Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Sunshine Sykes
Nominee to the U.S. District Court for the Central District of California
February 8, 2022

1. **You have served as a California Superior Court Judge for over eight years. In that time, you have presided over approximately 90 cases that have gone to verdict or judgment.**

   a. **In terms of subject matter, please describe the range of cases you have considered.**

      Response: I have handled a variety of civil cases which have included medical malpractice, breach of contract, construction defect, class actions, California Environment Quality Act cases, product liability, personal injury, wrongful death, writ of mandates, employment discrimination and retaliation. I have also handled a handful of criminal cases which included charges of robbery and domestic violence.

   b. **During your time on the bench, have you had occasion to handle matters related to expert witness testimony?**

      Response: I have handled numerous trials that included expert witness testimony. In the majority of those cases, motions in limine were filed concerning the scope and/or exclusion of expert testimony. In California the court looks to California Evidence Code Section 801 to determine the admittance of opinion testimony by expert witnesses. In regards to scientific evidence, the California Supreme Court has rejected the *Daubert* standard in which the trial judge must determine whether the proffered expert testimony is based on scientific, technical, or other specialized knowledge that will assist the trier of fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). The California courts use the *Kelly/Frye* standard in which scientific expert testimony may be admissible if the proponent of the evidence makes "a preliminary showing of general acceptance of the new technique in the relevant scientific community." *People v. Kelly*, 17 Cal.3d. 24 (1976). *Frye v. United States*, 293 F. 1013 (1923). If confirmed, I will follow the precedent of the Supreme Court and the Ninth Circuit in regards to the admittance of expert testimony.

2. **You have spoken highly of the Riverside County Youth Court, which aims to offer rehabilitative opportunities to juvenile offenders. In your capacity as a Superior Court Judge, you are currently working with tribal judges to develop a similar court that will serve tribal youth.**

   a. **Please discuss your experience with juvenile justice issues.**

      Response: The Riverside County Youth Court acts as an early intervention program for first time offenders of misdemeanor crimes such as graffiti, shop lifting, and marijuana

use. It gives minors who have broken the law and admitted guilt a second chance. It is a peer-based program and it encourages youth to mentor other youth. The youth defendant is sworn in and provides testimony explaining the conduct that brought them before the court. A jury of their peers can then ask questions of the youth defendant. The purpose of the questioning is to understand the reasoning behind the decision to commit the crime and determine an appropriate sentence. Once the questioning is complete the jurors deliberate and determine the appropriate sentence. Such sentences have included jail tours, drug testing, community service, restitution, apology letters, and counseling. I have participated in the program for the entire eight years I have served on the Riverside County bench.

b. What prompted you to work on developing a Tribal Youth Court?

Response: Riverside County and neighboring San Diego and San Bernardino Counties have over 30 Tribal Nations within their borders. Unfortunately, tribal youth are not immune to the criminal justice system. In working with Tribes in the Riverside County Tribal Alliance and the Tribal Court/State Court Forum it became apparent that tribal youth were becoming lost in the system. The idea to start a Tribal Youth Court was a way to reach tribal youth and connect them back to their communities. A tribal judge presides over the hearings and tribal youth make up the jury of peers. Any sentencing includes cultural practices such as participating in an elder feed, cleaning up the reservation, participation in tribal ceremonies, such as a sweatlodge, and other culturally appropriate activities. Currently the Intertribal Court of Southern California has an active Youth Court which centers on educating tribal youth about tribal restorative justice practices and empowering them to engage in practices to serve their communities.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Sunshine S. Sykes
Judicial Nominee to the United States District Court for the Central District of California

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

   Response: I do not believe that the Supreme Court or the Ninth Circuit have used or defined the term "super precedent." It is equally not a term I have used as an attorney or a judge. If confirmed, I will faithfully apply all precedent of the Supreme Court and the Ninth Circuit.

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: If confirmed, I will faithfully apply all precedent of the Supreme Court and the Ninth Circuit. I would fully adhere to the precedent without reservation or regard to my personal views. As a sitting judge and judicial nominee, I am ethically prohibited from commenting on legal issues that could come before me or the correctness of Supreme Court precedents. However, it is unlikely that de jure racial discrimination in schools or miscegenation laws would come before me, so like prior judicial nominees I can state that I believe *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Loving v. Virginia*, 388 U.S. 1 (1967) were correctly decided.

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 neither familiar with the statement nor the context of the statement by Judge Ketanji Brown Jackson. The term "living constitution" can mean different things to different people. If it is used to refer to the Constitution as having no fixed meaning, then I do not believe in that concept. I believe the Constitution is an enduring document.

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

   Response: The role of a judge is limited to faithfully and impartially applying the law to the facts.

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: Judges must faithfully and impartially apply precedent of the Supreme Court and their Circuit.

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

   Response: In *Meyer v. Nebraska*, 262 U.S. 390, the Supreme Court held that parents have the right to direct their children's education.

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

   Response: I believe Federal courts have considered testimony of scientific experts to be relevant to whether a specific substance cause cancer in humans. For example, in *Messick v. Novartis Pharms. Corp.,* the Ninth Circuit held that scientific evidence is relevant as to whether a specific substance caused cancer in a human. 747 F. 3d. 1193, 1197 (2014).

8. **Is when a "fetus is viable" a scientific question?**

   Response: The Supreme Court stated in *Planned Parenthood v. Casey*, that "advances in neonatal care have advanced viability to a point somewhat earlier" than in 1973, and recognized the possibility that it may further advance if "fetal respiratory capacity can somehow be enhanced in the future." 505 U.S. 833, 860 (1992).

9. **Is when a human life begins a scientific question?**

   Response: The Supreme Court stated in *Planned Parenthood v. Casey* that "At 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." 505 U.S. 833, 851 (1992). The question is the subject of scientific, religious, and philosophical discussions.

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

    Response: Threatening any person can be unlawful pursuant 18 U.S.C. § 875.

11. Do you believe that we should defund or decrease funding for police departments and law enforcement? Please explain.

Response: As a sitting judge and judicial nominee it would be inappropriate for me to provide an opinion. The question is an important one for policy makers to consider.

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

Response: As a sitting judge and judicial nominee it would be inappropriate for me to provide an opinion. The question is an important one for policy makers to consider.

13. 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: As a sitting judge and judicial nominee, it would be inappropriate for me to provide an opinion as questions regarding the release of incarcerated individuals during the COVID-19 pandemic are pending in federal courts.

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

Response: The Second Amendment protects an individual's right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that is fully applicable to the states and municipalities, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). If confirmed, I will follow the precedent of the Supreme Court and the Ninth Circuit. *See Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021); *see also Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021)

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

Response: I am unaware of controlling precedent from the Supreme Court or the Ninth Circuit on this issue. Further, as a sitting judge and judicial nominee it would be inappropriate for me to provide an opinion. If confirmed, I would carefully research the issue and apply the law to the facts.

16. 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 judicial nominee it would be inappropriate for me to provide an opinion. If confirmed, I would carefully research the issue and apply the law to the facts.

17. 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?**

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

Response: The Religious Freedom Restoration Act ("RFRA") states the "Government shall not substantially burden 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 courts decide whether there is a burden on the exercise of religion under RFRA. In *Burwell v. Hobby Lobby*, the Supreme Court distinguished whether a government action "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with their religious beliefs," and the question of "whether the religious belief asserted in a RFRA case is reasonable." 573 U.S. 682, 724 (2014). If confirmed, I would follow the Supreme Court and Ninth Circuit precedent in making the determination.

18. 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: As a sitting judge and judicial nominee I am bound to faithfully and impartially apply the law including the precedent of the Supreme Court and the Ninth Circuit in all cases that come before me.

19. 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: There is no constitutional right to representation in civil cases.

20. Is threatening Supreme Court justices right or wrong?

Response: Threatening any person may be unlawful pursuant to 18 U.S.C. § 875.

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

Response: The Supreme Court's first defined "fighting words" as words that "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 e.g., Terminiello v. City of Chicago*, 337 U.S. 1 (1944); *Cohen v. California,* 403 U.S. 15 (1971); *Gooding v. Wilson,* 405 U.S. 518 (1972); *Texas v. Johnson*, 491 U.S. 397 (1989). If confirmed, I would follow the precedent of the Supreme Court and the Ninth Circuit.

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

Response: In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court held that the First Amendment permits a State to ban a true threat that "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia*, 538 U.S. at 359 (internal citations omitted). Equally, the Ninth Circuit has held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *United States v. Cassel,* 408 F.3d 622, 633 (2005); *see also United States v. Bagdasarian,* 652 F.3d 1113 (9th Cir. 2011).

23. 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.

24. 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?**

d. Response: No.

25. 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.

26. 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.

27. 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.

28. 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: I submitted an application for the United States District Court for the Central District of California to Senator Dianne Feinstein on January 31, 2021, and to Senator Alex Padilla on February 23, 2021. On April 22, 2021, I interviewed with Senator Padilla's Committee. On April 29, 2021, I interviewed with Senator Feinstein's Committee. On May 4 and May 28, 2021, I interviewed with staff from Senator Padilla's office. On June 24, 2021, I interviewed with Senator Padilla. On June 28, 2021, I interviewed with Senator Feinstein's Statewide Chair. On September 13, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On December 15, 2021, my nomination was submitted to the Senate.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

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

Response: See response to Question No. 28. In addition, following my nomination, I have been in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office regarding preparation for my confirmation hearing.

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

Response: On February 8, 2022, I received these questions from the Office of Legal Policy. I reviewed each question, conducted research, reviewed my records and opinions issued, and drafted my responses. I submitted my draft responses to the Office of Legal Policy for feedback, which I considered, before submitting my final responses to the Senate Judiciary Committee.

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

Questions for the Record for Sunshine Suzanne Sykes, Nominee for the United States District Court for the Central District of California

I. Directions

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

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

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

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

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

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

II. Questions

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

Response: My judicial philosophy is to treat all litigants with dignity and respect, to keep an open mind, to listen attentively, to research and do the work necessary to prepare, and to issue a clear, concise, and understandable decision consistent with the applicable law. I

have not studied the judicial philosophies of the named Justices and therefore could not identify which one is most analogous to my own.

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

Response: Black's Law Dictionary (11th ed. 2019) defines the doctrine of originalism as: "1. The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect. . . . 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." I do not describe myself according to any particular label. If confirmed, it is my duty to follow the precedent of the Supreme Court and the Ninth Circuit in interpreting the Constitution or a statute.

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

Response: Black's Law Dictionary (11th ed. 2019) defines the doctrine of 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." I do not describe myself according to any particular label. If confirmed, it is my duty to follow the precedent of the Supreme Court and the Ninth Circuit in interpreting the Constitution or a statute. However, I believe the Constitution is an enduring document whose precise meaning cannot change over time.

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: 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.'"

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: See my response to Question No. 4.

6. What tools of construction are appropriate for a judge to employ to resolve statutory ambiguity, and do policy considerations rank among those tools and if so where? If policy considerations are appropriate, in what context should they be relied upon?

Response: If the text of the statute is clear and unambiguous then extrinsic factors do not need to be considered. If the text is ambiguous, then I would look to precedent of the United States Supreme Court and the Ninth Circuit. If there is no precedent, then I would look to the canons of construction, analogous statutes, persuasive authority from other circuits, and lastly to legislative history. I do not believe that my own personal policy considerations may be considered when interpreting a statute.

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

Response: No.

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

Response: The Supreme Court has held that there are limits as to what the government may impose or may require of private institutions. *See e.g., Tandon v. Newsom*, 142 S. Ct. 1294 (2021), *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held the government may not act in a manner which is "hostile to religious beliefs of affected citizens" or that "passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." 138 S. Ct. 1719, 1731 (2018). The Supreme Court has further stated that "at a minimum the protections of the free exercise clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Further, Free Exercise claims are evaluated under strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021). If confirmed, I will follow all applicable Supreme Court and Ninth Circuit precedent.

10. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain

the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the applicants met their burden by showing (1) a likelihood of success on their First Amendment claims; (2) denial of relief would lead to irreparable injury; and (3) granting relief would not harm the public. The Court also stated that "the [challenged] regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Id.* at 66.

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

Response: In *Tandon v. Newsom*, 142 S. Ct. 1294 (2021), the Supreme Court held that (1) governmental regulations are not neutral and trigger strict scrutiny under the Free Exercise Clause if they treat a comparable secular activity more favorably than a religious activity; (2) whether two activities are comparable is determined based on whether the asserted government interest justifies the regulation; (3) the government bears the burden to establish that the challenged law satisfies strict scrutiny namely that it is narrowly tailored and there is not a least restrictive means of achieving the governmental interest; and (4) rescinding COVID-19 restrictions does not moot a case challenging such restrictions.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's conduct in evaluating the cake shop's owners reasoning for declining to make a cake for a same-sex couple violated the Free Exercise Clause. The Court concluded that the Commission's actions violated the duty of the State not to use hostility towards religious viewpoints as a basis for laws or regulations. The Court determined the religious justification for the refusal to bake the cake was not afforded neutral treatment as required under the Free Exercise Clause.

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

Response: In *Frazee v. Illinois Dep't of Employment Sec.,* 489 U.S. 829 (1989), the Supreme Court ruled that a person's sincerely held religious belief need not conform to the commands of a particular religious organization. The operative question is whether the professed belief is sincerely held.

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

Response: In *Frazee v. Illinois Dep't of Employment Sec*., 489 U.S. 829 (1989), the Supreme Court instructed that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without judicial evaluation of the validity of their interpretations.

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

Response: In *Frazee v. Illinois Dep't of Employment Sec*., 489 U.S. 829 (1989), the Supreme Court instructed that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without judicial evaluation of the validity of their interpretations.

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

Response: I am unaware of the official position of the Catholic Church on these issues.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court found the "ministerial exception," which derives from the religion clauses of the First Amendment, prevents civil courts from adjudicating employee discrimination claims of an employee against her religious employer.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court found that the City's actions burdened the Catholic foster care provider's religious exercise. The Court held that the policy was not neutral and not generally applicable as it allowed exceptions to the anti-discrimination requirement at the sole discretion of the

Commissioner and as such was subject to strict scrutiny. The policy did not survive strict scrutiny as it did not serve a compelling governmental interest and its certification requirement was not narrowly tailored.

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

Response: In Justice Gorsuch's concurrence in *Mast v. Fillmore County,* 141 S. Ct. 2430 (2021), he highlighted three aspects of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021) that lower courts and administrative authorities may consider when applying strict scrutiny in a similar case: 1) the government must establish its interest with specificity and with respect to the specific religious community; (2) the government must show why it cannot provide the same exemption given to other groups and given in other jurisdictions; and (3) the state must demonstrate that its policy is narrowly tailored "with evidence" and not "supposition."

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

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

Response: I am not aware what role, if any, federal district court judges play in supervising their courts' human resources programs. I would expect any training to be consistent with federal law.

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

Response: I am not aware what role, if any, federal district court judges play in supervising their courts' human resources programs. I would expect any training to be consistent with federal 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 what role, if any, federal district court judges play in supervising their courts' human resources programs. I would expect any training to be consistent with federal law.

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

Response: I am not aware what role, if any, federal district court judges play in supervising their courts' human resources programs. I would expect any training to be consistent with federal law.

19. 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 what role, if any, federal district court judges play in supervising their courts' human resources programs. I would expect any training to be consistent with federal law.

20. Is the criminal justice system systemically racist?

Response: The question is an important one for policy makers to consider. As a judge, I had not had the occasion to consider whether any judicial system is systemically racist. If presented with questions of race or race discrimination, I will evaluate each case by applying the applicable law to the individual facts.

21. Is it appropriate, for a government actor, to consider skin color or sex when selecting a judge? Is it constitutional under the Equal Protection Clause?

Response: If such a case were to come before me I would apply Supreme Court and Ninth Circuit precedent.

22. To what extent does the practice of making race-conscious appointments undermine the hard-earned merits of an appointee and harm that appointee's standing in his or her field?

Response: As a sitting judge and judicial nominee it would be inappropriate for me to provide my opinion.

23. 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: If confirmed, I would be bound by Supreme Court precedent regardless of the size or composition of the courts. As a sitting judge and judicial nominee it would be inappropriate for me to comment on what Congress should do.

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

Response: The Second Amendment protects an individual's right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that is fully applicable to the states

and municipalities, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). If confirmed, I will follow the precedent of the Supreme Court and the Ninth Circuit. *See Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021); *see also Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021)

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

Response: No.

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

Response: No.

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

Response: If presented with this question, I would faithfully and impartially apply the precedent of Supreme Court and the Ninth Circuit.

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

Response: Prosecutorial discretion refers to the authority of the prosecuting agency to decide whether or not to charge a person with a crime and which criminal charges to file. As to what may distinguish prosecutorial discretion form a substantive administrative rule change, I would follow Supreme Court and Ninth Circuit precedent if confirmed.

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

Response: Congress passed the Federal Death Penalty Act which states that a defendant found guilty of a death eligible offense "shall be sentenced to death if, after consideration of the factors set forth in [the Act] it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who is less than eighteen years of age at the time of the offense." 18 U.S.C. § 3591. It would require legislation passed by Congress and signed into law by the President to amend the current criminal code regarding the availability of capital punishment for certain offenses. Article II of the Constitution grants the President the power to pardon individuals charged with federal crimes and to commute the sentences of individuals sentenced for federal crimes.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, the Supreme Court ruled that the Centers for Disease Control and Prevention had exceeded its authority in issuing a nationwide ban on eviction by stating that "The Director of the Centers for Disease Control and Prevention (CDC) has imposed a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID–19 transmission and who make certain declarations of financial need. 86 Fed. Reg. 43244 (2021). . . . And careful review of [the] record makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority [under § 361(a) of the Public Health Service Act, 42 U.S.C. § 264(a)]." 141 S. Ct. 2485, 2486 (2021).

Senator Josh Hawley
Questions for the Record

Sunshine Sykes
Nominee, U.S. District Court for the Central District of California

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

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

    Response: I do not agree with that philosophy. If confirmed, I would be bound by Supreme Court and Ninth Circuit precedent.

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

    Response: Federal judges are duty bound to uphold the Constitution and follow relevant precedents regardless of personal opinion or preference on issues that come before them.

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

    Response: *Railroad Comm'n of Texas v. Pullman Co*., 312 U.S. 496 (1941). The *Pullman* abstention doctrine allows federal courts to abstain from addressing the constitutionality of state enactments until a state court has had a reasonable opportunity to decide them.

    Burford v. Sun Oil Co., 319 U.S. 315 (1943). The *Burford* abstention doctrine allows federal courts to abstain from deciding a case arising out of a complicated state regulatory scheme. Its application requires "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). The *Burford* abstention doctrine is to be applied in rare circumstances as an exception to a federal court's obligation to resolve the case properly brought before it.

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). The *Thibodaux* abstention doctrine allows federal courts sitting in diversity jurisdiction to abstain from deciding cases involving unresolved issues of state law that are of great public importance to the state, thereby allowing the state to resolve the issues. The *Thibodaux* abstention doctrine is to be applied in rare circumstances as an exception to a federal court's obligation to resolve the case properly brought before it.

Younger v. Harris, 401 U.S. 37, 49-53 (1971). The *Younger* abstention doctrine allows federal courts to abstain from hearing civil rights tort claims brought by a person being prosecuted in state court from a matter arising from that claim.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The *Colorado River* abstention doctrine allows federal courts to abstain from deciding a case raising a federal law question where a pending state court proceeding concerns identical issues.

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

   Response: No.

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

      Response: Not applicable.

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

   Response: If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent in determining what role the original public meaning should play.

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

   Response: When interpreting legal texts, I would first look to the Supreme Court and Ninth Circuit to determine if there was any precedent regarding the statute. Second, if there was no precedent, I would look to the plain language of the statute to see if it was unambiguous. If the plain language of the statute is unambiguous my inquiry would end there. Third, if the plain language of statute was ambiguous I would look to Supreme Court and Ninth Circuit precedent to identify appropriate tools to resolve the ambiguity, such as the canons of construction, analogous statutes, precedent from other circuits. If no other tools of statutory interpretation resolve the issue then I

would look to legislative history. I would consult legislative history that is more probative of the legislative process and purpose of the statute such as committee reports as opposed to floor speeches from legislators.

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: See my response to Question No. 5.

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

Response: It would not be appropriate.

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

Response: In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Supreme Court reaffirmed *Glossip v. Gross*, 576 U.S. 863 (2015) and *Baze v. Rees*, 553 U.S. 35, 50 (2008) and held that the *Baze-Glossip* test applies to all challenges against an execution protocol under the Eighth Amendment's prohibition of cruel and unusual punishment. To establish that an execution method "superadds" pain to the death sentence as forbidden by the Eighth Amendment a petitioner bears the burden to demonstrate the existence of a "feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." (*Bucklew*, 139 S. Ct at 1127). The Ninth Circuit has followed Supreme Court precedent by holding in *Lopez v. Brewer* that "[t]o prevail on an Eighth Amendment claim 'there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." 680 F.3d 1068, 1073 (9th Cir. 2012).

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

Response: Yes.

8. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis

for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: Neither the Supreme Court nor the Ninth Circuit have recognized a right to access DNA for a habeas petitioner.

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

   Response: No.

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

    Response: When evaluating a constitutional free exercise claim, the Supreme 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). *See also Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531-32 (1993); *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). *Bay United Pentecostal Church v. Newsom*, 985 F. 3d. 1128, 1140 (2021) ("Any law burdening religious practices that is not neutral or of general application, however, must undergo the most rigorous of scrutiny." (internal quotation marks omitted)).

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

    Response: See my response to Question No. 10.

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

    Response: A religious belief is sincerely held if it is a "meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." *United States v. Seeger*, 380 U.S. 163, 176

(1965). A "pretextual assertion of a religious belief" in order to obtain a beneficial exemption is not a sincere belief. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 717 n.28 (2014). 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). However, the trier of fact may not inquire into the truth or falsity of the claimant's religious beliefs, although they might seem incredible or preposterous. *United States v. Ballard*, 322 U.S. 78, 87-88 (1944); *Callahan v. Woods* 658 F. 2d. at 685 ("In applying the free exercise clause of the First Amendment courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."). Sincere religious beliefs are not limited to traditional or parochial concepts of religion. *Welsh v. United States*, 398 U.S. 333, 339-40 (1970). A sincerely held religious belief need not be one held by all members of a religious sect. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715-16 (1981).

13. 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* that the Second Amendment protects "an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." 554 U.S. 570, 577 (2008).

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.

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

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

Response: It is my understanding that Justice Holmes made this statement in his dissent in *Lochner* to support his view that the Fourteenth Amendment does not dictate any particular economic theory. *Lochner*, 198 U.S. at 65.

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

Response: As a sitting judge and nominee to the federal district court I am bound to follow binding Supreme Court precedent. It is my understanding that *Lockner* was abrogated by *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937).

15. 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: No.

a. If so, what are they?

Response: Not applicable.

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

Response: I commit to faithfully applying Supreme Court precedent.

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

a. Do you agree with Judge Learned Hand?

Response: I would follow Supreme Court and Ninth Circuit precedent on the issue as to what constitutes a monopoly. The Supreme Court held in *Eastman Kodak Company v. Image Technical Services, Inc.* 504 U.S. 451 (1992) that evidence that a defendant holds more than an eighty percent share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. *Eastman Kodak*, 504 U.S. at 481. The Ninth Circuit has found that "a market share of less than fifty percent is presumptively insufficient to establish market power," but that a "sixty-five percent market share" typically "establishes a prima facie case of market

power." *Rebel Oil Co., Inc. v. Atlantic Richfield Co., Inc.*, 51 F.3d 1421, 1434 (9th Cir. 1995).

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

Response: See my response to Question No. 16a.

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: See my response to Question No. 16a.

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

Response: Black's Law Dictionary (11th ed. 2019) defines federal common law as: "The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." This is similar to my understanding.

18. 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: The United States Constitution is the "supreme law of the land and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." United States Constitution Clause Article VI, Clause 2. Therefore, the protections granted by the United States Constitution are binding on the states. A state constitution may provide greater civil rights than the United States Constitution. Federal courts must differ to the decisions of the highest court in the state whose constitution a federal court is interpreting. *See Erie Railroad Company v. Tompkins,* 304 U.S. 64, 78 (1938).

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

Response: See my response to Question No. 18.

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

Response: See my response to Question No. 18.

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

Response: As a sitting judge and judicial nominee, I am ethically prohibited from commenting on legal issues that could come before me. However, *Brown v. Board of Education*, 347 U.S. 483 (1954) (de jure racial segregation) involves issues that are not likely to be relitigated and I agree it was correctly decided.

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

Response: It is my understanding that there is a live legal discussion on the issue of nationwide injunctions. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). If confirmed, I would follow applicable precedent on nationwide injunctions should the issue come before me.

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

Response: See my response to Question No. 20. I would also note that Rule 65 of the Federal Rules of Civil Procedure governs injunctions.

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

Response: See my response to Question No. 20. In addition, as a general matter the issuance of a preliminary injunction is an extraordinary remedy and is only granted when such injunction is necessary to give plaintiff's complete relief without imposing an undue burden.

21. 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: See my response to Question No. 20.

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

Response: Black's Law Dictionary (11th ed. 2019) defines federalism as: "The legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." This definition comports with my understanding of federalism. The relationship between federal and state governments plays a foundational role in our democracy.

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

Response: See my response to Question No. 2.

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

Response: The advantages and disadvantages of awarding damages versus injunctive relief would depend on the facts and circumstances of each case. Accordingly, I would make that determination on a case by case basis.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that due process protects those fundamental rights and liberties though not expressly in the United States Constitution that are "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." 521 U.S. at 720-21 (internal quotations and citation omitted). Examples that the Supreme Court gave include the right to marry, the right to have children, and the right to direct the education and upbringing of one's children. *Id.* at 720.

26. 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: See my responses to Question Nos. 10-12.

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 of the First Amendment protects both the freedom to hold a religious belief and the freedom to worship in accordance with one's religion. If confirmed, I would follow Supreme Court and Ninth Circuit precedent on matters regarding the free exercise of religion or the freedom to worship.

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

Response: See responses to Question Nos. 10-12.

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: See responses to Question Nos. 10-12.

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") states the "Government shall not substantially burden 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 courts decide whether there is a burden on the exercise of religion under RFRA. In *Burwell v. Hobby Lobby*, the Supreme Court distinguished whether a government action "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with their religious beliefs," and the question of "whether the religious belief asserted in a RFRA case is reasonable." 573 U.S. 682, 724 (2014). If confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent.

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.

27. 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 the above quote to mean that judges are duty bound to decide cases without regard to their personal opinions or preferences.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

29. 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.

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

Response: It is my understanding that the term has been used to refer to policies and practices in an institution that result in racial discrimination, racial disparities, and racial bias. Therefore, it is a matter for policy makers. As a sitting judge and judicial nominee it would be inappropriate to comment on matters subject to ongoing policy debates.

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

Response: No.

32. How did you handle the situation?

Response: Not applicable.

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

Response: Yes.

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

Response: I do not believe any particular Federalist Paper has most shaped my view on the law.

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

Response: As a sitting judge and judicial nominee it would be inappropriate for me to comment on this issue which could come before me and is being litigated in our courts. I will faithfully follow Supreme Court and Ninth Circuit precedent in any case raising such a question.

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

Response: No.

37. 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.

38. 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.

39. 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.

Response: Not applicable.

40. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

41. 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: All nominees owe a duty of candor and must tell the truth when testifying under oath before the Senate Judiciary Committee.

Senator Mike Lee
Questions for the Record
Sunshine Sykes, Nominee to the United States District Court for the Central District of California

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

   Response: My judicial philosophy is to treat all litigants with dignity and respect, to keep an open mind, to listen attentively, to research and do the work necessary to prepare, and to issue a clear, concise, and understandable decision consistent with the applicable law.

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

   Response: First I would look at the Supreme Court and Ninth Circuit to determine if there was any precedent that would resolve the issue. Second, if there was no precedent, I would look to the plain language of the statute to see if it was unambiguous. Third, if the statute was ambiguous I would look to Supreme Court and Ninth Circuit precedent to identify appropriate tools to resolve the ambiguity, such as the canons of construction, analogous statutes, precedent from other circuits, and lastly to legislative history.

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

   Response: I would look at the Supreme Court and Ninth Circuit to determine if there was any precedent that would resolve the issue. Although it is highly unlikely that such a case would arise for which there was no precedent, if such a case were to arise I would look to Supreme Court and Ninth Circuit precedent for guidance on the interpretive method to be used in the relevant constitutional provision. Lastly, I would consider any persuasive authority from other Circuits.

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

   Response: I am bound to follow Supreme Court precedent and Ninth Circuit precedent as to the role of the text and the original public meaning of the text of the relevant constitutional provision.

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

   Response: If the plain meaning of the statute is unambiguous then that ends the inquiry. If the text is ambiguous, then I would use various tools set forth in response to Question No. 2.

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

Response: I would follow Supreme Court and Ninth Circuit precedent as to how to interpret the plain meaning of a statute or constitutional provision.

6. What are the constitutional requirements for standing?

Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court provided a three-part test for establishing standing in federal court: (1) the plaintiff must have suffered an "injury in fact," of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct; and (3) it must be likely that a favorable decision by the court will redress the injury.

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

Response: The United States Supreme Court found in *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) that Congress has implied powers derived from the Necessary and Proper Clause (Article I, Section 8).

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

Response: I would faithfully follow Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has held that the Constitution protects unenumerated fundamental rights. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that due process protects those fundamental rights and liberties that are objectively, "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal quotations and citation omitted). Recognized "unenumerated" rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to direct the upbringing of one's children, *see Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

10. What rights are protected under substantive due process?

Response: Fundamental rights are protected such as those listed in response to Question No. 9. The Supreme Court has identified that the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for recognition of such rights.

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: If confirmed, I would faithfully apply the Supreme Court's precedent concerning the scope of constitutional substantive due process protections.

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

Response: 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 determined that race, national origin, alienage, and religion are suspect classes that are subject to strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365, 371-72; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The Supreme Court has looked at various factors in determining whether a group qualifies as a "suspect class" such as: 1) whether the members of the class constitute a discrete and insular minority (*United States v. Carolene Products Co*., 304 U.S. 144 (1938); 2) whether the group has been subjected to historical discrimination, *Lyng v. Castillo*, 477 U.S. 635 (1986); and 3) whether the group has "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Id.* at 638. Further, in *San Antonio Independent School Dist. v. Rodriguez*, the Supreme Court explained traditional indicia of suspectness includes a class that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. 1, 28 (1973).

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

Response: Checks and balances and the separation of powers prevents any one branch from becoming too powerful. As such they are fundamentally important to our constitutional structure.

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 faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: Empathy should not play a role in deciding a case.

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

Response: A court has equal responsibility in upholding laws that are constitutional and invalidating laws that are unconstitutional. Failure to do one is not worse than the other.

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 judge and judicial nominee, it would be inappropriate for me to comment as to any personal opinions I might have, if any, as to any changes, increases, or trends regarding the invalidation of federal statutes by the Supreme Court. As a sitting judge and if confirmed, I will continue to faithfully follow Supreme Court and Ninth Circuit precedent.

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

Response: Black's Law Dictionary defines "judicial supremacy" as "the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." It defines "judicial review" as "a court's power to review the actions of other branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional."

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the

whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials are duty bound to follow the Constitution.

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

Response: Judges must faithfully and impartially decide all cases that come before them in accordance with applicable law.

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: If confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent.

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

Response: None. The factors to be considered in sentencing are set forth in 18 U.S.C. § 3553(a).

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: How any particular administration defines "equity" seems to be a policy decision. As a sitting judge and judicial nominee, it would not be appropriate for me to comment on policy debates that are occurring regarding such definition.

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

Response: Black's Law Dictionary defines "equity" as fairness, impartiality and evenhanded dealing and "equality" as the quality, state, or condition of being equal; esp., likeness in power or political status.

26. Should equity be taken into consideration in determining the outcome of a case?

Response: As a sitting judge and if confirmed, I will continue to treat all litigants fairly and impartially.

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

Response: See response to Question No. 24. In addition, if confirmed, the issue of whether the Fourteenth Amendment equal protection clause guarantees "equity" could come before me, therefore, it would be inappropriate for me to opine on the matter.

28. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism." It is my understanding that the term has been used to refer to policies and practices in an institution that result in racial discrimination, racial disparities, and racial bias.

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

Response: I do not have a personal definition of "critical race theory." It is my understanding is that it refers to an academic theory that examines the relationship between race and law.

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

Response: I do not have a personal definition for either term. Therefore, I do not have any personal opinion or view as to distinguishing one term from another.

Senator Ben Sasse
Questions for the Record for Sunshine Suzanne Sykes
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
February 1, 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 to treat all litigants with dignity and respect, to keep an open mind, to listen attentively, to research and do the work necessary to prepare, and to issue a clear, concise, and understandable decision consistent with the applicable law.

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

   Response: I do not describe myself according to any particular label. If confirmed, it is my duty to follow the precedent of the Supreme Court and the Ninth Circuit in interpreting the Constitution or a statute.

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

   Response: I do not describe myself according to any particular label. If confirmed, it is my duty to follow the precedent of the Supreme Court and the Ninth Circuit in interpreting the Constitution or a statute.

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

   Response: I believe the Constitution is an enduring document whose precise meaning cannot change over time.

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

Response: I have not studied the jurisprudence of any individual Justice. As such there is no Justice whose jurisprudence I most admire.

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, I would be bound by the precedent of the Ninth Circuit, the Supreme Court, and the doctrine of *stare decisis*. The Ninth Circuit in the absence of controlling Supreme Court precedent, could only overrule its own precedent by the Ninth Circuit sitting *en banc*. Generally *en banc* review is not favored and 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." Federal Rules of Appellate Procedure 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: See response to Question No. 8.

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

Response: If the text of the statute is clear and unambiguous then extrinsic factors do not need to be considered. If the text is ambiguous, then I would look to precedent of the United States Supreme Court and the Ninth Circuit. If there is no precedent, then I would look to the canons of construction, analogous statutes, persuasive authority from other circuits, and lastly to legislative history.

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: In determining an appropriate sentence, I would look to 18 U.S.C. § 3553(a), and the sentencing guidelines. Specifically, 18 U.S.C. § 3553(a)(6) includes consideration of the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

Questions from Senator Thom Tillis
for Sunshine Suzanne Sykes
Nominee to be United States District Judge for the Central District of California

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

   Response: Yes.

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

   Response: Judicial activism is a term that can mean different things to different people. If it is defined as inserting ones own personal views and agenda into a decision, then it would not be appropriate.

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

   Response: Impartiality is expected.

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: Judges must impartially and fairly apply the law to the facts without consideration of any personal desirable outcome. As a sitting judge, and if confirmed I will continue to faithfully apply the law to the facts without any consideration of my personal views.

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

   Response: No.

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

   Response: If confirmed, I will faithfully and impartially apply the law as set forth in the Supreme Court's decisions in *D.C. v. Heller*, 554 U.S. 570, 595 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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: I would faithfully and impartially apply the law of the United States Supreme Court and the Ninth Circuit to the facts as established by the evidence in the record. As a sitting judge and a judicial nominee it would not be appropriate for me to comment further as such a challenge could potentially come before me for decision.

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

Response: In *Harlow v. Fitzgerald* the United States Supreme Court held that government officials performing discretionary functions generally are immune from civil suits unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. 800, 818 (1982).

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

Response: I would follow the standard set forth in response to Question No. 9 regardless of any belief I may or may not have.

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

Response: See my response to Question No. 10.

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment on Supreme Court jurisprudence. However, I do recognize the importance of judicial decisions that provide clear guidance and standards for litigants to follow.

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 judge and judicial nominee, it would not be appropriate for me to comment on a hypothetical scenario. If confirmed, I would be bound to follow the Supreme Court and Ninth Circuit precedent and would faithfully apply the law to any case that comes 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: See my response to Question No. 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: See my response to Question No. 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: See my response to Question No. 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: See my response to Question No. 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: See my response to Question No. 13a.

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: See my response to Question No. 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: See my response to Question No. 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: See my response to Question No. 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: See my response to Question No. 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: As a sitting judge and judicial nominee it would not be appropriate for me to comment on Supreme Court jurisprudence. Further, in regards to applying the Supreme Court's ineligibility tests I would follow the precedent of the Supreme Court and the Ninth Circuit including *Alice Corp. v. CLS Bank*, 573 U.S. 208 (2014) and *Mayo v. Prometheus Labs. Inc.* 566 U.S. 66 (2012) which unanimously concluded that "In consequence, we must hesitate before departing from established general legal rules lest a new protective rule that seems to suit the needs of one field produce unforeseen results in another. And we must recognize the role of Congress in crafting more finely tailored rules where necessary. Cf. 35 U. S. C. §§161–164 (special rules for plant patents). We need not determine here whether, from a policy perspective, increased protection for discoveries of diagnostic laws of nature is desirable.

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

a. What experience do you have with copyright law?

Response: I did not litigate such matters as an attorney and do not recall presiding over such matters as a judicial officer.

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

Response: I did not litigate such matters as an attorney and do not recall presiding over such matters as a judicial officer.

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

Response: I did not litigate such matters as an attorney and do not recall presiding over such matters as a judicial officer.

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

Response: I cannot recall litigating such matters as an attorney. As a sitting judge, I have presided over matters that involve the First Amendment, but only a couple involved intellectual property issues.

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

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

    Response: I would first look at the text of the statute and review the plain language of the statute. If the text of the statute was unambiguous, I would apply the law to the facts before me. If the text of the statute was ambiguous, I would look to the precedent of the Supreme Court and the Ninth Circuit. If there was no precedent, I would look to the canons of construction, analogous statutes, analogous cases from other circuits, and lastly legislative history.

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

    Response: In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court held that agency interpretations of a statute that the agency is delegated to administer contained in the policy statements, agency manuals and enforcement guidelines do not warrant *Chevron* deference. Such interpretative guidance is entitled to respect, but only to the extent that those interpretations have the power to persuade.

    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: If such a matter came before me as a sitting judge, and if confirmed, I would apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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: As a sitting judge, and if confirmed, I will continue to faithfully and impartially apply all existing laws and the precedent of the Supreme Court and the Ninth Circuit.

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: See my response to Question No 17a.

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: As a sitting judge and judicial nominee, it would not be appropriate for me to provide an opinion. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: District Court Judges have a duty to impartially and fairly decide all cases that come before them in accordance with the applicable law.

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

Response: District Court Judges have a duty to impartially and fairly decide all cases that come before them in accordance with the applicable law.

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

As a sitting judge, and if confirmed, I will continue to decide all cases that come before me impartially and fairly in accordance with the applicable law.

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

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to provide an opinion. If confirmed, I will continue to faithfully decide all cases that come before me fairly, impartially, promptly, and consistently with the applicable law.

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

Response: See my response to Question No. 19a.

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

Response: See my response to Question No. 18a.

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

Response: See my response to Question No. 18a.

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: See my response to Question No. 18a.

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

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to provide an opinion.

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

Response: See my response to Question No. 21a.