Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Trina Thompson
Judicial Nominee to the United States District Court for the Northern 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**:** I am not familiar with this term nor am I aware of its use by the 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**:** The solemn duty of a judge is to set aside personal views and decide cases in strict adherence with precedent. If I am confirmed as a federal district court judge, I will follow all binding United States Supreme Court and Ninth Circuit precedent, irrespective of any personal views I might hold as to whether a particular case was correctly decided. As a judicial nominee, it would not be appropriate for me to pass a value judgment on a Supreme Court opinion because I would not want to create the appearance that I had prejudged any matter that could come before me. I can say that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided since it is exceedingly unlikely that *de jure* racial segregation in schools or miscegenation laws would be the subject of any case before the federal court.

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

   Response**:** I am not familiar with the context in which Judge Ketanji Brown Jackson made this statement. The term "living constitution" has a variety of meanings within academia and it has different meanings in different contexts. Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism" as "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." The Constitution has an enduring quality. If confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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

   Response**:** In the *Merriam-Webster* dictionary the term "equity" is defined as "the state or quality of being just and fair." Judicial decisions should be based solely upon the discrete facts of a particular case and the applicable law and precedent. Judicial decisions should not take into consideration principles of "social equity" unless such consideration is required by a statute or binding precedent. If a case involving these terms came before me, I would look to the text of the relevant statute and to relevant Supreme Court and Ninth Circuit precedents to inform my understanding of the terms.

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**:** As a sitting state court trial judge, I have taken an oath to "faithfully and impartially discharge and perform all duties, to support and to defend the Constitution of the United States." If confirmed as a federal district court judge, I will be duty bound by Supreme Court and Ninth Circuit precedent. I will continue to approach each case with an open mind and faithfully and impartially apply the law to the facts of each case.

6. **Is climate change real?**

   Response**:** As a judicial nominee, it would not be appropriate for me to comment on a policy question or issue that could come before me. Specifically, I would not want to create an impression that I had taken a side regarding a political or social issue or that I have prejudged the facts regarding an issue that could come before me.

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

   Response**:** Yes, the Supreme Court has held that parents have a fundamental right to direct the upbringing and education of their children. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972) and *Meyer v. Nebraska,* 262 U.S. 390 (1923).

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

Response**:** The Supreme Court has held that considering testimony by scientific experts is relevant to the question of whether a specific substance causes cancer in humans. *GE v. Joiner,* 522 U.S. 136 (1977). In *Messick v. Novartis Pharms. Corp*, 747 F.3d 1193, 1197 (9th Cir. 2014), the Ninth Circuit held scientific evidence is relevant to determining whether a specific substance caused cancer in a human.

[T]he district court must act as a "gatekeeper" and screen the experts' testimony under the standards set by the Federal Rules of Evidence and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc,* 509 U.S. 579 (1993). Federal Rule of Evidence 702, which governs this inquiry, provides that expert opinion testimony is admissible if: (1) the witness is qualified to testify about the topics she intends to address; (2) the expert's specialized knowledge will help the jury "to understand the evidence or to determine a fact in issue"; (3) "the testimony is based on sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods"; and (5) "the expert has reliably applied the principles and methods to the facts of the case." The burden is on the plaintiff to establish the admissibility of their experts' testimony. See *Building Industry Association of Washington v. Washington State Building Code Council,* 683 F.3d 1144, 1154 (9th Cir. 2012).

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

Response**:** The Supreme Court stated in P*lanned Parenthood v. Casey,* 505 U.S. 833, 860 (1992), that "advances in neonatal care have advanced viability to a point somewhat earlier" than the point of viability identified in *Roe v. Wade*. The Supreme Court noted that viability occurred at approximately 23 to 24 weeks as compared to 28 weeks in 1973 when *Roe* was decided. *Id*. The Court further stated viability may occur "at some moment even slightly earlier in pregnancy… if fetal respiratory capacity can somehow be enhanced in the future." *Id.*

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

Response**:** The Supreme Court stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Understanding that the question of when human life begins is a matter of passionate legal, religious, scientific, moral and philosophical debate, it would not be appropriate for me to respond to this question. If faced with a case or controversy raising this question, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding precedent.

11. Can someone change his or her biological sex?

Response**:** Questions regarding gender identity are matters of current political, legal, and societal debate. As a sitting judge and a judicial nominee, I do not wish to prejudge any issue that might come before me. If confirmed as a federal district court judge, if faced

with a case or controversy raising this question, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding precedent.

12. Is threatening Supreme Court justices right or wrong?

Response**:** Although the First Amendment generally prevents the government from regulating speech, the United States Supreme Court has held that the First Amendment "permits a State to ban a true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003). In addition, 18 U.S.C. § 875 - 877, criminalizes certain threatening communications.

A "true threat" is a statement wherein 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). The speaker need not intend to carry out the threat. *Id.* at 359-60. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

If confirmed, I would follow precedent regarding the proper scope of protected speech under the First Amendment and any criminal statutory violations based upon the statutory language and Supreme Court precedent.

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

Response**:** Pursuant to Article II of the Constitution, the President has the exclusive authority to remove his appointees from office, but the heads of independent and statutorily protected federal agencies can only be removed for cause. *Collins v. Yellen,* 141 S. Ct. 1761 (2021), *Myers v. United States*, 272 U.S. 52 (1926). When a statute does not limit the President's power to remove an agency head, courts generally presume that the officer serves at the President's pleasure. *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021).

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**:** As a sitting judge, it is improper for me to weigh in on policy matters, such as how a federal legislature, state legislature or local municipality should allocate their funding. If confirmed as a federal district court judge, I would handle only the cases and controversies that come before me, and faithfully and impartially apply the law to the facts of each case.

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

Response**:** As a sitting judge, it is improper for me to weigh in on policy matters, such as how a mayor or local municipality should allocate their funding. This is a question for policymakers to consider. If confirmed as a federal district court judge, I would handle only the cases and controversies that come before me, and it would be imprudent for me to opine on how municipalities allocate their funds.

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**:** I understand the question to be asking about pretrial detention decisions. Specifically, 18 U.S.C. § 3142 governs release or detention of a defendant pending trial. Under that statute, "[t]he judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," consider the following factors: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the person; (3) the history and characteristics of the person (including criminal history and physical condition); and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g)(1)-(4). A court would be required to take into account prior gun crimes under § 3142(g)(3) in determining whether the defendant may be a danger to the community if released. In addition, there is a presumption that no condition will reasonably assure the appearance of the defendant in certain cases. 18 U.S.C. § 3142(e). If confirmed, I will follow and faithfully apply the factors Congress set forth in 18 U.S.C. § 3142(g), including the potential danger to any person or to the community that would be posed by the person's release. In addition, I would stay abreast of any statutory amendments and Supreme Court and Ninth Circuit precedent affecting the weighing process for pretrial release decisions.

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

Response**:** In *District of Columbia v. Heller,* the Supreme Court held that "on the basis of both text and history" the Second Amendment protects an "individual right to keep and bear arms." 554 U.S. 570, 595 (2008). While the Second Amendment right is not unlimited, see id., it protects the right to keep an operable handgun in one's home for purposes of immediate self-defense. *Id.* at 635. The right to keep and bear arms is a fundamental right, and the Supreme Court has extended *Heller* to the states. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Heller requires 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. *District of Columbia v. Heller,* 554 U.S. 570, 629-630 (2008).

The Ninth Circuit requires a two-step process for analyzing whether a regulation or statute infringes on the Second Amendment right. First, courts ask if the challenged law affects conduct that is protected by the Second Amendment. *Silvester v Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Courts base that determination on the "'historical understanding of the scope of the right.'" *Id.* (quoting *Helle*r, 554 U.S. at 625). *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) petition for certiorari filed, May 11, 2021. 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"—courts move to the second step of the analysis and determine the appropriate level of scrutiny. *Silvester*, 843 F.3d at 821. Courts 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, courts apply intermediate scrutiny. *Young v. Hawaii,* 992 F.3d 765, 784 (9th Cir. 2021).

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

Response**:** Title III of the Americans with Disabilities Act prohibits discrimination on the basis of disability in the activities of places of public accommodations. I am unaware of any Supreme Court or Ninth Circuit precedent that definitively answers this question. As a sitting judge and a judicial nominee, I do not wish to prejudge any issue that might come before me. If confirmed as a federal district court judge and faced with a case or controversy raising this question, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding precedent.

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

Response**:** As a sitting judge and a judicial nominee, it is not appropriate for me to opine on the outcome of a hypothetical issue. If confirmed as a federal district court judge and faced with a case or controversy raising this question, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding Supreme Court and Ninth Circuit 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**:** The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b).

The Supreme Court held in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S. Ct. 2367, 2383 (2020), that RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections."

A litigant suing under RFRA must demonstrate that it has suffered a concrete and particularized injury which is: (1) actual or imminent; (2) caused by or fairly traceable to an act that the litigant challenges in the instant litigation; and (3) redressable by the court. See, e.g., *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014), (a corporation is a citizen with standing to bring a claim under RFRA).

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

Response**:** Under the Religious Freedom Restoration Act (RFRA), a "substantial burden" on the exercise of religion is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Fazaga v. Fed. Bureau of Investigation,* 965 F.3d 1015, 1061 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2720 (2021*), see also Oklevueha Native Am. Church of Haw., Inc. v. Lynch,* 828 F.3d 1012, 1016 (9th Cir. 2016); 42 USCA § 2000bb.

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 the context in which Judge Stephen Reinhardt made this statement. Judges are expected to perform the duties of the office fairly, impartially, and diligently. As a sitting state trial court judge, I adhere to the rules of judicial conduct. If confirmed, I will continue to diligently research the law and strictly adhere to Supreme Court and Ninth Circuit precedent. *See,* 28 U.S.C. § 453 and Canon 3, Code of Conduct for Unites States Judges.

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 general rule, there is no constitutional right to counsel in civil cases unless the litigant's physical liberty is at stake. *Lassiter v. Department of Social Services of Durham County, North Carolina,* 452 U.S. 1825 (1981). The outcomes of legal issues are often heavily dependent on the specific facts in the record. As a current state trial court judge, and federal district court nominee, it is not appropriate for me to comment on a hypothetical case or to prejudge a matter that could come before me

23. Do Blaine Amendments violate the Constitution?

Response**:** The Supreme Court ruled in, *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) that a state-based scholarship program that provides public funds to allow students to attend private schools cannot discriminate against religious schools under the Free Exercise Clause of the Constitution. If confirmed and a matter comes before me involving state-based Blaine Amendments, I will faithfully and fully follow all Supreme Court and Ninth Circuit precedent.

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

Response**:** The First Amendment to the United States Constitution protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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

Response**:** The Supreme Court has defined "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942). See also *Mahanoy Area Sch. Dist. v. B. L.,* 141 S. Ct. 2038, 2046 (2021).

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

Response**:** The United States Supreme Court held in *Virginia v. Black* that a "true threat" "encompass[es] 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." 538 U.S. 343, 359 (2003). The speaker need not intend to carry out the threat. *Id.* at 359-60. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a 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 January 30, 2021, I submitted an application to Senator Dianne Feinstein for a position on the United States District Court for the Northern District of California. On March 19, 2021, I was invited to interview with the Chair of Senarot Feinstein's Judicial Advisory Committee. On March 30, 2021, I interviewed with the Committee's Chair. My understanding is that Senator Feinstein then recommended me to the White House. On July 30, 2021, I interviewed with attorneys from the White House Counsel's Office. On August 5, 2021, the White House Counsel's Office advised that my name would be submitted for vetting by the United States Department of Justice. Since that date, I have communicated with officials from the Office of Legal Policy at the Department of Justice. On November 3, 2021, President Biden announced his intent to nominate me and my nomination was submitted to the Senate.

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**:** I interviewed with attorneys from the White House Counsel's Office on July 30, 2021. I was in trial during the final four months of the year and I do not have the exact dates of subsequent communications with White House staff or the Justice Department regarding my nomination. I was in regular contact with both offices during the vetting process and in preparation for my Senate Judiciary Committee hearing.

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

Response**:** On February 23, 2022, I received these questions from the Office of Legal Policy (OLP). After reviewing the questions and relevant case law, I drafted my answers. OLP provided feedback on my draft, which I considered, before I submitted my final responses to the Committee.

Senator Marsha Blackburn
Questions for the Record to Judge Trina Thompson
Nominee to be United States District Judge for the Northern District of California

1. **During your nomination hearing before the Judiciary Committee, I asked about your role as a defense attorney for Kevin Sawyer during his 1997 trial and your argument at the time about the unreliability of DNA testing methods. Specifically, I asked how prosecutors can feel comfortable that you will make fair and impartial rulings on the admissibility of DNA evidence, given your prior statements. Could you elaborate on your answer?**

   Response**:** Forensic DNA analysis has vastly evolved since the late 1990s. At that time, there were some limitations and challenges for forensic labs dealing with highly degraded or low template DNA samples. As a defense attorney, it was my obligation pursuant to the Sixth Amendment to provide my clients with all legally available defenses. *Strickland v. Washington,* 466 U.S. 668 (1984). If confirmed, I would apply *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993), in which the U.S. Supreme Court held that Rule 702 of the Federal Rules of Evidence ("FRE") requires district judges to be gatekeepers for proposed scientific evidence by assuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Accordingly, an expert's testimony under FRE 702 must be based on scientific knowledge that is grounded "in the methods and procedures of science," and consists of more than just "subjective belief or unsupported speculation." Id. at 590-91.

   As a judicial officer, I have taken a judicial oath to administer justice and to discharge my duties faithfully and impartially under the Constitution and laws of the United States. 28 U.S.C. § 453. If I am confirmed as a federal district court judge, I will do the same and I will follow all binding United States Supreme Court and Ninth Circuit precedent.

2. **In 2018, you delivered a presentation called "White Supremacy in Constitution Law" at San Francisco State University's Constitution Day Conference. This presentation included a discussion of "the most astonishingly racist Supreme Court rulings in American history," and included on that list the Supreme Court's 2018 decision in *Trump v. Hawaii*. Do you disagree with the Supreme Court's decision in that case?**

   Response**:** As a panelist, I did not choose the title of the conference session. My role was to provide the language of key Constitutional provisions, like the 13th Amendment, and the holdings in seminal cases; namely, *Dred Scott v. Sanford, Plessy v. Ferguson, Brown v. Board of Education, Pace v. Alabama* and *Loving v. Virginia*.

   My co-panelist answered hypotheticals and responded to policy questions posed by the moderator. As a sitting state court trial judge and a federal district court nominee, it is not

appropriate for me to opine on whether a Supreme Court case was correctly decided; instead, my obligation is to faithfully follow all Supreme Court precedent.

3. **Do you believe that the ruling in *Trump v. Hawaii* was motivated in any way by racism on the part of any of the Supreme Court justices?**

   Response**:** As a judicial nominee, it would not be appropriate for me to pass a value judgment on a Supreme Court opinion because I would not want to create the appearance that I had prejudged any matter that could come before me.

   In all cases, federal judges must faithfully and impartially apply the law. If a case raising these issues were to come before me, I would carefully consider the record and the arguments presented by the parties and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

Nomination of Trina L. Thompson
to be United States District Judge for the Northern 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 drafted answers to each question based upon my own personal knowledge and research. I submitted draft answers to the Office of Legal Policy for feedback, and after receiving 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 Trina Lynn Thompson,
Nominee for the Northern District of California

I. Directions

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

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

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

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

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

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

II. Questions

1. **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**:** My judicial philosophy is one that rests upon judicial restraint, fairness, due process, equality and inclusion. Recognizing the principle of restraint, I am clear that judges are to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties. I

recognize that the Supreme Court has the final word and I have taken an oath to follow the tenets of the U.S. Constitution.

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 originalism as the doctrine that words of a legal instrument are to be given "the meanings they had when they were adopted; specifically, the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I do not apply labels to myself. If confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent. The Constitution has an enduring, fixed quality.

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

Response**:** The term "living constitutionalism" is not a universally agreed upon term. It means different things to different people. For some, it means that it is subject to interpretation and its meaning evolves over time.

Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism" as "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values."

The Constitution has an enduring, fixed quality. If confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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**:** Yes.

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**:** No.

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

Response: Lawmakers, just like judicial officers, are also bound to follow decisions of the United States Supreme Court when interpreting the Constitution. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) [Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referred to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* (citation omitted)].

To enable changes, the Framers drafted an amendment process into the Constitution. This amendment process is described in Article V of the Constitution. Under Article V, the process to alter the Constitution consists of proposing an amendment or amendments, and subsequent ratification. Absent Article V, there would be no Bill of Rights (the first ten amendments), and most notably, the 13th Amendment, an amendment to end slavery; the 14th amendment to require the states to adhere to the constitution; the 15th Amendment to allow newly free Black slaves (men only then) to vote; and the 19th Amendment, which gave women the right to vote.

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.

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

Response**:** Laws that discriminate against institutions or persons solely because of their religious status are subject to strict scrutiny review. *Espinoza v. Montana Dep't of Revenue,* 140 S. Ct. 2246, 2257 (2020). If such an issue would come before me, I would review Supreme Court and Ninth Circuit precedent.

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 Court held that the applicants met all of the requirements for a preliminary injunction. The applicants in this case were entitled to a preliminary injunction because they had shown:

(1) a likelihood of success on their First Amendment claims, (2) that denial of relief would lead to irreparable injury, and (3) that granting relief would not harm the public interest. The Court found that they had made a "strong" showing that the challenged restrictions violated a "minimum requirement of neutrality" by specifically naming religious entities for restrictions while allowing secular businesses categorized as "essential." Second, the Court noted that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." And finally, the Court found that the government had not demonstrated that the requested relief would harm the public, as it did not claim that attendance at the applicants' services resulted in the spread of disease. As a result, the enforcement of the restrictions on the religious services were enjoined.

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

Response**:** In *Tandon v. Newsom,* 141 S. Ct. 1294 (2021), the Supreme Court preliminarily enjoined a California COVID-19 regulation finding that the governmental regulations were not neutral and generally applicable and therefore triggered strict scrutiny under the Free Exercise Clause. The applicants in this case were entitled to a preliminary injunction because they had shown: (1) a likelihood of success on their First Amendment claims, (2) that denial of relief would lead to irreparable injury, (3) that granting relief would not harm the public interest, and (4) that it was an ongoing issue.

Applying strict scrutiny to the regulation, the Court held the petitioners were likely to succeed on their challenge on all four points. First, the Court stated that the California regulation was not likely to survive the strict scrutiny test in part because it treated comparable secular activities more favorably than at-home religious exercise. *Id.* at 1297. The reasons for why people gather should not have been a part of the analysis. Second, the Court observed that the Ninth Circuit did not conclude that those activities pose a lower risk of COVID transmission than the plaintiffs' proposed in-home religious gatherings. Third, instead of putting the burden on the state to explain why it could not safely permit at-home worshippers to gather in larger numbers, the state declared that precautions used for secular activities might not translate to the home setting. And fourth, the Court reasoned that the government could not moot a case by changing the regulations if the applicants remain under a constant threat that government officials, given the constant fluidity of COVID, could use their power to "[move] the goalposts" and retain authority to reinstate those heightened restrictions at any time. *Id.* at 1297-1298. As a result, the enforcement of the restrictions on the religious services were enjoined pending appeal.

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

Response**:** Yes.

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 Court ruled on narrow grounds that the Commission did not employ religious neutrality, violating Masterpiece owner Jack Phillips's rights to free exercise, and reversed the Commission's decision that required him to bake the cake for the same-sex couple.

The Court concluded, based in part on the comments by Colorado adjudicators, that the Commission's treatment of the baker's case violated the state's duty under the First Amendment not to base regulations on hostility to religious viewpoints. The Court concluded that these comments cast doubt on the fairness of the Commission's consideration of Phillips's claims. *Masterpiece Cakeshop r*eaffirmed the religious neutrality principle set forth in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

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**:** A religious belief is sincerely held if it is a sincere and "meaningful belief which occupies of the life of its possessor." *United States v. Seeger,* 380 U.S. 163, 176 (1965). A religious belief is sincere if it is not obviously a sham or an absurdity. *Callahan v. Woods*, 658 F. 2d 679, 683 (9th Cir. 1981). A sincerely held religious belief does not need to be held by all members of a religion. *Thomas v. Rev Bd. of Indiana Emp. Sec. Div.,* 450 U.S. 707, 715-716 (1981).

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

Response: In general, my understanding of existing doctrine is that an individual's religious beliefs are protected by the First Amendment if they are sincerely held, even if they are not consistent with the faith tradition to which they belong. *See, e.g.*, *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989) ("we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection"). Further, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (internal quotation marks and citation omitted).

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

Response**:** Please see my answer to question 13(a).

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

Response**:** It would be inappropriate for me to opine on a hypothetical. If such a case were to come before me, I would review the written and oral arguments of counsel, review and apply the Supreme Court and Ninth Circuit precedent that pertains to the individual facts of the case.

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. Morrisey-Berru*, 140 S. Ct. 2049 (2021), the issue before the Court was whether the "ministerial exception" set forth in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), precluded the teachers' discrimination claims.

Under the ministerial exception, 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."

Here, the Supreme Court applied its holding in *Hosanna-Tabor* and concluded that the First Amendment foreclosed the adjudication of the teachers' claims because the teachers performed vital religious duties. In so holding, the Court made clear that the test in *Hosanna-Tabor* should not be applied rigidly or focused solely on whether the employees in question held a clerical title, had formal religious schooling, or were practicing members of the employer's religion.

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

Response**:** In *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021), the Court determined that Philadelphia's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment. The Court held that a restriction that burdens religious liberty is not generally applicable and is subject strict scrutiny when it permits government to exempt individuals on a discretionary basis but does not extend a religious exemption to cases of religious hardship without a compelling reason.

In this case, the government, unable to articulate a compelling state interest, violated the First Amendment by conditioning the ability of a religious agency, namely, Catholic Social Services, to participate in the foster care system unless it was willing to take actions and make statements that would directly contradict the agency's religious beliefs.

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**:** *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), involved a Minnesota county ordinance requiring homes to have a modern septic system for the disposal of grey water. Members of the Amish faith filed a state court action under the Religious Land Use and Institutionalized Persons Act (RLUIPA), after they sought and were denied an exemption to the county's septic-system mandate. The Minnesota courts sided with the county, but the Supreme Court vacated the state court judgment and remanded it for further consideration in light of F*ulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021).

In his concurrence, Justice Gorsuch noted that under a RLUIPA strict-scrutiny analysis, it would not be proper to treat the county's general interest in sanitation and public health regulations as a "compelling interest" without reference to the specific application of the sanitation regulations to the litigants in this case. In other words, according to the concurrence, the Court must scrutinize the alleged harm that would be caused by a specific exemption for members of the Amish community. Justice Gorsuch further argued that the county was required to offer a compelling explanation for why it permitted exemptions to the septic-system requirement for campers, hunters, fisherman, and others, but not for Amish families.

17. **Is it be appropriate for the court to provide its employees trainings which include the following:**

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

Response**:** I am not aware of any trainings of the type described. The trainings I have participated in have been consistent with the law.

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

Response**:** I am not aware of any trainings of the type described. The trainings I have participated in have been consistent with the law.

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

Response**:** I am not aware of any trainings of the type described. The trainings I have participated in have been consistent with the law.

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

Response**:** I am not aware of any trainings of the type described. The trainings I have participated in have been consistent with the law.

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**:** I am not aware of any trainings of the type described. The trainings I have participated in offered by the Federal Judicial Institute, the National Judicial College, the Northern District of California Court and the Berkeley Judicial Institute, have been consistent with the law. I am confident that the Northern District of California Court will continue to have trainings that are consistent with the law. To the extent that I have a say in the types of trainings provided, I will commit to encourage the Court to continue to have trainings consistent with the law.

19. I**s the criminal justice system systemically racist?**

Response**:** I am aware that there is an ongoing debate about whether aspects of certain criminal justice systems lead to disparate racial outcomes. The United States Sentencing Commission concluded "that the crack/powder sentencing differential '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.'" (*See, e.g., Kimbrough v. U.S.*, 552 U.S. 85 (2007) [differential treatment of cocaine base and powder cocaine under former sentencing guidelines "yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs.... This disparity means that a major supplier of powder cocaine may receive a shorter sentence than a low-

level dealer who buys powder from the supplier but then converts it to crack"]; *U.S. v. Armstrong, 517* U.S. 456, 469 (1996)).

In addition, 18 U.S.C. 3553 acknowledges the need for federal judges to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

If confirmed as a United States District Court Judge, I would decide any case involving allegations of racism or disparate sentencing by faithfully and impartially applying Supreme Court and Ninth Circuit precedent to the individual facts of the case.

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

Response**:** I have not handled any cases involving this issue. If this issue was presented in a case before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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**:** It would be inappropriate for me to comment on this issue. As a sitting State Trial Judge and Federal District Court nominee, I am bound by Supreme Court precedent irrespective of the size.

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

Response**:** The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." See also *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that this right is fundamental and fully applicable to states and municipalities).

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. **In 2020, during your participation in the panel "Race, Racism, and Racialization in History: An Ethnic Studies Perspective" at the U.C. Berkeley American Cultures Center, you explicitly rejected one panelist's suggestion that police departments should be defunded. Nevertheless, your very next statement was "[b]ut we are talking about shifting the way we think about policing and maybe shifting the way we fund policing."**

    a. **Please elaborate on your statement regarding your proposed changes to police funding. Specifically, what functions or competencies of police departments do you believe need to be funded in greater amounts?**

    Response**:** As an academic, it is my role to engage students to think broader. Everyone has a vested interest in public safety. Students are encouraged to engage in critical analysis and debate. They are further encouraged to decide for themselves how to accomplish public safety within their own communities and to examine all sides of the issue regarding realignment.

    That question is for policymakers to consider. As a sitting state court judge and if confirmed as a United States District Court Judge, my role is to faithfully and impartially apply the law to the facts of each case that comes before me based upon Supreme Court and Ninth Circuit precedent.

    b. **Conversely, what functions of current police departments should be reduced in order to offset these proposed increases?**

    Response**:** Please see the answer to question 25(a).

26. **During this same talk, you stated your belief that "ethnic studies should be part of the curriculum beginning at elementary school."**

    a. **What is the youngest age at which you believe schoolchildren should have ethnic studies courses included as part of their elementary school curriculum?**

    Response**:** Ethnic studies in the context of this discussion is the collective and inclusive history and contributions to the United States. Whether ethnic studies, as described, should be included as part of elementary school curriculum is a decision reserved for policy makers, school superintendents and educators.

    b. **Should school districts that decline to include ethnic studies courses in their elementary school curriculum have their federal funding reduced?**

Response**:** This is a question for policy makers to consider. As a sitting judge and if confirmed as a United States District Court Judge, my role is to faithfully and impartially apply the law to the facts of each case. It would be improper for me to opine on a hypothetical case.

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

Response**:** If the issue was presented in a case before me, I would review Article II and I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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

Response**:** In general terms, prosecutorial discretion refers to the discretion exercised by a prosecutor to make a charging decision or sentencing recommendation, within the bounds of the law and taking into account the discrete facts and circumstances of a particular case.

A substantive administrative rule change refers to the adoption of a new rule with application to all cases across the board. Pursuant to 5 U.S.C. § 551 *et. seq.*, the Administrative Procedure Act governs the rule making procedures for the federal government.

If the question were to come before me whether an act constituted prosecutorial discretion or a substantive rule change, I would carefully consider the record and the arguments presented by the parties and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

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

Response**:** Congress has defined death-eligible crimes in 18 U.S.C. § 3591. It would require an act of Congress to eliminate the availability of capital punishment. Article II of the Constitution, however, grants the President the authority to issue pardons, commutations, and reprieves. U.S. Const., Art. II, Sec. 2.

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

Response**:** The district court had applied the test from *Nken v. Holder,* 556 U.S. 418, 434 (2009), listing the four traditional stay factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will

be irreparably injured absent a stay; (3) whether issues of the stay will substantially injury the other parties interested in the proceeding, and (4) where the public interest lies."

The Supreme Court nullified a nationwide injunction stating it was up to Congress to decide wither the public interest merits a residential eviction moratorium and that the Center for Disease Control (CDC) had exceeded its statutory authority. The court reasoned that CDC could implement measures that directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself. However, eviction moratoriums were found to be attenuated and exceeded the scope of the CDC's authority pursuant to 42 U.S.C. § 264(a). *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485*, 2486-2487 (2021).

Specifically, the Court stated that "[i]t is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–586 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization). It is up to Congress, not the CDC, to decide whether the public interest merits further action here. Finally, the Court further stated that "[i]f a federally imposed eviction moratorium is to continue, Congress must specifically authorize it." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 141 S. Ct. 2485, 2490 (2021)

31. **Is it your belief that everyone harbors implicit bias? Do you harbor implicit bias? Against what groups do you have a bias against?**

Response**:** During my twenty years on the bench, I have served as faculty for the local and statewide courts' continued education on access and fairness. My understanding is that implicit bias refers to the idea, supported by social science research, that all people have unconscious biases. Unconscious bias refers to attitudes and stereotypes that affect decision-making without an individual's awareness or intentional control. We all have unconscious bias that may affect our judgment and decision-making processes but with the motivation to change one can begin to reduce unconscious bias. Cultural responsiveness is the ability to learn from and relate respectfully with people of one's own culture as well as those from other cultures.

It is important that judges understand this concept and that they treat all people impartially and fairly. As a judge, I adhere to my oath and I treat everyone that appears before me fairly and impartially.

Senator Josh Hawley
Questions for the Record

Judge Trina Thompson
Nominee, U.S. District Court for the Northern District of California

1. **You have previously written and spoken extensively about bias in the judicial system. How do you define a "microaggression"?**

   Response**:** Merriam Webster's dictionary defines microaggression as that which "refers to a comment or action that is subtly and often unintentionally hostile or demeaning to a member of a minority or marginalized group."

2. **Justice Thurgood 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?**

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

      Response**:** I am not familiar with this statement. The duty of a federal judge is to apply the law impartially and faithfully in all cases, including following Supreme Court precedent.

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

   Response**:** Federal courts may abstain from hearing cases that implicate important state interests or are otherwise more properly resolved in state courts.

   Younger abstention: A federal court's decision not to interfere with an ongoing state criminal proceeding by issuing an injunction or granting declaratory relief, unless the prosecution has been brought in bad faith or merely as harassment. Under the *Younger* doctrine, federal courts of equity should not act to restrain state criminal prosecutions, absent bad faith or a patently invalid state statute. In addition, federal courts abstain from interfering in state court proceedings where those proceedings: (1) are pending at the time of filing; (2) implicate important state interests; and (3) provide an adequate opportunity for raising federal claims. See *Younger v. Harris,* 401 U.S. 37, 49-53 (1971).

   Colorado River abstention: A federal court's decision to abstain while relevant and parallel state-court proceedings are under way. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

Pullman abstention: A federal court's decision to abstain so that state courts will have an opportunity to settle an underlying state-law question whose resolution may avert the need to decide a federal constitutional question. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Burford abstention: A federal court's refusal to review a state court's decision in cases involving a complex regulatory scheme and sensitive areas of state concern. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The *Burford* doctrine presents an "extraordinary and narrow" exception to a federal court's general obligation to exercise jurisdiction. *Id.* Federal courts abstain from deciding a case where the following criteria are met: "first, that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and third, that 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).

Rooker-Feldman abstention: A federal court's decision to abstain to prevent the federal court from serving as a "de facto appellate court" from a state court judgment. Federal courts should not hear cases better heard in state courts. Similarly, the *Rooker-Feldman* doctrine is appropriate if a federal plaintiff asserts a legal wrong based upon an allegedly erroneous decision by a state court and seeks relief from the state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Thibodaux abstention: A federal court's decision to abstain so that state courts can decide difficult issues of public importance that, if decided by the federal court, could result in unnecessary friction between state and federal authorities. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). According to the *Thibodaux* abstention doctrine, federal courts abstain in cases involving unresolved state law questions where the proceedings are "intimately involved with the sovereign prerogative" of the state.

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

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

    Response**:** No. I have never worked on a legal case or representation in which I opposed a party's religious liberty claim.

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

Response**:** In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) the Supreme Court noted that courts should be "guided by the principle that '[t]he 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.'" If confirmed, I will follow Supreme Court and Ninth Circuit precedent regarding the interpretive methods used in interpreting Constitutional provisions.

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

   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**:** I would first turn to the text of the statute and evaluate its plain meaning. See *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). It if is unambiguous, I would stop there.

      If the text is ambiguous, I would next turn to a variety of potential interpretive methods to resolve the question. These could include employing canons of statutory construction, looking to Supreme Court and Ninth Circuit precedent analyzing analogous statutory provisions.

      Courts may cautiously consider legislative history where the text is ambiguous and application of canons of construction fails to resolve the ambiguity. If so, Committee Reports on a particular bill may be considered a[n] "authoritative" source in terms of discerning legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

      Response**:** Never. The Constitution is a domestic document, and the courts are not bound by the laws or judicial decisions of other nations.

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

   Response**:** The litigant must show "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). The Ninth Circuit Court of Appeals, in reliance upon Supreme Court precedent, has stated: "To 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)).

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

   Response**:** Yes, that is my understanding of the holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015).

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

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

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

    Response**:** No.

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

    Response**:** The Supreme Court decisions have provided clarity regarding the meaning of neutrality and general applicability.

    The Court has held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise," *Tandon v. Newsom,* 141 S. Ct. 1294, 1296 (2021), or "single out houses of worship for especially harsh treatment," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Nor is the neutrality requirement met when a free exercise defense is adjudicated by a body that is "hostile to the religious beliefs of affected citizens" or that acts "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018). And a law is not generally applicable when, for example, it includes "a formal

system of entirely discretionary exceptions" that are nevertheless not extended to cases of religious hardship. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877-78 (2021).

The court has stated that the inquiry does not end with an examination of facial neutrality. "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and also "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *See Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

The Court has further emphasized that "state interference" in "matters 'of faith and doctrine' … would obviously violate the free exercise of religion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) the Supreme Court opined that "[t]he members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." The court ruled that "[s]uch action interferes with the internal governance of the church." *Id.*

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

Response**:** The legal standard used to evaluate such claims depends on context but could involve application of: (1) the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1; (2) the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) 42 U.S.C. § 2000cc(a); and/or (3) the Establishment and Free Exercise Clauses of the First Amendment.

As mentioned in Q. 11, there are many ways of demonstrating "that the object or purpose of a law is the suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). The "minimum requirement of neutrality" is that a law not discriminate on its face. *Id.* Facial neutrality, however, is not determinative of discrimination since the Free Exercise Clause forbids "subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id.* at 534.

Once again, recent Supreme Court decisions have provided further elucidation of the applicable legal standard. For example, in *Tandon v. Newsom*, 141 U.S. 1294, 1296 (2021), the Court held that government regulations are not neutral and generally

applicable (and therefore will trigger strict scrutiny) whenever they treat any comparable secular activity more favorably than religious exercise. The narrow tailoring component of the strict scrutiny test requires the government to show that measures less restrictive of the religious activity cannot address the government interest behind the regulation. *Id.* at 1296-97.

Additionally, in *Masterpiece Cake Shop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that a government adjudication considering the scope of a person's free exercise rights is not neutral where government adjudicators show impermissible hostility toward the person's sincere religious beliefs. And in *Trinity Lutheran Church of Columbia v. Comer,* 137 S. Ct. 2012, 2019 (2017), the Court held that denial of a generally available government benefit solely on account of religious identity imposes a discriminatory penalty on the free exercise of religion, and that such a denial must satisfy strict scrutiny.

If confirmed as a federal district court judge, I will follow all binding Supreme Court and Ninth Circuit precedent to evaluate a claim that a state governmental action discriminates against a religious group or religious belief.

13. 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**:** Injunctions in general are authorized by Rule 65 of the Federal Rules of Civil Procedure and a federal court's equitable power. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). An "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." If a less drastic remedy is sufficient to redress the injury in question, then no recourse to the additional and extraordinary relief of an injunction is warranted. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 165 -166. (2010). If confirmed, I would follow all binding Supreme Court and Ninth Circuit precedent regarding the proper scope of available equitable remedies.

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

Response**:** A free exercise claim must be rooted in religious belief. The Court's "narrow function ... is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction," *Burwell v. Hobby Lobby Stores*, *Inc.,* 573 U.S. 682, 686 (2014).

In *Welsh v. United States*, 398 U.S. 333, 339 (1970) the Court held that "'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect'" can "come within the meaning of 'religious belief'". The Ninth Circuit has held that "the First Amendment does not extend to 'obvious shams and absurdities.'" *Callahan v.*

Woods, 658 F.2d 679, 683 (9th Cir. 1981). The question is rather whether an individual's beliefs reflect "'an honest conviction.'" *Id.*

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

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

Response**:** It is my understanding that Justice Holmes meant that the economic and moral beliefs of the judiciary are not relevant when deciding cases. I further understand this statement to mean that a judge must rule not according to his or her personal opinion but the rule of law. If confirmed, I will be duty bound to impartially apply all binding Supreme Court and Ninth Circuit 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 Superior Court Judge and U.S. District Court nominee, I am bound to follow Supreme Court precedent and it would be inappropriate for me to opine on Justice Holmes' statement or the correctness of a Supreme Court decision. I am aware, however, that *Lochner v. New York* has been abrogated and overturned and that the doctrine that prevailed in *Lochner* has long been discarded. *See Ferguson v. Skrupa*, 373 U.S, 726, 730 (1963), *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Nebbia v. New York*, 291 U.S. 502 (1934).

16. 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 understand this statement to mean that a judge must rule not according to his or her personal opinion but the rule of law. If confirmed, I will be duty bound to impartially apply all binding Supreme Court and Ninth Circuit precedent.

17. 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 Court noted that the forcible relocation policy in *Korematsu* was "morally repugnant" and that the case was "gravely wrong the day it was decided." *Trump v. Hawaii*, 138 S. Ct. at 2423 (2018). I understand the above-quoted phrase to mean that the "moral repugnance" of the forcible relocation of Japanese Americans in *Korematsu* has long been acknowledged and accepted by courts and in American society.

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

Response**:** I am unaware of any such opinions.

a. If so, what are they? I am unaware of any such opinions.

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

Response**:** Yes.

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

a. Do you agree with Judge Learned Hand?

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

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

Response (a) - (c): Judge Learned Hand's statement roughly reflects current antitrust jurisprudence involving market share and monopolization. While I am not aware of any precise market share figure that conclusively establishes whether a company has monopoly power, courts generally have required a dominant market share before monopolization is found. In *Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 480 (1992) the Court held that litigants' evidence showing that the manufacturer controlled 80% to 95% of the service market was sufficient to constitute a monopoly under standard of § 2 of the Sherman Act. The Ninth Circuit has held that a 65% market share generally establishes a prima facie case of market power. *Image Tech. Serve. Inc. v. Eastman Kodak Co*., 125 F. 3d 1195, 1206 (9th Cir. 1997).

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

Response**:** In *Erie R.R Co. v. Tompkins,* 304 U.S. 64, 78 (1938), the Supreme Court stated that "there is no federal general common law."

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

Response**:** "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, (1938). However, all states are bound by the provisions of the United States Constitution.

The rights guaranteed by state constitutions are not dependent on those guaranteed by the United States Constitution. State constitutional provisions can confer greater protections that the United States Constitution. When the terms of a state constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision and therefore, if confirmed, I would review the language of the state constitution, Supreme Court and Ninth Circuit precedent, the written and oral arguments of counsel and apply the law to facts of the case before me.

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

Response**:** Please see my answer to question 21.

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

Response**:** State constitutional provisions can confer greater protection than the United States Constitution. However, all states are bound by the provisions of the United States Constitution.

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

Response: Yes. As a sitting judge and a nominee for a federal judicial position, it would generally be inappropriate for me to comment on the merits of the Supreme Court's binding precedents, all of which I would faithfully apply as a lower court judge. It would, further, be inappropriate for me to comment on issues that might come before me or that are pending or impending in the courts.

However, the issue of de jure segregation of schools is unlikely to come before me, so I can follow the practice of prior judicial nominees and ethically state that I believe *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided.

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

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

Response: Yes. Please see my response to Question 13.

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

Response**:** Please see my response to Question 13.

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

Response**:** My understanding is that the founders of the Constitution included the principles of separation of powers, checks and balances, and federalism in order to prevent the government's overreach, provide states with autonomy and to prevent abuses of power. As stated in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power."

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

Response**:** I am proud of my work as a judicial officer while handling the high-profile Ghostship negligent murder Trial. (*People v. Matt Harris and Derick Ion Almena*, Docket 17-CR- 017349AB). The case was quasi-civil and criminal. It was the largest case handled by our courthouse and I had to resolve several constitutional law issues, including but not limited to the issuance of time released gag orders, the use of a speech relay interpreter, victim restitution issues, and trial management issues during the onset of the COVID pandemic.

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

Response**:** Federal courts are courts of limited jurisdiction. Federal courts may abstain from hearing cases that implicate important state interests or are otherwise more properly resolved in state courts. In determining whether abstention is appropriate, federal judges should be cognizant of principles of comity (the courtesy or privilege extended as a matter of deference to the states) and federalism. Please see my response in question 3.

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

Response**:** In general, an award of damages redresses past harm, whereas injunctive relief is intended to prevent future harm. If I am confirmed as a district court judge, the parties before me will assert claims and defenses as to the appropriate form of relief, and I will adjudicate the claims and defenses in accordance with Supreme Court and Ninth Circuit precedent.

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

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

Response**:** The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. Amend. I. I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent in determining questions regarding the scope of the First Amendment right.

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

Response**:** The Free Exercise Clause embraces freedom of conscience and worship. In *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court explained that freedom of worship is one aspect of the right to free exercise.

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

Response**:** Please see my responses to questions 11 and 12.

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 12.

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) "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 693 (2014). It prohibits the federal government from substantially burdening a person's free exercise of religion, even if that burden results from a rule of

general applicability, unless the government demonstrates that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1.

Under RFRA, generally applicable laws may fail the strict scrutiny test if they substantially burden free exercise. *See, e.g., Burwell*, 573 U.S. at 690-91 (holding that the Affordable Care Act's contraception mandate violated the religious freedom of the owners of a privately held company). Similarly, a generally applicable, federal criminal prohibition that substantially burdens religious practice may fail strict scrutiny if the government fails to show a compelling interest in applying the prohibition to the religious practice. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1225 (2006). RFRA applies to all federal law, and the implementation of that law, whether statutory or otherwise. *See* 42 U.S.C. § 2000bb-3(a).

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

Response**:** No.

29. 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**:** The Supreme Court has not affixed a numerical value to reasonable doubt. The Ninth Circuit's model jury instructions state that, "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." Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit 46 (2021).

30. 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 "fair-minded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

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"?

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

Response**:** (a) - (c): As a sitting judge and judicial nominee, it would be inappropriate for me to prejudge any issue that might come before me, such as the one presented by this question. As a federal district court judge, I would be bound by any precedent governing this question. If confirmed, in any case raising this issue, I will hear from the parties, research the law, make factual findings as appropriate, and apply the law consistent with binding precedent.

31. In your legal career:

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

Response**:** Over 150 cases.

b. How many have you tried as second chair?

Response**:** Approximately 8-10 cases.

c. How many depositions have you taken?

Response**:** None.

d. How many depositions have you defended?

Response: None.

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

Response**:** None.

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

Response**:** none

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

Response: For five years, from 2011 through 2016, I appeared before the U.S. Department of Justice, Office of Justice Programs quarterly as a Practitioner Member of the Coordinating Council on Juvenile Justice and Delinquency Prevention.

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

Response**:** During my 5-year tenure as a public defender, I argued all of my pretrial, trial, and post-trial motions. And during the 10 years as a sole practitioner, I argued hundreds of pretrial, trial, post-trial and sentencing motions before various trial courts throughout the state of California.

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

Response**:** I have over 15 years trial experience as a lawyer. During that time, I conducted over 100 evidentiary hearings and in limine motions, and argued each one before the assigned trial court.

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

Response**:** No.

a. If yes, please provide appropriate citations.

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

Response**:** No

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

Response**:** In *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997), the Court held that the "Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." The Court stated that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and' implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Id. at 720-21

The Court recited in Glucksberg its recognition of specific rights, including: to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's

children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).

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

Response**:** The question whether there are systemic issues in our county, including racism, is an important question for policy makers to consider.

36. 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 advocate I did not conflate my advocacy with that of my personal views. It was my duty as a Sixth Amendment lawyer to zealously and ethically present good-faith arguments and all available legal defenses regarding the client's position for the jury and courts to review.

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

Response**:** Yes.

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

Response**:** I have read the Federalist Papers and I recognize their historical importance. No one particular federalist paper has shaped my view of the law.

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

Response**:** The Supreme Court stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Understanding that the question of when human life begins is a matter of passionate legal, moral, philosophical, scientific and societal debate, it would not be appropriate for me to respond to this question except to say that consistent with my judicial oath, I am committed to faithfully and impartially applying the law in all cases.

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

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

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

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.

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

Response**:** Yes. I testified During my divorce proceeding but it is not available online or in record form.

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

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

Response**:** No.

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

Response**:** No.

c. Systemic racism?

Response**:** No.

d. Critical race theory?

Response**:** No.

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

a. Apple?

Response**:** No.

b. Amazon?

Response**:** No**.**

c. Google?

Response**:** No.

d. Facebook?

Response**:** No**.**

e. Twitter?

Response**:** No.

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

Response**:** No.

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

44. Have you ever confessed error to a court?

Response**:** No.

a. If so, please describe the circumstances.

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

Response**:** Nominees owe a duty of candor and must tell the truth as to all matters when testifying under oath before the Senate Judiciary Committee. I took an oath to tell the truth and I did so.

Senator John Kennedy
Questions for the Record to Judge Trina Thompson
Nominee to be United States District Judge for the Northern District of California

1. **Although you have served as a superior court judge for nearly two decades, you have had few opportunities to interact with cases that implicate federal law. Even more, the bulk of your experience has been on civil matters in state court.**

    a. **How has your career handling mostly non-federal matters prepared you to serve on the federal bench?**

    Response**:** The bulk of my experience has involved criminal matters. During my tenure as a sole practitioner, I had to learn how to handle complex capital litigation, how to run a law office, manage employees and personally prepare all court filings. I have been a dedicated public servant all of my life. I will bring the same tenacity, work ethic, and respect for the rule of law if I am confirmed as a Federal District Court Judge.

    As a judicial officer, I have supervised two separate courthouses, served as faculty for continued education, and handled some of the most complex criminal trials in our county. In addition, I have conducted my own research, and prepared each of my decisions without the benefit of a law clerk or research attorney.

    Finally, during the Ghostship negligent homicide trial, I reviewed briefs, oral arguments, municipal codes, and constitutional law issues throughout the trial. If confirmed, I will bring this same work ethic to the federal court.

    If there are any gaps in my experience, I will utilize the resources offered by the Federal Judicial Center, the National Judicial College, the Ninth Circuit, and the Northern District of California Court.

    b. **Please describe the ways you have prepared to hear a caseload that includes criminal matters, including those involving federal criminal law**.

    Response: Before I became a judge, I was a sole practitioner and I handled complex criminal law for 15 years. While in private practice, approximately 3 % of my caseload was in federal court. During my 20 years of experience on the bench as a state court judge, I have handled hundreds of criminal matters varying in complexity. Finally, over the course of the past three years, I have attended courses offered by the Federal Bar Association, the Berkeley Judicial Institute, the National Judicial College and Supreme Court summary seminars offered by the University of California, Berkeley Law.

2. **As a superior court judge, you have been an active advocate for political change inside and outside the classroom. Please describe the proper relationship between a federal judge and advocacy on matters of public concern.**

    Response**:** I have refrained from political activity as described by Canon 5 of the Code of Conduct for United States Judges. Although Canon 4 allows judges to teach, I have taken a sabbatical from teaching and I do not have any current plans to return in the near future.

3. **You delivered a presentation about "white supremacy in constitutional law" for San Francisco State University's 2018 Constitution Day Conference.**

a. Do you think the federal judiciary is inherently racist?

Response: No.

b. Do you think constitutional law in the United States favors one race over another?

Response**:** The course covered historical seminal cases in which individuals were treated differently due to their race. The law has evolved since *Dred Scott, Plessy v. Ferguson* and *Pace v. Alabama*. In any case presenting questions of racial bias, racial disparities, and/or racial discrimination, I would hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts consistent with binding Supreme Court and Ninth Circuit precedent.

c. Co-panelists described the *Trump v. Hawaii* decision as "astonishingly racist." Do you agree?

Response**:** As a sitting Superior Court Judge and U.S. District Court nominee, I am duty bound to follow Supreme Court precedent and it would be inappropriate for me to opine on the holding or the correctness of a Supreme Court decision. In any case presenting questions of racial bias, racial disparities, and/or racial discrimination, I would hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts consistent with binding Supreme Court and Ninth Circuit precedent.

Senator Mike Lee
Questions for the Record
Trina Thompson, Nominee to the District Court for the Northern District of California

1. How would you describe your judicial philosophy?

Response**:** My judicial philosophy is one that rests upon judicial restraint, fairness, due process, equality and inclusion. Recognizing the principle of restraint, I am clear that judges are to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties. I recognize that the Supreme Court has the final word and I have taken an oath to follow the tenets of the U.S. Constitution.

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

Response**:** I first look at the text of the statute. If the text is unambiguous, I stop there. If the text is ambiguous, I would then review Ninth Circuit and Supreme Court precedent addressing the issue. If there is no binding precedent and the statute remains ambiguous, I will then look to the canons of statutory construction and look for additional resources for the plain meaning of the text including persuasive authoring from circuit courts outside of the Ninth Circuit addressing analogous statutes. Only as a last result and with caution would I then consult legislative history. The Supreme Court has stated that legislative history can be used in limited circumstances to shed light on the enacting legislature's understanding of otherwise ambiguous terms. *Exxon Mobil Corp v. Allapattah Servs. Inc*., 5445 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**:** I would apply Supreme Court and Ninth Circuit precedent. In the rare instance where there was no binding precedent, I would consider the text of the provision at issue, and methods of interpretation employed by the Supreme court and the Ninth Circuit interpreting similar provisions. Only after exhausting these options would I turn to persuasive authority from circuit courts outside of the Ninth Circuit.

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

Response**:** I am bound by the methods of interpretation and framework set forth by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Supreme Court instructed that a textual analysis of the Constitution should be guided by the principle that "[t]he 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." *See also United States v. Sprague,* 282 U.S. 716, 731 (1931).

If confirmed, I would be duty bound by cases where the Supreme Court has stated that the original meaning of the provision applies.

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**:** I would start with the text and its plain meaning. I would also review Supreme Court and Ninth Circuit precedent in interpreting those statutes.

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**:** Please see my response to question 2.

6. What are the constitutional requirements for standing?

Response**:** Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujuan v. Defenders of Wildlife,* 504 U.S. 555, 560. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See also Spokeo, Inc. v. Robins,* 578 U.S. 330, 338 (2016).

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

Response**:** The scope of Congress's authority under Article I of the Constitution is the subject of significant precedent of the Supreme Court and of continuing debate. In *M'Culloch v. Maryland* 17 U.S. 316 (1819), the Supreme Court held that Congress has implied powers under the Necessary and Proper Clause to carry out the enumerated powers in the Constitution. For example, in *M'Culloch v. Maryland*, the Court held (among other things) that Congress had the power to establish a national bank. (*Id.* at p. 424.) *M'Culloch* 's primary arguments for the constitutionality of the national bank are based not on the necessary and proper clause but on the nature of the federal Constitution itself.

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

Response**:** If confirmed, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent in evaluating the constitutionality of the law.

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

Response**:** In *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), the Supreme Court held that the Fifth and the Fourteenth Amendments protect "those fundamental rights and

liberties which are, objectively, deeply rooted in this Nation's history and tradition, and are implicit in the concept of ordered liberty."

The Supreme Court had established these unenumerated rights to include: the right to marry, *See, Loving v. Virginia*, 388 U.S. 1 (1997); to have children, *Skinner v. Oklahoma ex el Williamson,* 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to interstate travel, *Saenz v. Roe*, 342 U.S. 489 (1999).

10. What rights are protected under substantive due process?

Response**:** Please see my answer in question 9.

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

Response**:** The Supreme Court has recognized a distinction between these types of rights. In addition, the Court has subsequently state that the "doctrine which prevailed in *Lochner*…has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will be duty bound to apply binding Supreme Court and Ninth Circuit precedent.

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

Response**:** The Supreme Court has held Congress may only regulate three categories of activity pursuant to the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce and activities that threaten such instrumentalities, persons or things; and (3) activities that substantially affect interstate commerce. *United States v. Lopez,* 514 U.S. 549 (1995).

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 concluded that race, national origin, religion and alienage are suspect classifications. Discriminatory laws affecting these groups must survive strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S 297, 303 (1976); *Graham v. Richardson,* 404 U.S, 365, 371-372.

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

Response**:** The separation of powers doctrine is a bedrock component of our constitutional democracy that keeps our government stable and enduring. Under our system of government, there are three co-equal branches, each with its own powers and limitations.

The existence of checks and balances in our governmental structure protects against excessive accumulation of power in a single branch or entity and is also protective of individual liberties. *Morrison v. Olson,* 487 U.S. 654, 693 (1988), *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

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

Response**:** I would analyze the constitutional text and impartially apply Supreme Court and Ninth Circuit precedent in deciding a case in which one branch was alleged to have assumed an authority not granted by the text of the Constitution.

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

Response**:** In all cases, judges must be fair and impartial. Judges must set aside any personal feelings and objectively apply the rule of law.

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

Response**:** Both are equally undesirable and inappropriate. A judge has a duty to avoid impropriety and to perform the duties of the office diligently by staying abreast of the current state of the law. If a judges discovers a mistake, they are duty bound to take corrective measures and uphold the integrity of the judiciary.

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 state court judge and a judicial nominee, I am duty bound to focus on the cases that are before me and to decide each case based upon the facts, the legal texts, and binding precedent.

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

Response**:** Judicial review is the power of the judicial branch to review the constitutionality of legislative and executive actions in the course of deciding controversies. *Marbury v. Madison,* 5 U.S. 137 (1803). Judicial supremacy refers to the Supreme Court's position as the final arbiter on the meaning of constitutional provisions. As Chief Justice John Marshall famously stated, "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Id.,* 138.

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**:** Legislators, executive officers, and judicial officers are bound by oath to support the Constitution. U.S. Constitution, Art VI. Additionally, legislators, executive officers, and judicial officers are required to follow decisions of the United States Supreme Court interpreting the Constitution. *See 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 legislature has the power to make law under Article I of the Constitution and the executive branch has the power to enforce the law under Article II of the Constitution. Pursuant to Article III, the Court's role is limited to interpreting and deciding what law is applicable and applying the law to the facts before the court.

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

Response**:** I would be bound by Supreme Court and Ninth Circuit precedent. It is never appropriate for a lower court to extend or limit the plain meaning of Supreme Court or Ninth Circuit precedent. If confirmed, as a U.S. District Court Judge, it will be my obligation to apply relevant binding precedent regardless of whether I agree with its reasoning. I may determine that the precedent may not apply, but only because the facts and circumstances are distinguishable.

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**:** First, a sentencing court may not discriminate on the basis of a defendant's race or group identity. Second, in 18 U.S.C. § 3553(a), Congress set forth the specific factors to be considered in imposing a sentence. Those factors include "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar

conduct. *Id*. § 3553(a)(6). Third, 18 U.S.C. § 3661 requires that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The sentencing court's discretion to consider information at sentencing under § 3661 "is subject to constitutional constraints." *Pepper v. United States*, 562 U.S. 476, 489 n. 8 (2011).

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**:** Black's Law Dictionary (11th ed. 2019) defines equity as "fairness; impartiality; evenhanded dealing, [t]he body of principles constituting what is fair and right. It further defines equality as "the quality, state, or condition of being equal; esp., likeness in power or political status."

As a judicial nominee, it would not be appropriate for me to comment on statements made by the President or other administration officials, or on matters of executive policy. As a judge it is not my role to make policy or to comment on the statements of policy makers. If confirmed, I will decide cases by faithfully and impartially applying the law to the facts of each case.

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

Response**:** These terms mean different things to different people. Although they are not synonymous, they are often used interchangeably. Please see my response to question 24.

26. In 2018 you sat on a panel at San Francisco State University's Constitution Day Conference. The notes on the agenda from that event say "[d]ismantling racism. The power of the Court to create balance and equity." Do you agree with that statement?

Response**:** The moderator's notes were for her use. I was not the moderator, but a panelist. Judicial officers are duty bound to perform their duties fairly and impartially. If confirmed, I am also duty bound to uphold the integrity and independence of the judiciary. If a case comes before me involving disparities, I will faithfully and impartially apply the law to the facts before me.

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

Response**:** The text of the Fourteenth Amendment provides that "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U. S. Const amend. XIV section 1.

As a judicial nominee, it would not be appropriate for me to comment on statements made by the President or other administration officials, or on matters of executive policy. Article II. As a judge it is not my role to make policy or to comment on the statements of policy makers. If confirmed, I will decide cases by faithfully and impartially applying the law to the facts of each case

28. How do you define "systemic racism?"

Response**:** The term means different things to different people. It is an important and hotly debated topic in academia, amongst policy makers, and in the community.

I don't have a personal definition. The online Cambridge dictionary defines it as: policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race.

As I understand it, "systemic racism" refers to policies and practices of an institution that result in racial disparities or harmful treatment of persons based on race, or both. If any cases come before me involving allegations of discrimination on the basis of race, I will fully, faithfully, and impartially apply relevant Supreme Court and Ninth Circuit precedent.

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

Response**:** The term means different things to different people. It is an important and hotly debated topic in academia, amongst policy makers, and in the community. For some it is the review of the static history through seminal cases and their impact on disempowered minorities. Black's Law Dictionary (11th ed. 2019) defines critical race theory as "a reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

Response**:** Please see my responses in questions 28 and 29.

Senator Ben Sasse
Questions for the Record for Trina L. Thompson
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**:** My judicial philosophy is one that rests upon judicial restraint, fairness, due process, equality and inclusion. Recognizing the principle of restraint, I am clear that judges are to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties. I recognize that the Supreme Court has the final word and I have taken an oath to follow the tenets of the U.S. Constitution.

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

   Response**:** Black's Law Dictionary (11th ed. 2019) defines originalism as the doctrine that "words of a legal instrument are to be given the meanings they had when they were adopted; specifically, the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I do not apply labels to myself. If confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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

   Response**:** Black's Law Dictionary (11th ed. 2019) defines textualism as "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." I don't apply labels to myself. If

confirmed as a federal district court judge, I will apply Supreme Court and Ninth Circuit precedent when determining the meaning of any legal 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 "living constitutionalism" as "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values."

   The Constitution has an enduring, fixed quality. If confirmed as a United States District Judge, I will interpret the Constitution as directed by Supreme Court and Ninth Circuit precedent.

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

   Response**:** It would be difficult to name one Supreme Court justice whose jurisprudence I admire the most. Indeed, most decisions are not the work of any single justice, but of the majority of justices who shape not only the outcome but the text of each Supreme Court opinion. I admire many justices for their well-written opinions, their scholarship and work ethic, their role as (trail blazers) or ("firsts") on the Court, the work they did that prepared them for the bench, or their commendable judicial temperament and restraint.

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**:** If confirmed as a U.S. District Court Judge, and in the absence of controlling Supreme Court precedent, I would be bound by Ninth Circuit precedent. In the absence of an intervening Supreme Court decision, Ninth Circuit precedent can only be overruled by the court sitting en banc. En banc review "ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

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**:** If confirmed as a U.S. District Court Judge, and in the absence of controlling Supreme Court precedent, I would be bound by Ninth Circuit precedent. In the absence of an intervening Supreme Court decision, Ninth Circuit precedent can only be overruled by the court sitting en banc. En banc review "ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions;

or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

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**:** I would first turn to the text of the statute and evaluate its plain meaning. See *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). If it is unambiguous, I would stop there.

If the text is ambiguous, I would next turn to a variety of potential interpretive methods to resolve the question. These could include employing canons of statutory construction and looking to Supreme Court and Ninth Circuit precedent analyzing analogous statutory provisions. Only if the statute's meaning is ambiguous, and there is no applicable binding precedent, should the court review the legislative history *See Bostock v. Clayton Cty., Georgia,* 140 S. Ct. 1731, 1738 (2020).

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**:** No. Congress has set forth in 18 U.S.C. § 3553(a) the specific factors that are to be considered by district courts in sentencing defendants. These factors include the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Id. § 3553(a)(6). If confirmed and if such an issue were to come before me, I would look to case law, the sentencing guidelines, these statutory factors, and pertinent policy statements issued by the Sentencing Commission.

Questions from Senator Thom Tillis for Trina L. Thompson
Nominee to be United States District Judge for the Northern District of California

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

   Response**:** Yes. I have been a state court trial judge for close to 20 years. Throughout that time, I have applied the law to the cases that arise before me without regard to my personal beliefs or opinions. If confirmed as a federal district court judge, I would continue to do so.

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

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

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

   Response**:** Judges are expected to perform their duties fairly and impartially.

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

   Response**:** No.

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

   Response**:** I believe that faithfully applying the law sometimes results in a judge having to issue a decision with which they personally disagree. The job of a judge is not to decide cases based upon their own opinions or beliefs but based upon application of the rule of law to the facts before them. My focus is not on the desirability of the outcome, but on my duty to faithfully interpret the law.

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

   Response**:** No.

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

Response**:** If confirmed, in every case that comes before me, including cases involving the Second Amendment, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding Supreme Court and Ninth Circuit precedent.

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**:** The "intermediate scrutiny" standard applies if the [regulation] on its face, does not completely prohibit or unduly burden the right of law-abiding persons to bear arms. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Supreme Court's reasoning in *Heller* and *McDonald* suggests that "heightened scrutiny" applies only if a regulation substantially burdens the right to keep and to bear arms for self-defense. *Id., McDonald v. City of Chicago*, 561 U.S. 742 (2010).

As a federal district court judge, I would be bound by any Supreme Court and Ninth Circuit precedent governing this question. If confirmed, in any case raising this issue, I will hear from the parties, research the law, make factual findings as appropriate, and impartially apply the law consistent with 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**:** The Supreme Court has held that law enforcement officers and other government officials are entitled to qualified immunity unless they violated a clearly established constitutional right, which means that "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby,* 138 S. Ct. 577, 589 (2018). *See also*, *Rivas-Villegas v. Cortesluna*,142 S. Ct. 4 (2021), and *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021).

If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent in all cases that came before me.

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**:** It is not appropriate for me as a sitting judge or a judicial nominee to opine on the sufficiency of the protection provided by any line of cases. If confirmed, I will follow any and all binding Supreme Court and Ninth Circuit precedent on the issue of qualified immunity.

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

Response**:** Please see my answer to question 10.

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

Response**:** In my 20 years a judge and 15 years as an attorney, I have not handled a case regarding patent eligibility. However, I appreciate the significance of patent eligibility cases. As a sitting judge and a nominee for the U.S. District Court bench, it is not appropriate for me to debate the strengths and weaknesses of a body of Supreme Court jurisprudence. If confirmed, in patent litigation that may arise before me, I will follow any and all binding Supreme Court and Ninth Circuit precedent on the issue of patent eligibility.

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

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

Response**:** As a sitting state court trial judge and U.S. District Court nominee, it is not appropriate for me to comment on the outcome of a hypothetical case. Notably, it is my understanding that the Northern District of California has a heavy load of patent cases and patent issues. If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent to patent issues before me.

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

Response**:** Please see my answer to 13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to question13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to 13a.

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**:** Please see my answer to question 12.

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

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

    Response**:** In my nearly 20 years as a state trial court judge and my 15 years as a practicing attorney, I have not had experience with copyright law.

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

    Response**:** I have not had any experience with the Digital Millennium Copyright Act. If confirmed, and if a case were to come before me in which I had to address infringement, take down notices or violations by hosting services, I would apply the rule of law, the First Amendment and all binding Supreme Court and Ninth Circuit precedent.

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

    Response**:** Please see my answer to 15a.

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

    Response**:** As a state court trial judge, I have had to resolve First Amendment and free speech issues involving press coverage, gag orders in high profile cases and restraining orders. Consequently, I have some very limited experience addressing free speech and digital platforms in the context of criminal litigation. I do not have any experience with respect to copyright. If confirmed, I would hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding precedent.

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**:** When a court is interpreting a statute, it must first review the text and any relevant binding precedent. If the text is unambiguous, or there is binding Supreme Court or Ninth Circuit precedent interpreting the statute, the court must apply the statute's plain meaning or the binding precedent. Only if the statute's meaning is ambiguous, and there is no applicable binding precedent, should the court review the legislative history. *See Bostock v. Clayton Cty., Georgia,* 140 S. Ct. 1731, 1738 (2020).

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**:** United States Supreme Court and the Ninth Circuit precedent governs the deference a court should give, if any, to a federal agency's analysis. If confirmed as a U.S. District Court Judge, I will faithfully follow that precedent when and if confronted with the issue of the deference to be afforded to a federal agency, including the United States Copyright Office.

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 state trial judge and a judicial nominee, it would not be appropriate for me to comment on a hypothetical case. If confirmed, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent to copyright issues before me.

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**:** I have an obligation to remain fair, open-minded, and impartial in every case. To address how judges should handle the matters raised by this question would be inconsistent with that obligation and suggest to litigants that might come before me that I have prejudged their cases. A judge must apply the plain language of the statute to that new technology using the canons of statutory interpretation and binding precedent. It is not the judge's role to modify the statute to accommodate the new technology; that is the role of Congress. If confirmed, in any case involving the application of the Digital Millennium Copyright Act, I will hear from the parties, research the relevant law, make factual findings as appropriate, and apply the law to the facts as dictated by binding precedent.

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

Response**:** Please see my answer to question 17(a).

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

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

Response**:** The Supreme Court has expressed concerns about the dangers of forum shopping. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (giving deference to state law in a personal injury case). *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (referring to the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."). *See also Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984 (referring to the enforcement of the Federal Arbitration Act and reversing the California Supreme Court interpretation to prevent "reward forum shopping.").

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

Response**:** Judicial officers have a responsibility to follow the law on jurisdiction and venue and to be aware of the Code of Conduct for United States Judges.

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**:** It is inappropriate for a judge to take actions with the intent to attract a particular type of case or litigant. District Court Judges are duty bound by the Code of Conduct for United States Judges to uphold the integrity and independence of the judiciary.

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

Response**:** Yes.

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 nominee for the U.S. District Court, I do not believe it is appropriate to comment on the conduct of other judges.

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

Response**:** As a nominee for the U.S. District Court, I do not believe it is appropriate to comment on the conduct of other judges.

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?**

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?**

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 20, (a)-(b): Pursuant to the Code of Conduct for United States Judges, federal judges have an ethical obligation to follow the law and I agree that judges should not take actions that undermine the perception of fairness and the judiciary's evenhanded administration of justice.

However, I do not have the full context for the factual scenario set forth above and thus cannot provide a reasoned and informed opinion as to whether the concentration of a particular type of litigation in a few judicial districts undermines the perception of fairness.

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?**

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

Response**:** Please see my answer for 20, (a)-(b).

Questions for the Record for Trina L. Thompson
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.