efforts to establish a coherent policy." *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

The *Thibodaux* abstention doctrine provides that a federal court should abstain in cases involving unresolved state law questions where the proceedings are "intimately involved with the sovereign prerogative" of the state. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

The *Rooker-Feldman* doctrine provides that a federal district court is prohibited from exercising subject matter jurisdiction over a lawsuit that is a de facto appeal from a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); District of *Kougasian v. TMSL, Inc.*, 359 F. 3d 1136, 1139 (9th Cir. 2004). The Ninth Circuit in *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), explained the general formulation of the doctrine as follows:

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker–Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker–Feldman* does not bar jurisdiction. If there is simultaneously pending federal and state court litigation between the two parties dealing with the same or related issues, the federal district court in some circumstances may abstain or stay proceedings; or if there has been state court litigation that has already gone to judgment, the federal suit may be claim-[or issue-] precluded under [28 U.S.C.] § 1738. But in neither of these circumstances does *Rooker–Feldman* bar jurisdiction.

Noel v. Hall, 341 F.3d at 1164. *Rooker–Feldman* thus applies only when the federal plaintiff both asserts as an injury legal error by the state court and seeks as a remedy relief from the state court judgment.

The *Colorado River* doctrine provides that a federal court, in the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," can dismiss or stay "a federal suit due to the presence of a concurrent state proceeding." *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). *See also Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002). Although often treated as an abstention doctrine, the Ninth Circuit has held that the *Colorado River* doctrine is technically not an abstention doctrine. See *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1202 (9th Cir. 2021) (observing that *Colorado River* is not an abstention doctrine but "shares the qualities of one."). Thus, it is included in this response.

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

   Response: I have never worked on a legal case or representation in which I opposed a party's religious liberty claim.

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

      Response: Not applicable.

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

   Response: If confirmed to the district court and presented with a case or controversy requiring me to interpret a Constitutional provision, I would be bound to follow Supreme Court and Ninth Circuit precedent and the approach taken in such precedent when interpreting the provision, including their consideration of the original public meaning. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning of the Second Amendment. (stating, "[i]n interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.") *Id.* at 576 - 577.

5. Do you consider legislative history when interpreting legal texts?

Response: The approach I follow as a sitting judge and would follow if confirmed as a federal district court judge is I first look to the legal text to determine if it is clear and answers the question at issue. If it is ambiguous, I apply binding precedent from the appellate and supreme courts to address the issue, as well as the methods of interpretation and canons of instruction used by these higher courts. If that does not answer the question, I consider persuasive authority from other courts, which are not binding on me. As a last resort, I would consider legislative history, but would do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

Response: The approach I follow as a sitting judge and would follow if confirmed as a federal district court judge is to apply binding precedent and the manner in which it has treated various forms of legislative history. In *Garcia v. U.S.*, 469 U.S. 70, 76 (1984) (footnote omitted), the United States Supreme Court stated:

> In surveying legislative history we have repeatedly 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." *Zuber v. Allen*, 396 U.S. 168, 186, 90 S. Ct. 314, 324, 24 L. Ed. 2d 345 (1969). We have eschewed reliance on the passing comments of one Member, *Weinberger v. Rossi*, 456 U.S. 25, 35, 102 S. Ct. 1510, 1517, 71 L. Ed. 2d 715 (1982), and casual statements from the floor debates. *United States v. O'Brien*, 391 U.S. 367, 385, 88 S. Ct. 1673, 1683, 20 L. Ed. 2d 672 (1968); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). In *O'Brien*, *supra*, 391 U.S., at 385, 88 S. Ct., at 1683, we stated that Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in *Zuber*, *supra*, 396 U.S., at 187, 90 S. Ct., at 325.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court consulted the English common law prior to ratification when interpreting the ordinary public meaning of the Second Amendment. If confirmed as a federal district court judge and if presented with a case or controversy involving this issue, I would apply binding Supreme Court and Ninth Circuit precedent and the methods used to interpret constitutional provisions.

6. **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: Quoting the United States Supreme Court, the Ninth Circuit stated, "[t]o prevail on an Eighth Amendment claim 'there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.'" *Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012), quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008).

7. **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: In *Glossip v. Gross*, 576 U.S. 863 (2015), the Supreme Court held "[a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives." *Id*. at 877 - 878, quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008).

8. **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: I am not aware of any Ninth Circuit case that has recognized such a right. In *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72 (2009), the Supreme Court held that there is no such substantive due process right under the Due Process Clause to DNA testing and that any such right must be provided by state legislative action. *Id*. at 73 - 74.

9. **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.

10. **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: Citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court stated in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021), "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." A law is not "neutral" however if its enactment or enforcement is motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 173 - 1732 (2018) (state civil rights commissioners' hostile comments toward religion during public meetings was sufficient to show religious animus); *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 534 - 542 (1993) (city ordinances were not neutral because they were enacted due to concern about church's religious practices). In such a case, strict scrutiny applies. "A law is not 'generally applicable' if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884 (internal quotations omitted)). Additionally, a law is not "generally applicable" when it treats any comparable secular activity more favorably than religious exercise, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Lukumi*, 508 U.S. at 542 - 546. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014), the Supreme Court determined that the burden on the plaintiffs was substantial because if the plaintiffs failed to comply with the challenged law, "the economic consequences will be severe," the alternative course "would also entail substantial economic consequences," and the remaining options would be "costly." *Id.* at 720 - 722.

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

state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: The United States Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), stated, "[a]t a minimum, the protection of the Free Exercise Clause pertains if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Further, it stated:

> Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

Id. at 533 (internal citations omitted). Even if a law does not discriminate on its face, it is not "neutral" if its enactment or enforcement is motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 - 1732 (2018) (state civil rights commissioners' hostile comments toward religion during public meetings was sufficient to show religious animus); *Lukumi*, 508 U.S. at 534 – 42 (city ordinances were not neutral because they were enacted due to concern about church's religious practices). Further, "[a] law is not 'generally applicable' if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990) (internal quotations omitted). Additionally, a law is not "generally applicable" when it treats any comparable secular activity more favorably than religious exercise, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Lukumi*, 508 U. S. at 542 - 546. A law restrictive of religious practices that is not neutral or not of general application must undergo the most rigorous scrutiny. To satisfy the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S. 618, 628 (1978), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

12. 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: In *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), the Supreme Court stated that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." The Ninth Circuit has held that a nationwide injunction is only appropriate if "such broad relief is necessary to give the prevailing party the relief to which it is entitled," and is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *City and County of San Francisco v. Barr*, 965 F.3d 753, 764 - 65 (9th Cir. 2020) (internal quotations omitted). "[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *compare Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 – 2089 (2017) (where the Supreme Court upheld a nationwide injunction); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 - 44 (1999) (same).

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

Response: In *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 725 (2014), the Supreme Court stated, "it is not for us to say that [the owners and their companies'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction . . . .'" In *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit stated:

> A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to "so-called religions which ... are obviously shams and absurdities and whose members are patently devoid of religious sincerity." Second, as the Supreme Court held in *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S. Ct. 1526, 1532-33, 32 L. Ed. 2d 15 (1972), the claim must be rooted in religious belief, not in "purely secular" philosophical concerns. Cf. *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733 (1965) (test

> for religious belief within meaning of draft law exemptions is whether beliefs professed are sincerely held and, in claimant's scheme of things, religious).

Callahan v. Woods, 658 F.2d at 683 (internal citations and footnotes omitted). In *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 832 - 35 (1989), the Supreme Court held a person's sincerely held religious belief is constitutionally protected even if that person's belief does not represent an accepted belief of the person's religious organization. In *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981), the Supreme Court described protection of religious beliefs:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas, 450 U.S. at 713 - 14 (internal citations and footnotes omitted).

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

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

Response: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine regarding my personal beliefs, if any, concerning what Justice Holmes' may have meant by his statement. I do note Justice Holmes also stated in his dissent that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As stated below in question 14(b), my understanding is that *Lochner* has been largely overturned and is no longer binding precedent.

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

Response: As a sitting judge, and if confirmed as a federal district court judge, it is my duty to apply binding precedent to cases or controversies that come before me and to remain fair, impartial, and open-minded in every case.

It is not generally appropriate for me to opine on the correctness of binding precedent. It is my understanding that *Lochner v. New York*, 198 U.S. 45 (1905) ("*Lochner*") has been largely overturned by subsequent case law, including *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and is no longer binding precedent. *See e.g. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (recognizing that *Lochner* was overruled by stating "[f]ourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), signaled the demise of *Lochner* by overruling *Adkins" v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923)); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (stating "[t]he doctrine that prevailed in *Lochner* … that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded").

15. 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 this statement or the context in which it was made. As a sitting judge and, if confirmed as a federal district court judge and when presented with a case or controversy, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

16. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: The Supreme Court explained in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." It further stated, "[t]he dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear— 'has no place in law under the Constitution.'" Regarding my understanding, Chief Justice Roberts' words speak for themselves: although never expressly overruled, history has demonstrated the *Korematsu* case was wrongly decided.

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

Response: I am not familiar with any Supreme Court opinions that have not been formally overruled that are no longer good law.

a. If so, what are they?

Response: Not applicable.

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

Response: As a sitting Los Angeles Superior Court Judge, and if confirmed as a federal district court judge, I am committed to faithfully applying all Supreme Court and Ninth Circuit precedent.

18. 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 the full context in which Judge Learned Hand made that statement. As a sitting Los Angeles County Superior Court Judge, and if confirmed as a federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. If confirmed as a federal district court judge, and a case or controversy were to be presented involving this question, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: Not applicable—please see my response to Question 18a.

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: In *Eastman Kodak Co. v. Image Tech Servs.*, *Inc.*, 504 U.S. 451, 481 (1992), Kodak appealed from an order of the Ninth Circuit reversing the grant of summary judgment to Kodak in an antitrust action brought under sections 1 and 2 of the Sherman Act by 18 independent service organizations that had been servicing Kodak's copying and micrographic equipment and were asserting claims that Kodak's subsequently adopted policies limiting the availability of parts to these organizations and making it more difficult for them to compete with Kodak in servicing Kodak's equipment violated the Act. *Id.* at 454 - 455. The Supreme Court held evidence Kodak controlled nearly 80% of the service market "with no readily available substitutes" was sufficient to create a triable issue of material fact precluding Kodak's summary judgment motion. In *Image Tech v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), the Ninth Circuit held:

> A plaintiff relying on circumstantial evidence to establish a § 2 monopolization claim must show that the defendant owned a "dominant share" of the market. Calculation of the market share allows for a proper understanding of the defendant's influence and relative power in the relevant market. A dominant share of the market often carries with it the power to control output across the market, and thereby control prices.

Id. at 1206 (internal citations omitted). The Ninth Circuit has held that a prima facie case of sufficient market power is established with evidence that the defendant had 65% market share. See *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). On the other hand, the Ninth Circuit has held that less than 50% of market share is "presumptively insufficient to establish market power." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).

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

Response: The definition for "federal common law" in Black's Law Dictionary (11th ed. 2019) is as follows: "The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." In *Rodriguez v. Federal Deposit Insurance Corporation*, 140 S. Ct. 713, 717 (2020), the United States Supreme Court discussed the issue of federal common law:

> Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the States. See Art. I, § 1; Amdt. 10. As this Court has put it, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004). These areas have included admiralty disputes and certain controversies between States. *See, e.g.*, *Norfolk Southern R. Co. v. James N. Kirby*, Pty Ltd., 543 U.S. 14, 23, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S. Ct. 803, 82 L. Ed. 1202 (1938). In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. The Sixth Circuit correctly identified one of the most basic: In the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'" *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)).

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

Response: Under the system of federalism, state constitutions may provide greater protections that the United States Constitution. Further, the interpretation of a state constitutional right is generally a matter for the state court, and federal courts should apply the interpretation declared by the highest court in the state whose constitutional provision the federal court is interpreting. See *Erie v. Tompkins*, 304 U.S. 64, 77 - 79 (1938). If confirmed as a federal district court judge and I were presented with a case or controversy involving this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: Please see my response to Question 20.

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

Response: Please see my response to Question 20.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on whether binding legal precedent was correctly decided. Instead, I am duty-bound to apply all binding precedent and remain open-minded, fair, and impartial in each case. However, I do agree with prior judicial nominees that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided, as those cases established legal principles that are foundational and are unlikely to be litigated in any case that comes before me.

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

Response: Please see my response to Question 12 above.

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

Response: Please see my response to Question 12 above.

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

Response: Please see my response to Question 12 above.

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

Response: In *Bond v. U.S.*, 564 U.S. 211, 220 - 22 (2011), the Supreme Court described federalism:

> The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S. 706, 758, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). The Framers concluded 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.
>
> Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another. The allocation of powers

in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.

But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (Blackmun, J., dissenting)).

Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *See ibid*. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. *See New York*, *supra*, at 181, 112 S. Ct. 2408. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

24. What case or legal representation are you most proud of?

Response: During my time as a state judge, I presided over a case involving an individual who was charged with a misdemeanor substance offense and qualified for military diversion under California law. Under California law, individuals charged with misdemeanors, who have served in the military, are suffering from PTSD as result of that service, and satisfy other criteria can be placed on pre-trial diversion. Upon a grant of diversion, pre-trial proceedings are suspended and for a period of up to two years the individual receives necessary medical, psychological, and other treatment and must abide by the law. If successful, such individuals can earn a dismissal of the misdemeanor charge. The individual satisfied all the criteria to receive diversion, and, as I recall, both the prosecution and defense attorneys recommended it should be granted. However, the individual initially would not accept the help, believing it would be a "cop-out" and "let down" of his fellow servicemen. At the request of his counsel, I took the time to speak to the individual at length about the various factors judges consider in determining sentences, including punishment and the need for rehabilitation; the purpose of the military diversion statute; and the sacrifices that servicemen make in serving their country. I explained that, under law and facts of his case, it would not be a "cop out" for him to admit he needed help and that providing such help was a means of truly thanking him for his service. By the end of our talk, the individual agreed to accept the help. I thus placed him on military diversion with a plan for his rehabilitation and treatment.

25. 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 2 above.

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

Response: It would depend on the facts and circumstances of the case or controversy and applicable law to be applied to those facts. As a sitting Los Angeles County Superior Court judge, and, if confirmed as a federal district court judge, I have the duty and obligation to not prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. If confirmed as a federal district court judge and I was presented with a case or controversy involving the issue of damages versus injunctive relief, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

27. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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

Response: The Free Exercise Clause of the First Amendment is a foundational and fundamental right to practice one's religion. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). Laws substantially burdening the free exercise of religion are subject to strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

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

Response: In its First Amendment Free Exercise Clause decisions, the Supreme Court has used both terms to describe the Clause's protections. For example, in *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court referred to the right protected by the Free Exercise Clause as the "freedom of worship." *See also West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). In *McDaniel v. Paty*, 435 U.S. 618, 628 (1978), the Supreme Court stated, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

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

Response: The Religious Freedom Restoration Act (RFRA) provides "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). "To protect this right, Congress provided that the '[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability' unless 'it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.' " *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S. Ct. 2367, 2383 (2020) (quoting §§ 2000bb–1(a)–(b)). The "RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise.' " *Id.*, (quoting § 2000bb–3(a)). Under the RFRA, however,

Congress is permitted to exclude statutes from RFRA's protections. § 2000bb–3(b).

Citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court stated in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021), "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." A law is not "neutral" however if its enactment or enforcement is motivated by religious animus. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730–1732 (2018) (state civil rights commissioners' hostile comments toward religion during public meetings was sufficient to show religious animus); *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 534 - 542 (1993) (city ordinances were not neutral because they were enacted due to concern about church's religious practices). In such a case, strict scrutiny applies. "A law is not 'generally applicable' if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884 (internal quotations omitted)). Additionally, a law is not "generally applicable" when it treats any comparable secular activity more favorably than religious exercise, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Lukumi*, 508 U.S. at 542 - 546. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014), the Supreme Court determined that the burden on the plaintiffs was substantial because if the plaintiffs failed to comply with the challenged law, "the economic consequences will be severe," the alternative course "would also entail substantial economic consequences," and the remaining options would be "costly." *Id.* at 720 - 722.

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

Response: Please see my response to Question 13 above.

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

Response: The Religious Freedom Restoration Act ("RFRA") "…applies to all Federal law, and the implementation of that law, whether statutory or

otherwise…." 42 U.S.C. § 2000bb-3(a); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) ("Placing Congress' intent beyond dispute, RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise' "). "Under RFRA, a law that substantially burdens the exercise of religion must serve 'a compelling governmental interest' and be 'the least restrictive means of furthering that compelling governmental interest.' §§ 2000bb–1(a)–(b)." *Little Sisters of the Poor Saints Peter and Paul Home,* 140 S. Ct. at 2383. However, "RFRA also permits Congress to exclude statutes from RFRA's protections." *Id.* The Supreme Court has recognized a "ministerial exception" to employment discrimination claims under Title VII where enforcement of such laws would interfere with the employment decisions of churches and religious schools in matters of faith and doctrine. *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049 (2020).

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

Response: While serving as a Justice Pro Tem on the California Court of Appeal, Second Appellate District, Division Seven, I served on a three-judge panel that issued *Rothman v. City of Los Angeles*, No. B258670, 2016 WL 4482925 (Cal. Ct. App. 2016), concerning religious discrimination claims under the California Fair Employment and Housing Act, California Gov. Code § 12900 et seq. The decision was unanimous.

28. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: If confirmed to the federal district court and called upon to preside over a jury trial requiring me to orally instruct the jury on the "beyond a reasonable doubt" burden of proof, I will read the applicable Ninth Circuit criminal pattern jury instruction to the jury. For example, Ninth Circuit Manuel of Model Criminal Jury Instructions 6.5 (Reasonable Doubt – Defined) (2022) provides:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt. A reasonable doubt is a doubt based upon reason and common

sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Because the collective wisdom of those who have contributed to crafting and refining the above instruction over many years did not compel them to describe the definition in numerical terms, I will respectfully and humbly refrain from attempting to do so.

29. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is inappropriate for me to opine on the issue presented by this question or to prejudge issues that may come before me in a case or controversy. If confirmed and if presented with a case or controversy involving such an issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: Please see my response to Question 29a.

c. If you disagree with either of these statements, please explain why and provide examples.

Response: Please see my response to Question 29a.

30. In your legal career:

a. How many cases have you tried as first chair?

Response: As an Assistant United States Attorney in the Central District of California, I tried nine cases to verdict, judgment, or final decision. I was sole counsel for four of those cases and co-lead counsel in the other five cases. In addition, as a Los Angeles County Superior Court Judge, I have presided over 30 trials.

b. How many have you tried as second chair?

Response: Please see my response to Question 30a.

c. How many depositions have you taken?

Response: I do not recall the specific amount of depositions I took or defended while serving as a civil litigation associate from 1995 to 1998. I can only approximate the number is three to five.

d. How many depositions have you defended?

Response: Please see my response to Question 30c.

e. How many cases have you argued before a federal appellate court?

Response: To the extent that the term "argued" in the question includes arguments in appellate briefs taken under submission without oral argument, as well as oral arguments, approximately 15 - 20. To the extent the term refers only to oral arguments, approximately three to five.

f. How many cases have you argued before a state appellate court?

Response: As an attorney, none. However, as a Justice Pro Tem on the California Court of Appeal, I presided over state appellate cases and authored or joined approximately 66 state appellate opinions.

g. How many times have you appeared before a federal agency, and in what capacity?

Response: None.

h. How many dispositive motions have you argued before trial courts?

Response: I do not recall the specific amount of dispositive motions I argued before trial courts while serving as a civil litigation associate from 1995 to 1998. I can only approximate the number is three to five. However, as a state judge, I have presided over hundreds of dispositive motions.

i. How many evidentiary motions have you argued before trial courts?

Response: I do not recall the specific amount of evidentiary motions I argued before trial courts while serving as a civil litigation associate from 1995 to 1998. I can only approximate the number is three to five. However, as a state judge, I have presided over hundreds of evidentiary motions.

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

Response: To the best of my recollection, I do not believe so.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

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

Response: The Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997), that the Fifth and Fourteenth Amendments protect certain unenumerated or substantive due process rights. The Supreme Court explained that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." The Court explained that "[t]he Clause provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720. The Court further explained: "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720 - 721 (internal quotations and citations omitted). "Second, we have required in substantive due-process cases a careful description of the asserted fundamental liberty interest." *Id.* at 721 (internal quotations omitted). The Supreme Court has recognized such rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942),

to direct the education and upbringing of such children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

The Supreme Court further explained, "we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. at 720. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* The Court thus cautioned, "[w]e must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (internal quotations and citations omitted). If confirmed, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent concerning substantive due process rights.

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

Response: The question of whether America is a systematically racist country is one for policymakers to consider. As a sitting Los Angeles Superior Court Judge, and, if confirmed as a federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. If confirmed as a federal district court judge, and issues of racial disparities, racial discrimination, and/or racial bias were to come before me in a case or controversy, I would consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: Yes.

a. How did you handle the situation?

Response: As an attorney, I followed my duty to be a zealous, yet ethical, advocate for my client.

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

Response: Yes, as a sitting Los Angeles County Superior Court Judge and if confirmed to the federal district court, I am committed to following legal precedent regardless of any personal beliefs.

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

Response: I do not believe any of the Federalist Papers specifically shaped my views of the law.

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

Response: As a sitting Los Angeles County Superior Court Judge, and, if confirmed as a federal district court judge, it is not appropriate for me to opine on this question. Further, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. If confirmed as a federal district court judge and I am presented with a case or controversy involving this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent, without regard to my personal beliefs.

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

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

Response: The United States Supreme Court held in *District of Columbia v. Heller,* 554 U.S. 570 (2008) that the Second Amendment protects an individual's right to possess a firearm, that right is unconnected with service in a militia, and the individual may use the right to keep and bear arms for traditionally lawful purposes, such as self-defense within the home. *Id.* at 582 - 584, 594. It thus held "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id*. at 635.

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.

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: Other than at my hearing before the Senate Judiciary Committee, I do not believe I have ever testified under oath.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: As a former supervisor in the United States Attorney's Office for the Central District of California, as part of my supervisorial responsibilities during the period from approximately 2010 to 2014, I would review and provide feedback on court filings and briefs authored by the individuals I supervised.

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

Response: Unfortunately, I did not keep records of the cases I reviewed as a supervisor. Nor can I recall that information.

43. Have you ever confessed error to a court?

Response: To the best of my recollection, I do not believe so.

a. If so, please describe the circumstances.

Response: Not applicable—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: Nominees take an oath to speak truthfully and honestly, consistent with the Code of Conduct for United States Judges.

Senator Mike Lee
Questions for the Record
Sherilyn Peace Garnett, Nominee to the District Court for the District of California

1. How would you describe your judicial philosophy?

Response: As a sitting Los Angeles County Superior Court Judge, I apply the same methodology in every case, as follows: (1) To ensure individuals and attorneys who appear before me feel they are being heard and treated fairly, I carefully listen to their arguments, engage with them to understand the issues presented, and keep an open mind; (2) to ensure I understand the applicable rule of law, I diligently research the applicable law; (3) to ensure fairness and impartiality, I decide cases and controversies that come before me based upon applicable binding precedent, as applied to the facts of each case, and not based on any personal views; and (4) I treat each person who comes before me with dignity and respect.

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

Response: I would first look to the language of the statute and applicable Supreme Court and Ninth Circuit precedent. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), the Supreme Court explained, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Id.* at 56. "If 'the statute is clear and unambiguous, that is the end of the matter'" and "[t]here is no need to look beyond the plain meaning in order to derive the 'purpose' of the statute." *Tang v. Reno*, 77 F.3d 1194, 1196 - 97 (9th Cir. 1996) (internal citations omitted); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms"). If the plain language of the statute and precedent do not resolve the question, I would employ other interpretative methods, such as by considering Supreme Court and Ninth Circuit precedent interpreting analogous language in statutory provisions within the same statutory scheme or analogous language in other statutes. If that still does not answer the question, I would consult relevant persuasive authority from other circuits, which are not binding on me. As a last resort, I would consider legislative history, but would do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

Response: If confirmed as a federal district court judge and a case or controversy came before me involving interpretation of a constitutional provision, I would review the constitutional provision at issue and applicable Supreme Court and Ninth Circuit precedent interpreting the particular provision. In the rare instance where I was confronted with a question of first impression involving a constitutional provision

that had not yet been interpreted by the Supreme Court or Ninth Circuit, I would look to Supreme Court and Ninth Circuit precedent for the interpretive method to be applied to the provision and interpret the text in a manner consistent with the method used. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning of the Second Amendment. *Id.* at 576 - 77 (stating "[i]n interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.") (internal quotations and citations omitted).

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

Response: If confirmed to the district court and presented with a case or controversy requiring me to interpret a Constitutional provision, I would be bound to follow Supreme Court and Ninth Circuit precedent and the way they have interpreted the provision. The Supreme Court has provided guidance in interpreting particular constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 - 77 (2008), the Supreme Court evaluated the relevant text of the Second Amendment by looking to the original public meaning at the time of the founding.

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: My approach to reading statutes is as follows: I first read the language of the statute. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), the Supreme Court explained, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Id.* at 56. "If 'the statute is clear and unambiguous, that is the end of the matter'" and "[t]here is no need to look beyond the plain meaning in order to derive the 'purpose' of the statute." *Tang v. Reno*, 77 F.3d 1194, 1196 - 97 (9th Cir. 1996) (internal citations omitted); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms"). If confirmed to the federal district court, I would apply binding Supreme Court and Ninth Circuit precedent to any issues presented concerning the reading of a statute and the weight such precedent gives to the plain meaning of the statutory text.

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: In *Bostock v. Clayton County, Georgia*, 140 S. Ct 1731 (2020), the Supreme Court stated:

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

Id. at 1738 (citation omitted).

6. What are the constitutional requirements for standing?

Response: In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 - 81 (2000), the Supreme Court stated, ". . . to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

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

Response: In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that Congress has implied powers under the Necessary and Proper Clause of Article I, Section 8, of the Constitution (stating Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). The Supreme Court held in *Unites States v. Comstock*, 560 U.S. 126 (2010):

> [T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," which means that "[e]very law enacted by Congress must be based on one or more of" those powers. But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise." Chief Justice Marshall emphasized that the word "necessary" does not mean "absolutely necessary."

Id. at 133 - 34 (internal citations omitted). The Supreme Court has identified several implied powers held by Congress. Such powers include the power to create a national bank, *M'Culloch v. Maryland,* 17 U.S. 316 (1819); the power to enact criminal laws, *United States v. Fox*, 95 U.S. 670, 672 (1877); the power to designate treasury notes as legal tender, *The Legal Tender Cases*, 110 U.S. 421, 450 (1884); the "power to enact legislation for the effective regulation of foreign affairs," *Perez v. Brownell*, 356 U.S. 44, 57 (1958), overruled in part on other grounds by *Afroyim v. Rusk*, 387 U.S. 253 (1967); the power to imprison, *Comstock*, 560 U.S. at 129 - 30, 146; and the power to require the registration of military sex offenders, *United States v. Kebodeaux*, 570 U.S. 387, 394 - 95 (2013).

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

Response: In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012), the Supreme Court stated, "the question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Accordingly, whether Congress fails to recite a particular enumerated power when enacting a law or cites to the wrong enumerated power does not control the law's constitutionality. *See Id.* at 569 - 570 (dismissing the argument that Congress' use of the wrong label for a law or failure to identify the source of its authority for the law should result in the law being struck down). Instead, a court must determine whether a law is within the scope of Congress' enumerated powers regardless of whether Congress referred to any specific enumerated power in passing the law. *Id.* at 570.

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

Response: The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997) determined the Constitution protects rights that are not expressly enumerated in the Constitution. The Supreme Court stated, "we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if there were sacrificed.'" *Id*. at 720 - 721 (citations and internal quotation marks omitted). The Court further stated:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the right to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381

U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); to use contraception, *ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278 - 279, 110 S. Ct., at 2851 - 2852.

Id. at 719 - 20.

10. What rights are protected under substantive due process?

Response: Please see the answer to question 9 above. Fundamental rights are protected under substantive due process – namely, those rights that are objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if there were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720 - 21 (1997) (citations and internal quotation marks omitted).

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

Response: As a sitting judge, and if confirmed as a federal district court judge, it is my duty to apply binding precedent to cases or controversies that come before me, without regard to any personal beliefs. It is my understanding that *Lochner v. New York*, 198 U.S. 45 (1905) ("*Lochner*") has been largely overturned by subsequent case law, including *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and is no longer binding precedent. *See, e.g. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (recognizing that *Lochner* was overruled by stating "[f]ourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), signaled the demise of *Lochner* by overruling *Adkins" v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923)); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (stating "[t]he doctrine that prevailed in *Lochner* … that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded").

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 Indian Tribes." Article I, § 8, cl. 3. In *U.S. v. Lopez*, 514 U.S. 549, 558 - 559 (1995), the Supreme Court stated, "[o]ur precedents read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affecting interstate commerce.'"

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

Response: The Supreme Court has explained that a group of people qualify as a "suspect class" if the group "possess[es] an immutable characteristic determined solely by the accident of birth," or 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." *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974). A group of individuals classified by race, religion, national origin, or alienage is a suspect class. *See Graham v. Richardson*, 403 U.S. 365, 371 - 72 (1971); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).

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

Response: In *Morrison v. Olson*, 487 U.S. 654, 693 (1998) the Supreme Court explained, "…the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"

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 as a federal district court judge and if presented with a case or controversy involving the issue of whether one branch assumed an authority not granted it by the text of the Constitution, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: A judge must decide a case or controversy based on the applicable law and the facts presented, and personal views and sympathies should play no role in deciding the outcome of the case or controversy.

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

Response: Invalidating a law that is, in fact, constitutional, and upholding a law that is, in fact, unconstitutional, are both not appropriate and undesirable.

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

downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine regarding my personal opinions, if any, concerning this question. If confirmed to be a federal district court judge, my duty is to consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: I understand the concept of "judicial review" to mean under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) the authority of courts to hear and decide cases regarding the legality of actions of the executive and legislative branches of government. I understand the concept of "judicial supremacy" to refer to the idea that the Supreme Court is the final, authoritative interpreter of constitutional issues. *See id.* at 146 - 47.

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: Article VI of the Constitution states, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Elected officials take an oath to follow the Constitution. The Supreme Court has held, "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: The role of judging is to decide cases or controversies by applying the facts to applicable precedent, and not to enforce laws, make policy, or decide cases based on personal opinions.

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: As a sitting judge in Los Angeles County Superior Court, my duty is to apply legal precedent from the higher courts to the facts of the cases and controversies presented. If confirmed as a federal district court judge, my duty would remain the same. As a lower court judge, I am duty-bound to follow binding precedent, not to make or question the law. If confirmed as a district court judge for the Central District of California, I will apply applicable Supreme Court and Ninth Circuit precedent to the facts presented in each case and controversy.

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

Response: As a sitting Los Angeles County Superior Court Judge, the state law, legal precedent, and court rules dictate that I consider certain factors in my sentencing decisions. Race, gender, nationality, etc., are not among the factors to be considered. If confirmed to the federal district court, I would consider the factors set forth in Title 18, United States Code, Section 3553(a) in determining an appropriate sentence. See *Nelson v. U.S.,* 555 U.S. 350, 351 (2009) (stating "the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter"). Further, Section 5H1.10 of the advisory United States Sentencing Guidelines provides that "Race, sex, national origin, creed, religion, and socio-economic status" are factors that are "not relevant to the determination of sentences." If confirmed to the federal district court, I will faithfully and impartially apply the Section 3553(a) factors, consider the advisory guidelines, as well as the arguments of the parties and binding precedent, in all my sentencing decisions.

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 or aware of the context or circumstances of the Biden Administration's characterization of the word "equity." I do not have a personal definition of the word "equity." "Equity" is defined as "justice according to natural law or right specifically: freedom from bias or favoritism." ("Equity." 2022 In Merriam-Webster.com. Retrieved February 23, 2022, from https://www.merriam-webster.com/dictionary/equity.)

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

Response: "Equity" is defined as "justice according to natural law or right specifically: freedom from bias or favoritism." ("Equity." 2022. In Merriam-Webster.com. Retrieved February 23, 2022, from https://www.merriam-webster.com/dictionary/equity.) "Equality" is defined as "the quality or state of being equal" ("Equality." 2022. In Merriam-Webster.com. Retrieved February 23, 2022, from https://www.merriam-webster.com/dictionary/equality.)

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

Response: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citation omitted), the Supreme Court stated, "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."

27. How do you define "systemic racism?"

Response: I do not have a personal definition of the term "systemic racism." I am aware of public commentary and debate concerning perceived racial biases, disparities, and discrimination in the criminal justice system. I also am aware that the Supreme Court acknowledged in *Kimbrough v. United States*, 552 U.S. 85 (2007), the United States Sentencing Commission's conclusion that the 100 to 1 ratio, which treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine

for sentencing purposes, "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." *Id.* at 96 (internal quotation marks omitted). If confirmed to the federal district court and presented with a case or controversy involving claims of systemic racism or racial discrimination, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent Further, as a sitting Los Angeles Superior Court Judge, I have treated every individual who has come before me fairly and impartially, without regard to their race, and will continue to do so if confirmed as a federal district court judge.

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

Response: I do not have a personal definition of the term "critical race theory." Nor have I researched or otherwise studied this theory. The definition of "critical race theory" contained in Black's Law Dictionary (11th ed. 2019) is a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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 Ben Sasse
Questions for the Record for Sherilyn Peace Garnett
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
February 16, 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. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: As a sitting Los Angeles County Superior Court Judge, I apply the same methodology in every case, as follows: (1) To ensure individuals and attorneys who appear before me feel they are being heard and treated fairly, I carefully listen to their arguments, engage with them to understand the issues presented, and keep an open mind; (2) to ensure I understand the applicable rule of law, I diligently research the applicable law; (3) to ensure fairness and impartiality, I decide cases and controversies that come before me based upon applicable binding precedent, as applied to the facts of each case, and not based on any personal views; and (4) I treat each person who comes before me with dignity and respect.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines the term "originalism" as follows: "1. The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect . . . . 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I do not subscribe to a particular label. Instead, my duty is to fairly and impartially apply binding precedent from the higher courts to the facts presented in cases and controversies that come before me without regard to any personal beliefs. If confirmed to the district court, I will continue to abide by that duty and apply binding Supreme Court and Ninth Circuit precedent, as well as the methods of interpretation and canons of construction used by these higher

courts when interpreting Constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), the Supreme Court evaluated the relevant text of the Second Amendment by looking to the original public meaning at the time of the founding.

5. Would you describe yourself as a textualist?

Response: Black's Law Dictionary (11th ed. 2019) defines the doctrine of textualism as follows: "The doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I do not subscribe to labels, such as a "textualist." My duty as a sitting judge is to apply binding precedent of the higher courts to the facts of each case and controversy. For example, if presented with a case or controversy involving the meaning of a statutory text, I would first read the language of the statute. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), the Supreme Court explained, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Id.*, at 56. "If 'the statute is clear and unambiguous, that is the end of the matter'" and "[t]here is no need to look beyond the plain meaning in order to derive the 'purpose' of the statute." *Tang v. Reno*, 77 F.3d 1194, 1196 - 1197 (9th Cir. 1996); see also *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms"). If confirmed to the district court, I would apply binding Supreme Court and Ninth Circuit precedent to any issues presented concerning the reading of statutory text.

6. 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 (11th ed. 2019) defines the term "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values. While many authorities use the terms living constitutionalism and nonoriginalism interchangeably, others view living constitutionalism as a form of nonoriginalism that values interpretive conformity with changed circumstances and norms more greatly than do other forms of nonoriginalism." As a sitting Los Angeles Superior Court Judge and nominee to the federal district court, I do not subscribe to a particular label. Instead, my duty is to fairly and impartially apply binding precedent from the higher courts to the material facts presented in cases and controversies that come before me without regard to any personal beliefs. If confirmed to the district court, I will continue to abide by that duty and apply binding Supreme Court and Ninth Circuit precedent, as well as the methods of interpretation and canons of instruction used by these higher courts when interpreting Constitutional provisions.

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

Response: There is no individual Justice whose jurisprudence I admire the most.

8. **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: In *United States v. Mandel*, 914 F.3d 1215, 1221 (9th Cir. 1990), a panel of the Ninth Circuit Court of Appeals held, "we may reconsider an earlier Circuit precedent only when 'an intervening Supreme Court decision undermines an existing precedent ... and both cases are closely on point.'" Further, such reconsideration occurs only pursuant to en banc review. *Id.*

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

Response: Please see response to Question 8.

10. **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: When interpreting a statutory text, the approach I follow as a sitting judge and would follow if confirmed as a federal district court judge is I first look to the legal text to determine if it is clear and answers the question at issue. If it is not clear, I apply binding precedent from the appellate and supreme courts to address the issue, as well as the methods of interpretation and canons of instruction used by these higher courts. If that does not answer the question, I consider persuasive authority from other courts, which are not binding on me. As a last resort, I would consider legislative history, but would do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). I am unfamiliar with the meaning of the phrase "general principles of justice," as used in this question. To the extent it refers to relying on my own personal views or beliefs or relying on popular views of justice, such notions play no role in my decisions.

11. **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 factors that a federal district judge may appropriately consider when sentencing a defendant are set forth in Title 18, United States Code, Section 3553(a). Although "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is one of the enumerated factors to be considered in imposing a sentence under 3553(a), the need to correct for perceived racial disparities in sentencing is not. Further, Section 5H1.10 of the advisory

United States Sentencing Guidelines provides that "Race, sex, national origin, creed, religion, and socio-economic status" are factors that are "not relevant to the determination of sentences." If confirmed to the federal district court, I will faithfully and impartially apply the Section 3553(a) factors, consider the advisory guidelines, as well as the arguments of the parties and binding precedent, in all my sentencing decisions.

Questions from Senator Thom Tillis
for Sherilyn Peace Garnett
Nominee to be United States District Judge for
the Central District of California

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

   Response: Yes.

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

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

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No. Policy decisions should be left to policymakers and legislators.

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

   Response: As a sitting Los Angeles County Superior Court Judge, and nominee to the district court, my duty is to apply binding precedent to the material facts presented in each case or controversy, regardless of the outcome. A desirable outcome is one that is dictated by the application of the law to the facts and not based on the personal views of the parties or the judge.

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

   Response: No. A judge's duty is to interpret and apply the law to the individual facts of the case or controversy pending before the judge. Politics or policy preferences should play no role in interpreting and applying the law.

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

Response: If confirmed, I will faithfully follow Supreme Court precedent. The United Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), held that the Second Amendment confers "an individual right to keep and bear arms," and the Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) held that right is fundamental and incorporated against the States by way of the Fourteenth Amendment.

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

Response: If confirmed as a federal district court judge and I am presented with a case or controversy involving this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: If confirmed as a district court judge, I would follow the process set forth in Supreme Court and Ninth Circuit precedent. The Supreme Court has stated, "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). As a sitting judge, and if confirmed as a federal district court judge, and the issue of qualified immunity were to come before me in a case or controversy, I would consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is inappropriate for me to opine on whether qualified immunity jurisprudence provides sufficient protections for law enforcement officers. My duty as a judge is to apply binding precedent to the material facts of the case or controversy pending before me without regard to any personal opinions, if any, on the topic.

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

Response: Please see my responses 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: I have not dealt with the issue of patent eligibility in my combined 25 years of experience serving as an attorney and judge. If confirmed to the district court, I would be bound to apply Supreme Court and Ninth Circuit precedent.

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

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or

controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally

occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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 *BioTechCo* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court judge, I have the duty and obligation not to prejudge any case or

controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. I must therefore respectfully decline to provide my thoughts on how I would view this hypothetical. If confirmed as a federal district court judge and if presented with a case or controversy raising this issue, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to comment on the Supreme Court's current jurisprudence surrounding issues that may come before me. If confirmed to the district court and I were presented with a case or controversy involving the issue of patent eligibility, I would apply the legal framework set forth in *Alice Corp. Pty. Ltd. v. CLS Bank Intern*, 573 U.S. 208 (2014) and other binding precedent to the patent eligibility issue.

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: I do not recall having handled any cases involving copyrights during the total of four years I served as a civil litigator. I may have performed research on one or more cases involving copyright while I clerked for a district court judge, but do not recall the details. If confirmed to the district court and faced with a case or controversy involving copyright law, I would listen to the parties' arguments with an open-mind, diligently research that area of the law, and apply binding Supreme Court and Ninth Circuit precedent to the material facts presented.

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

Response: I have not dealt with the Digital Millennium Copyright Act in my combined nearly 25 years of experience serving as an attorney and judge. If

confirmed to the district court and faced with a case or controversy involving this Act, I would listen to the parties' arguments with an open-mind, diligently research that area of the law, and apply binding Supreme Court and Ninth Circuit precedent to the material facts presented.

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

Response: I have not dealt with the intermediary liability for online service providers in my combined nearly 25 years of experience serving as an attorney and judge. If confirmed to the district court and faced with a case or controversy involving this question, I would listen to the parties' arguments with an open-mind, diligently research that area of the law, and apply binding Supreme Court and Ninth Circuit precedent to the material facts presented.

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

Response: I have some experience as an Assistant United States Attorney handling federal criminal prosecutions and investigations in which freedom of speech issues were raised or implicated. I have not dealt with freedom of speech, as it relates to intellectual property, in my combined nearly 25 years of experience serving as an attorney and judge.

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

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

Response: The approach I follow as a sitting judge and would follow if confirmed as a federal district court judge is I first look to the legal text to determine if it is clear and answers the question at issue. If it is ambiguous, I apply binding precedent from the appellate and supreme courts to address the issue, as well as the methods of interpretation and canons of instruction used by these higher courts. If that does not answer the question, I consider persuasive authority from other courts, which are not

binding on me. As a last resort, I would consider legislative history, but would do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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: In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the Supreme Court held "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Id.*

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 sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. If confirmed as a federal district court judge and I am presented with a case or controversy involving this issue, I will consider the parties' arguments and evidence, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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: Until new legislation is passed, as a sitting Los Angeles County Superior Court Judge and if confirmed to the federal district court, I will continue to apply existing binding precedent faithfully and impartially to the cases and controversies that come before me.

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: If confirmed, as a federal district court judge, I am bound to follow existing Supreme Court and Ninth Circuit precedent.

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: If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent on the issue. In the Ninth Circuit, a federal district court may dismiss a case for forum shopping or judge shopping. In *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 981 (9th Cir. 2011), a panel of the Ninth Circuit Court of Appeals stated, "[f]orum shopping refers to '[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.'" (quoting Black's Law Dictionary 726 (9th ed. 2009)). "To avoid forum shopping, courts may consider the vexatious or reactive nature of either the federal or the state litigation." *Id.* (internal quotations omitted). The Court further stated, we have affirmed "dismissal when it was readily apparent that the federal plaintiff was engaged in forum shopping." *Id.*; *see also Hernandez v. City of El Monte*, 138 F.3d 383, 398 (9th Cir. 1998) ("Our case law supports the proposition that a district court has the inherent power sua sponte to dismiss an action for judge-shopping.").

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I would continue to faithfully follow the law on venue issues.

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: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and

impartial in every matter. My duty as a judge is to interpret and apply the law to the individual facts of the case or controversy pending before me.

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

Response: As a sitting Los Angeles Superior Court Judge and, if confirmed to the district court, I would continue to decide all cases before me fairly, impartially, and consistent with applicable binding precedent.

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

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

Response: As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this question. If confirmed as a federal district court judge, and this issue comes before me in a case or controversy, I will consider the parties' arguments, diligently research the relevant law, make factual findings as is appropriate, and apply the law to the material facts, as dictated by binding precedent.

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 19a.

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 issue for policy makers. As a sitting Los Angeles County Superior Court Judge and nominee to the federal district court, it is not appropriate for me to opine on this question.

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 sitting Los Angeles County Superior Court and nominee to the district court, it is not appropriate for me to opine on this question. Further, I have the duty and obligation not to prejudge any case or controversy that may come before me, and to remain open-minded, fair, and impartial in every matter. My duty as a judge is to interpret and apply the law to the material facts of each case or controversy

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

Response: Please see my response to Question 21a.

Questions for the Record for Sherilyn Peace Garnett
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.