Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Mustafa Taher Kasubhai Nominee to the United States District Court for the District of Oregon

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

   Response: I strongly disagree with that statement. In my roles as a U.S. Magistrate Judge for over 5 years, a judge on the Oregon State Circuit Court for 11 years, and a neutral appellate adjudicator for 4 years, I have faithfully and impartially applied precedent of the United States Supreme Court, the Ninth Circuit, and state appellate courts. My record of public service in the judiciary reflects my commitment to the rule of law, and if I am fortunate to be confirmed, I will continue to faithfully defend the U.S. Constitution, our country's laws, and all binding precedent.

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

   Response: I am not familiar with this statement, and I absolutely disagree with its sentiment. Trial courts are obliged to follow all binding precedent and to do so faithfully. My record in judicial public service reflects that abiding obligation. I will continue to follow all binding precedent should I be confirmed to serve as a district judge.

3. **Your "courtroom rules" state that "[p]arties and counsel are instructed to address each other in all written documents and court proceedings by those previously identified pronouns and honorifics."**

   a. **If a party or counsel in your courtroom states that their pronouns are "ze/zir/zirs" or "fae/faer/faers"—do your court rules require other parties and counsel to use those "pronouns" when referring to them? Please provide a yes or no answer.**

      Response: As I testified during my hearing, my courtroom practices are designed to ensure that all parties, counsel, jurors, witnesses, courtroom staff, and public observers are treated with respect and dignity. As such, I instruct that "attorneys and parties should conduct themselves with decorum and manners." These and other practices I have adopted are consistent with Canon 3(A)(3) of the Code of Conduct for the United States Judges which provides that "a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in

an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process." No party or attorney who has appeared before me has declined to address another party or attorney by their identified pronouns. If such an issue arose in my courtroom, I would address that issue consistent with my obligations to accord the persons before me the full right to be heard and to dispose of matters promptly, efficiently, and fairly while also affording full and complete respect for the First Amendment rights of every person appearing before the court.

I have served for 16 years on the state and federal courts and as a neutral appellate decision maker for 4 years on the Oregon Workers' Compensation Board. I have presided over 5,000 matters in my judicial career, and I have issued over 400 written opinions as a United States Magistrate Judge. My judicial opinions have been upheld over ninety-nine percent of the time. In these 20 years I have faithfully fulfilled my oath to defend our Constitution and all state and federal laws, without regard to the background of the attorneys and litigants. My record reflects that commitment, and I will continue to steadfastly apply the law to the facts in all cases, and I will faithfully apply all binding precedent of the Ninth Circuit and Supreme Court.

Last year the Oregon State Bar recognized my judicial service by awarding me with the Wallace P. Carson Jr. Award for Judicial Excellence. The award recognizes service to the law and the profession. The Oregon State Bar notified me that it is conferring on me its annual Judge John Acosta Professionalism Award. In this District Court nomination process, the American Bar Association unanimously found me well-qualified. I point to these recognitions as evidence that the Oregon legal community trusts my judicial service. My work to find ways in my courtroom to respectfully acknowledge all parties has been consistent with the ideals of ensuring equal access to our courts, and it does not affect my legal decision making.

b. Could a party or counsel be sanctioned for failing to refer to an opposing counsel or litigant by their declared pronoun? Please provide a yes or no answer.

Response: Please see my response to Question 3a.

4. In 2021, while you were a sitting federal magistrate judge, you wrote an article where you said: "I committed to begin every civil hearing, status conference, and jury selection with an introduction that invited attorneys or potential jurors to introduce themselves and provide their pronouns so I could be sure to address them respectfully and appropriately. Lawyers have been quite responsive, jurors not so much." (emphasis added)

a. Why do you think jurors are less responsive to your "invitation" to announce their pronouns than attorneys?

Response: I have not closely studied why some who have appeared before me have been more responsive to the invitation to introduce themselves and provide their honorifics than others. Generally, I have surmised that some who come to my courtroom have never been invited to provide their honorifics, while others have regularly been invited to do so.

b. As a judge, you wield considerable coercive power over attorneys whose livelihoods depend on repeated appearance before you. Do you think this coercive power bears on attorney responsiveness to your "invitation" to announce pronouns?

Response: No. Some attorneys introduce themselves with their honorifics, and some do not. I do not force anyone to introduce themselves if they have chosen not to do so.

c. Do you think it is appropriate for a federal judge to use the power of their office to promote controversial views about gender ideology?

Response: I am committed to ensuring access to the courts for everybody. I try to do this by ensuring a civil and respectful environment in which everybody, regardless of their background, has the best chance to present their case to me.

5. In your article *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head,* you reference Professor MacKinnon's view that sexuality is a "pervasive and socially constructed dynamic that systematically oppresses women."

a. What does it mean to say that sexuality is "socially constructed"?

Response: In that academic article I wrote almost 30 years ago as a law student, I surveyed several different theories related to rape law and issues including sexual relationships, consent, force, and resistance. The article traced these issues in an attempt to explain, for example, the difficulty prosecutors faced in prosecuting rape charges under the laws I surveyed at the time, which required evidence of physical resistance and force and regarded a victim's non-consent in the form of saying "No" to sexual contact as not enough. Within that context, I included a summary of some of Professor MacKinnon's writings, among many other theorists and philosophers. As I recall Professor MacKinnon's work nearly 30 years after I reviewed her writings, it was her opinion that sexuality was constructed through social relationships and institutions. The quoted language reflects the views of the professors whose theories I cited; the language did not, and does not, reflect my own views.

b. Is gender a social construct?

Response: I am not an expert in this area, and I generally leave such questions to social scientists, academics, religious leaders, and others to consider. To the extent that this issue may come before me as a judge, it would not be fair to litigants to speculate or suggest that I have prejudged the issue. If a case came before me in which this issue would need to be answered, I would work hard to evaluate the admissible evidence, apply all relevant law to those facts, and abide by all binding precedent from the Ninth Circuit and Supreme Court.

c. Is sex a social construct?

Response: I am not an expert in this area, and I generally leave such questions to social scientists, academics, religious leaders, and others to consider. To the extent that this issue may come before me as a judge, it would not be fair to litigants to speculate or suggest that I have prejudged the issue. If a case came before me in which this issue would need to be answered, I would work hard to evaluate the admissible evidence, apply all relevant law to those facts, and abide by all binding precedent from the Ninth Circuit and Supreme Court.

6. In the same article, you cite Professor MacKinnon's "illuminat[ing]" theory that "sexuality itself is a power web in which heterosexual relations *per se* are infused with violence and control."

Response: For clarity, the article does not describe MacKinnon's work as "illuminating." Rather, the article notes "Professor MacKinnon's theory behind the development of the power web model illuminates many questions…" The verb "illuminates" is a synonym for "explains." I did not personally subscribe to Professor MacKinnon's theory or the theories of any of the many writers whose work I described. The quoted language reflects the views of the professors' whose theories I cited; the language did not, and does not, reflect my own views.

a. Please define the term "heterosexual."

Response: Black's Law Dictionary (11th ed. 2019) defines "heterosexual" as "Of, relating to, or characterized by sexual desire for a person of the opposite sex…Of or related to sexual intercourse involving people of different sexes."

b. Please explain the meaning of this statement?

Response: The article I wrote almost 30 years ago as a law student surveyed many philosophers and theorists, including Plato, Aristotle, Locke, Hobbes, Rousseau, and also MacKinnon, Brownmiller and others. As I recall Professor MacKinnon's work nearly 30 years after I reviewed her writings, it was her opinion that sexuality was constructed through social relationships and institutions. I did not personally subscribe to Professor MacKinnon's theory or the theories of any of the many writers whose work I described. The quoted language reflects the views of the professors' whose theories I cited; the language did not, and does not, reflect my own views.

c. Do you now, or have you ever, believed that "heterosexual relations *per se* are infused with violence and control?"

Response: No.

7. In the same article, you wrote "Professor Brownmiller's assertion that rape is violence is well-reasoned, but its broadness decontextualizes male domination in everyday life." Please explain the meaning of this statement.

Response: The article I wrote almost 30 years ago as a law student surveyed many philosophers and theorists, including Plato, Aristotle, Locke, Hobbes, Rousseau, and also MacKinnon, Brownmiller and others. As I recall, when I wrote this article almost 30 years ago as a law student, I described Professor Brownmiller's work on rape as violence as influential, but found it did not explore the issue of consent, what consent meant in the context of sexual relationships, and particularly how the law defined consent in sexual assault laws. I did not personally subscribe to Professor Brownmiller's theory or the theories of any of the many writers whose work I described. The quoted language reflects the views of the professors' whose theories I cited; the language did not, and does not, reflect my own views.

8. In the same article, you cite Professor MacKinnon's belief that "sexuality is to feminism what work is to Marxism." Please explain the meaning of this statement.

Response: The article I wrote almost 30 years ago as a law student surveyed many philosophers and theorists, including Plato, Aristotle, Locke, Hobbes, Rousseau, and also MacKinnon, Brownmiller and others. As I recall, based on my review of relevant works 30 years ago, MacKinnon compared the status of workers and the status of women under her view that both can be oppressed and treated as if they are serving the desires of others. I did not personally subscribe to Professor MacKinnon's theory or the theories of any of the many writers whose work I described. The quoted language reflects the views of the professors' whose theories I cited; the language did not, and does not, reflect my own views.

9. Please explain the Ninth Circuit's decision in *Menotti v. City of Seattle.*

Response: The Ninth Circuit in *Menotti*, considered the constitutionality of an order that restricted movement within defined boundaries in Seattle during WTO protests in 1999. The court detailed the extensive damage protesters engaged in, the injuries police officers sustained, and the risk to the safety of conference attendees. The court found that the order was content neutral and then proceeded to evaluate whether the time, place, and manner restrictions survived a constitutional challenge. The court concluded that the geographic limits were narrowly tailored to meet the significant government interest of ensuring the safety of the conference attendees and maintaining order within the affected zone.

10. Would it be reasonable for a public official to look to *Menotti* for guidance when formulating government policy?

Response: As a judge and judicial nominee it is not appropriate for me to opine on government policy making. As a judge, when cases come before me, I will rigorously evaluate the record and arguments and apply the law to those facts, and abide by all binding precedent from the Ninth Circuit and Supreme Court.

11. In *Boudjerada v. City of Eugene* you concluded that a city-wide curfew imposed in response to violence, destruction of property, and looting during the 2020 Eugene, Oregon BLM riot was unconstitutional. To reach this conclusion, you distinguished *Menotti* noting that the Eugene riots "did not involve protestors in the tens of thousands." Are you aware that, adjusted for metro-area population, the Eugene BLM protests were larger than the Seattle WTO protests at issue in *Menotti*?

Response: My opinion details the circumstances of the protest activity and my legal analysis of the time, place, and manner restrictions. As my opinion describes, the curfew in *Boudjerada* was an all city-wide curfew without limiting geographic restrictions. In *Menotti*, the order restricting movement and activity was narrowly defined. As is my practice in every case that comes before me, I carefully researched and applied all relevant precedent to the issues before me. Because this case is still pending before me, my ethical obligations preclude me from commenting beyond the four corners of my opinion as doing so could be interpreted as prejudging issues the parties may raise in the ongoing litigation.

12. In *Boudjerada* you further distinguished *Menotti*, writing "there is no indication here (as there was in *Menotti*) that the protestors on May 29-30 were significantly organizing around violent activity." In your opinion, you acknowledged that rioters on May 31 "carried 'heavy backpacks,' bottles, and were communicating via radios." Does this not suggest organization?

Response: My opinion details the circumstances of the protest activity and my legal analysis of the time, place, and manner restrictions. As is my practice in every case that comes before me, I carefully researched and applied all relevant precedent to the issues before me. Because this case is still pending before me, my ethical obligations preclude me from commenting beyond the four corners of my opinion as doing so could be interpreted as prejudging issues the parties may raise in the ongoing litigation.

13. At your hearing, you avoided answering my question when I asked if you would describe the violence and destruction in Eugene, Oregon on May 29-30 as a riot.

a. Please provide a yes or no answer. Was the violence, destruction, and looting in Eugene, Oregon on May 29-30 a riot?

Response: Throughout my written opinions in this case, I consistently used the term "protest" to describe the events. I note that the court in *Menotti* also described the activity and events as "protests" in its opinion. My opinion detailed the property damage and injuries so as not to factually minimize what happened in the city of Eugene, Oregon. Federal and state law bars violence, destruction, and looting, and as a sitting judge for the last 16 years, I have been committed to upholding the rule of law. Because this case is still pending before me, my ethical obligations preclude me from commenting beyond the four corners of my opinion as doing so could be interpreted as prejudging issues the parties may raise in the ongoing litigation.

14. Please describe the relevant law governing when a federal court may entertain and grant a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a state court.

Response: The statutes relating to habeas corpus on behalf of a person in custody pursuant to a state court judgment can be found generally in 28 U.S.C. §§ 2241-2254. The petitioner must first exhaust all available state remedies and must file a petition within the one-year period of limitations. 28 U.S.C. § 2244(d). The standard for determining whether relief may be granted is whether the state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States…" 28 U.S.C. § 2254(d)(1). The Supreme Court explained that "as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court

was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

15. Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence

Response: Habeas petitions for persons in custody pursuant to a federal court judgment are governed by 28 U.S.C. § 2255. The petitioner must file the petition within a one-year period of limitation, 28 U.S.C. § 2255(f), and the petitioner must establish that "the sentence was imposed in violation of the Constitution or laws of the United States," the "court was without jurisdiction to impose such sentence," the "sentence was in excess of the maximum authorized by law," or the sentence was "otherwise subject to collateral attack," 28 U.S.C. § 2255(a). Successive motions must be based on newly-discovered evidence that would have resulted in acquittal or on a new and previously unavailable rule of constitutional law made retroactive by the Supreme Court. 28 U.S.C. § 2255(h)

16. In your hearing, you said that you "have not praised Marxist ideas." However, in a 1994 essay published in "The Weekly Dissent," you argued in favor of "integrating" Marxist theory with that of Locke and Bentham, in order to engage in a "creative struggle" to "redefin[e] property." Did you mislead the Committee?

Response: I did not mislead the Committee. I wrote this brief, and rather inarticulate, essay for the student paper almost 30 years ago. I have read the essay several times as I prepared for my testimony, and I am unable to piece together an explanation for what I was trying to say in the essay. The content of that essay, such that any meaning might be extrapolated from it, is so far removed from my work as a lawyer, public servant, and judge for the last 27 years, and so attenuated from the things that matter in my life as a citizen and a judge, I stand by my statement that I have not praised Marxist ideas.

Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

17. In the same article you wrote that "Marx was plainly disgusted with the alienation that property imposed." Please explain Marx's theory of alienation.

Response: I am not versed in Marx's theory of alienation, and I do not recall what I intended in the statements I wrote in a student newspaper 30 years ago. In my work as a judge in the

last 16 years, I have fairly and faithfully applied the law to the cases before me without reference to, or application of, any academic theory I may have encountered as a law student.

Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

18. Please explain what value you believed Marx's theory of alienation could play in redefining property.

Response: I am not versed in Marx's theory of alienation, and so I am unable to respond to this question. Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

19. Have you ever been a member of, or otherwise affiliated with, any organization or group that attempted to promote the theories of Karl Marx, Peter Kropotkin, or any other Marxist or Anarchist writers?

Response: No.

20. Have you ever identified your ideology as Marxist or Anarchist?

Response: No.

21. As a sitting Magistrate Judge, you made the following statement:

> **Privilege derives its power from the belief in scarcity. . . Scarcity of money, natural resources, food, and power itself. The desire to control it all drives privilege. I want to suggest to you that equity, the ideal of equity rejects this model of scarcity.**

Does this rejection of the reality of scarcity not run counter to basic economic theory?

Response: In 2020 I gave a speech about the value of diversity in our communities and why I regard it as important to consider everybody's voice and to afford everyone personal dignity. I made the point that, while people may have differential access to scarce resources

such as money, food, power, and natural resources, personal dignity is an endless resource that I strive to afford to anyone and everyone with whom I interact. As a judge, and as a proud American, I have committed to the value that no one should have more or less access to personal dignity than any other person.

I did reject the reality of scarcity. Indeed, scarcity is a key economic concept and a reality of the American economic system. My comments did not endorse an alternative economic or political model in any way whatsoever. The point I made was that there should be no scarcity when it comes to the concept of personal dignity.

The more complete quote reads "privilege derives its power from the belief in scarcity. Scarcity of money, natural resources, food, and power itself. The desire to control it all, drives privilege. Equity rejects the model of scarcity. I must be committed to the idea that your voice need not deprive me of mine. Equity also subscribes to the ideal that dignity is the foundational currency. I need not deprive another of her dignity to preserve mine."

My intent was to share the idea that dignity and respect for one another is an unlimited resource, and to set out the ways in which I strive to treat others with an abundance of dignity and respect. Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

22. Please explain Marx's theory of post-scarcity.

Response: I am not versed in Marx's theory of post-scarcity. In my work as a judge in the last 16 years, I have fairly and faithfully applied the law to the cases before me without reference to, or application of, any academic theory I may have encountered as a law student. Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

23. Do you agree with the following statement made by President Barack Obama: "the free market is the greatest producer of wealth in history -- it has lifted billions of people out of poverty"?

Response: I agree with the statement.

24. Please explain the facts and holding of the Supreme Court decisions in Students for Fair Admissions, Inc. v. University of North Carolina and Students for Fair Admissions Inc. v. President & Fellows of Harvard College.

Response: In this case defendants' admissions decisions considered, among other factors, an applicant's race. The Supreme Court concluded Asian-American applicants were negatively treated relative to other applicants, and that the negative treatment of race and racial stereotyping could not survive strict scrutiny. It held that Harvard's and UNC's admissions programs violated the Equal Protection Clause of the Fourteenth Amendment.

25. Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?

Response: Yes.

a. If yes, please list each job or role where you participated in hiring decisions.

Response: As a judge I have been responsible for hiring law clerks for my chambers, and I have participated in hiring decisions for Magistrate Judges. As an attorney in private practice, I was responsible for hiring staff. When I worked as a supervisor in the residence halls during college, I was responsible for hiring residence assistants.

26. Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?

Response: No.

27. Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?

Response: No.

28. Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?

Response: To the best of my knowledge, none of my employers used such preferences.

If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

Response: Not applicable. Please see my response to the first part of Question 28.

29. Under current Supreme Court and Ninth Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?

Response: The Supreme Court and the Ninth Circuit apply strict scrutiny to race-based differentiations. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Mitchell v. Wash.*, 818 F.3d 436 (9th Cir. 2016).

30. Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.

Response: The Supreme Court's holding is that a law that requires a private business to engage in speech, and in this case, requiring a web-designer to design a website for a same-sex wedding when the business owner would not have done so voluntarily, amounts to compelled speech in violation of the First Amendment.

31. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional* constellation*, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."

Is this a correct statement of the law?

Response: The Supreme Court cited *Barnette* favorably in its recent decision, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023). If confirmed as a district judge, and as I have done for the 16 years I have served as a judge, I will faithfully apply all binding precedent of the Ninth Circuit and the Supreme Court, including the *Barnette and 303 Creative decision.*

32. How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?

Response: I would faithfully apply all binding precedent of the Ninth Circuit and Supreme Court. In *Reed v. Town of Gilbert, Arizona*, 573 U.S. 155 (2015), the Supreme Court

explained that the first step is to determine if the regulation is content-neutral on its face. If it is, then the Court directs a second inquiry to determine the regulation's justification or purpose and whether it was promulgated because of a disagreement with the message to be regulated.

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

Response: The Supreme Court held that "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" are Constitutionally unprotected "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003). True threats are threats where the speaker expresses intent to explicitly cause immediate harm. *See Watts v. U.S.*, 394 U.S. 705 (1969).

34. Under Supreme Court and Ninth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

Response: Black's Law Dictionary (11th ed. 2019) defines a "fact" as "1. Something that actually exists; an aspect of reality … Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and the holding of opinions. 2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation … 3. An evil deed; a crime."

Black's Law Dictionary (11th ed. 2019) defines "question of law" as "1. An issue to be decided by the judge, concerning the application or interpretation of the law … 2. A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion… 3. An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide, what the true rule of law is … 4. An issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury…"

The appellate court will first determine whether a matter at issue is a question of fact or a question of law, or a mixed question of fact and law. If it is a question of fact, an appellate court will review under a clearly erroneous standard. If it is a question of law, it will review under a *de novo* standard. In the Ninth Circuit, mixed questions of law and fact are typically reviewed under a *de novo* standard "but depending on the nature of the inquiry involved, may be reviewed under a more deferential clearly erroneous standard." *U.S. v. Lang*, 149 F.3d 1044, 1047 (9th Cir. 1998).

35. Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?

Response: I am unaware of any statutory or case law precedent that prioritizes one purpose of sentencing over another. The factors set out in 18 U.S.C. § 3553(a), the United States Sentencing guidelines, the United States Probation Department's pre-sentencing report, sentencing memoranda, victim impact statements, and all binding precedent are the authority and resources on which I will rely in every case when determining a fair and impartial criminal sentence.

36. Please identify a Supreme Court decision from the last 50 years that you think is particularly well reasoned and explain why.

Response: As a sitting federal judge and a judicial nominee, I faithfully apply all binding precedent from the Supreme Court to the facts of the cases that come before me, and I would continue that practice if confirmed as a district judge. I do not differentiate precedents of the Supreme Court as it is my obligation to them all.

37. Please explain which Ninth Circuit or Supreme Court precedent supports your finding in *Gililland v. Southwest Oregon Community College District* that discrimination for past involvement in the pornography industry is actionable under Title IX.

Response: In the *Gilliland* case, I denied summary judgment finding there was sufficient evidence from which a jury could conclude that a defendant discriminated against the plaintiff on the basis of sex. In particular, as described in my written opinion, there was evidence in the summary judgment record that a member of the faculty told plaintiff something to the effect of "only classy women can be nurses, and you're not a classy woman." I found that a jury could conclude from that statement that plaintiff was treated differently because of her sex, and it was appropriate for a jury to decide. A jury returned a verdict for plaintiff.

38. Please identify a Ninth Circuit judicial opinion from the last 50 years that you think is particularly well reasoned and explain why.

Response: As a sitting federal judge and a judicial nominee, I faithfully apply binding precedent from the Ninth Circuit to the facts of the cases that come before me, and I would continue that practice if confirmed as a district judge. I do not differentiate precedents of the Ninth Circuit, as it is my obligation to apply them all.

39. While serving as a magistrate judge, you publicly praised Ibram X. Kendi as "an amazing historian and author" during a 2020 speech.

a. Which of Kendi's writings do you find most amazing? Please be specific.

Response: I am generally familiar with Mr. Kendi's work as he has written a number of New York Times Bestsellers. However, I have not read every book he has written, nor am I aware of every idea he has expressed. When considering Mr. Kendi generally, it was in relation to Mr. Kendi having received significant national recognition—for example, he was one of Time Magazine's 100 Most Influential People in the World, and as a national book award winner—rather than my support for any one idea Mr. Kendi has expressed.

b. Kendi is famous for authoring the following statement: "The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination." Do you agree with this statement?

Response: No, I do not agree with those statements. I learned of these statements for the first time at the Committee hearing. My understanding of diversity and equity does not include fighting discrimination with discrimination. I am absolutely opposed to such an idea or practice. As Gandhi once said, "An eye for an eye leaves the whole world blind." I am generally familiar with Mr. Kendi's work as he has written a number of New York Times Bestsellers. However, I have not read every book he has written, nor am I aware of every idea he has expressed.

40. While serving as a federal magistrate judge, in notes prepared for a 2019 speech to the University of Oregon Law School's incoming class, you endorsed Ibram X. Kendi's belief that it "is not enough to be not a racist. Rather you must be anti-racist, anti-sexist, anti-homophobic." Do you consider yourself to be anti-racist?

Response: The term "anti-racist" means something different to different people. As I understand that term, and how I used that term in my speech, I refer to someone who is stating their position about equity and diversity in a positive framing. To me the term means someone who is in support of equity and treating people equally. My understanding of the term does not include fighting discrimination with discrimination. I am absolutely opposed to such an idea or practice. As Gandhi once said, "An eye for an eye makes the whole world blind."

41. Ibram X. Kendi has stated that you cannot be anti-racist without being anti-capitalist. Do you agree with this statement?

Response: No, I do not agree with it. Moreover, I am not familiar with this statement or the context in which it was made.

42. In the same speech notes you wrote that you would "like to push some of Ibram's ideas a bit further." Please specify which of Ibram X. Kendi's ideas you would like to push further.

Response: At the Committee hearing on October 4, 2023, I was unable to recall the statement. I have reviewed my speech notes and located the reference: I was giving a speech to incoming law students at the University of Oregon School of Law. It was not until the Committee hearing that I became aware of Mr. Kendi's statements about fighting past discrimination with future discrimination, and so I would not have referred to them during my speech to the law students or in any other speech.

Rather, in the speech I referred to Mr. Kendi's idea that when someone takes a public position on a matter it is likely that someone else will take an opposing public position. Mr. Kendi described this back-and-forth in the context of race. As my notes indicate, in my speech I said I'd like to "push" it further by applying this idea to the experiences of students and the hard choices they would face. I specifically referred to the idea that when students embark on anything worthwhile, oftentimes they may find an obstacle or an opposing force that may make them question whether they made the right choice. In my speech I gave a few examples. One example involved an attorney who, upon declaring her intent to retire, was suddenly approached with the case of a lifetime. Another example involved someone accepting a job offer out of necessity, and then, soon after, receiving a call about the job they really wanted. I took what I understood to be Mr. Kendi's idea about action and reaction, and I turned it into motivation for students to stay engaged and not second-guess their hard choices. I explained that the goal is not about getting to the finish line but simply staying in the race.

I do not condone or profess discrimination. In my work on the bench for the last 16 years, I have treated every litigant with fairness and respect. As a sitting federal judge and former state court judge, I have applied the law to the facts in an evenhanded way with a focus on abiding all applicable precedent of the Supreme Court, the Ninth Circuit, and state appellate law. In my work with students and other members of the public, I encourage people to remain engaged and to believe in our systems of government.

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

Response: 18 U.S.C. § 1507 provides: Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. It further directs that "[n]othing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

44. Is 18 U.S.C. § 1507 constitutional?

Response: If confirmed as a district judge, I will follow Ninth Circuit and Supreme Court precedent when analyzing the constitutionality of a statute. In *Cox v. Louisiana*, 379 U.S. 559, 562 (1965), the Supreme Court rejected a facial challenge to a similarly worded state statute, explaining that: "A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. A narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate to vindicate the State's interest in assuring justice under law."

45. While serving as an Oregon state court judge, in notes you prepared for a 2013 speech to the Oregon Minority Lawyers Association, you stated "[o]f course, there is some deeper transcendent meaning to [l]ove see[s] no color, but let's be real. It's not going to happen in a pure and true way anytime soon." Please explain this statement.

Response: To the best of my recollection in the speech I gave 10 years ago, I meant that, though I believe strongly in the principle that love sees no color, I have observed that I cannot presume that everyone that I encounter follows this principle. For example, I am aware that some may see the color of my skin or hear the sound of my name and may draw presumptions before they take the time to get to know me. As a judge who has served on the state and federal courts for 16 years, I think a more apt description of how I approach each case is that the law sees no color. Every day, I strive to treat litigants fairly and to impartially apply the law to the facts before me without any bias or favor.

46. Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.

Response: I am not aware of any Ninth Circuit or Supreme Court authority that allows consideration of laws of foreign nations in interpreting a provision of the U.S. Constitution.

47. While serving as a federal magistrate judge you stated that the United States is "deeply Islamophobic."

a. Please define the term "Islamophobic."

Response: The term, as I understand it, means to have a dislike or a prejudice against Islam or Muslims.

b. Please describe precisely in what ways our nation is "deeply Islamophobic." Be as specific as possible.

Response: Although we live in a great country, I have unfortunately experienced exclusion and discrimination because of my heritage. I have also seen family members and friends who are Muslim experience discrimination over the years. For example, while a state court judge and in the courthouse, I was called sandn****r and camel jockey. In another instance, a litigant who did not agree with my ruling exclaimed something to the effect that "we don't need Muslims in this country, and someone should take him out," referring to me. Because of the credible threat, the sheriff's office posted security patrols at my home for several months. These were the kinds of experiences to which I referred in the speech you reference.

Importantly, no matter the personal instances of discrimination I have faced, I approach each and every case the same way—applying the law to the facts, faithfully abiding all relevant precedents, and treating litigants fairly.

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

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

Response: As prior judicial nominees have noted, the legal issues presented in *Brown* are unlikely to become the subject of litigation. Accordingly, I am comfortable expressing my view that *Brown* was correctly decided.

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

Response: As prior judicial nominees have noted, the legal issues presented in *Loving* are unlikely to become the subject of litigation. Accordingly, I am comfortable expressing my view that *Loving* was correctly decided.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Griswold* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Roe v. Wade*, 410 U.S. 113 (1973) was overturned *by Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge and candidate for the District Court, I can affirm that I am duty-bound to follow Supreme Court precedent. I will faithfully apply Dobbs and all other binding authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), was overturned *by Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge and candidate for the District Court, I can affirm that I am duty-bound to follow Supreme Court precedent. I will faithfully apply Dobbs and all other binding authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Gonzales* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

g. Was *District of Columbia v. Heller* correctly decided?

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Heller* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *McDonald* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Hosanna-Tabor* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *New York* State *Rifle & Pistol Ass'n v. Bruen* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

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

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Dobbs v. Jackson Women's Health* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

l. Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *Students for Fair Admissions* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

m. Was *303 Creative LLC v. Elenis* correctly decided?

Response: Canon 3(A) of the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of Supreme Court decisions. *303 Creative LLC* is binding precedent, and I will faithfully apply this, and all other Supreme Court authority.

49. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

Response: In New *York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court concluded that the constitutional right to bear arms in public for self-defense is a protected individual right. In determining whether a restriction on an individual's right to bear arms is constitutional, the court must assess whether such a restriction is consistent with the nation's historical tradition of regulating firearms.

50. While serving as a federal magistrate judge you stated "[w]e have to set aside conventional ideas of proof when we are dealing with the interpersonal work of equity, diversity and inclusion." Is this an appropriate statement for a Federal Judge to make?

Response: That statement was part of a larger essay that discussed finding ways to have more constructive and productive conversations about diversity, equity and inclusion in the Oregon legal community specifically, but also in the Oregon community more broadly. The essay was published in the Oregon State Bar's monthly professional magazine. The audience was primarily Oregon attorneys. The essay does not describe a judicial decision making methodology. Because I was writing to lawyers, who clearly understand the process by which we adjudicate matters in a courtroom, I used that commonly understood process as a contrast to the way in which we might have conversations with each other interpersonally about issues of diversity, equity and inclusion outside of the courtroom. In my 16 years on the bench, I have fairly and faithfully applied the law to the facts, including with respect to standards of proof in every case that has come before me. If I am fortunate enough to be confirmed, I will continue to do so as a District Court judge.

51. While serving as a federal magistrate judge, when discussing the "interpersonal work of equity, diversity, and inclusion," you stated "[a]s a judge, I can appreciate the challenge of employing a different mode for understanding truth than that which most lawyers are accustomed to in our work." Is this an appropriate statement for a Federal Judge to make?

Response: Please see my response to Question 50.

52. While serving as a federal magistrate judge, in notes prepared for a 2018 speech to the Lane County Bar Association, you criticized Mitch McConnell for contributing to the "politicization of the judiciary" by reducing the allotted time for debate on certain judicial appointments from 30 hours to 2 hours.

a. Is this an appropriate statement for a federal judge to make?

Response: As my notes indicate, I began the speech with the statement "I am making no political statements today, here in public or anywhere for that matter. There are references to current events, and they are discussed to describe the arc of the history of judicial independence."

As part of describing several historical events that impacted and shaped the judiciary, I included that "Last week, Senate Majority Leader Mitch McConnell revised the Senate rules reducing the 30 hours allotted for debate on judicial appointments to 2 hours." The broader theme of the hour-long presentation was discussing and describing the importance of judicial independence.

b. Will you continue to make public statements about matters of public policy if confirmed to a lifetime appointment?

Response: As a federal judge and judicial nominee, I am precluded by the Code of Conduct for United States Judges from commenting on matters of public policy.

53. 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: I previously spoke with Christopher Kang about how the nominations process generally worked based on his experience working in the White House Counsel's Office.

54. 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 the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: In 2021, I spoke briefly with William Harrison. He explained to me the general process for nominations.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

56. 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.

57. 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.

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

Response: On March 23, 2023, I submitted an application to Senators Ron Wyden and Jeff Merkley regarding a position on the United States District Court for the District of Oregon. On May 13, 2023, I interviewed with the Judicial Selection Commission established by Senators Ron Wyden and Jeff Merkley. On June 12, 2023, I interviewed with attorneys from the White House Counsel's Office. Since June 24, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2023, the President announced his intent to nominate me.

59. 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: Early in the process when Senators Wyden and Merkley were considering applications for this District Court position, I spoke with Christopher Kang briefly about his

experience with the nominations process, based on his experience working in the White House Counsel's Office.

60. 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.

61. 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.

62. 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.

63. 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.

64. Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?

a. If yes,

i. Who?
ii. What advice did they give?
iii. Did they suggest that you omit or include any particular case or type of case in your questionnaire?

Response to all subparts: I spoke with attorneys from Office of Legal Policy about preparing my materials to submit to the Senate Judiciary Committee. The attorneys recommended that I include cases that reflect the breadth and depth of my legal rulings as a judge throughout my 16 years on the bench. I independently reviewed my record and included cases I determined reflected the breadth and depth of my judicial experience.

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

Response: On March 23, 2023, I submitted an application to Senators Ron Wyden and Jeff Merkley regarding a position on the United States District Court for the District of Oregon. On May 13, 2023, I interviewed with the Judicial Selection Commission established by Senators Ron Wyden and Jeff Merkley. On June 12, 2023, I interviewed with attorneys from the White House Counsel's Office. Since June 24, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2023, the President announced his intent to nominate me.

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

Response: I received these questions on October 11, 2023, conducted legal research, reviewed my files, and drafted my responses. I submitted my draft responses to the Office of Legal Policy at the Department of Justice on October 12, 2023, and I received limited feedback. I then finalized and submitted my answers.

Senate Judiciary Committee
Nominations Hearing
October 4, 2023
Questions for the Record
Senator Amy Klobuchar

Mustafa Taher Kasubhai, nominee to be U.S. District Court Judge for the District of Oregon

Since 2018, you have served as a U.S. Magistrate Judge in the U.S. District Court for the District of Oregon. In this capacity, you have been assigned more than 900 civil cases as well as many criminal matters. Additionally, prior to your service as a federal magistrate judge, you served as a State Circuit Court Judge in Lane County, Oregon from 2007 to 2018. In this capacity, you presided over more than 500 criminal and civil matters as well as appeals from administrative and municipal courts.

- **How has your experience as a federal magistrate judge and as a state trial court judge prepared you to serve as a federal district court judge?**

  Response: Over the last 16 years I have served on the state and federal benches in Oregon, I have presided over 5,000 civil and criminal matters. If confirmed to serve as a United States District Judge, I would bring to the position a breadth and depth of subject matter knowledge as well as thousands of hours of experience as a trial judge in the courtroom.

  Currently, as a United States Magistrate Judge I am assigned the same kinds of civil cases that the United States District Judges are assigned. Over the last 5 years, I have presided over a vast range of subject matters including employment discrimination claims, patent infringement litigation, complex section 1983 claims involving multiple governmental defendants and bodies, prisoner civil rights cases, social security appeals, *pro se* litigant claims, and free speech and religious freedom claims. I am currently performing the civil work I would if I were confirmed. My record reflects that I vigorously review each case fairly and impartially; that I apply the law to the facts; and that my written opinions are detailed, clear, and well-reasoned.

  When I served on the Oregon State Circuit Court, I presided over both civil and criminal matters, including over 100 criminal jury trials in my 11 years on the state bench. I have a broad base of knowledge of criminal law generally, a deep understanding of criminal procedure and evidence, extensive experience managing jury trials, and experience with considering the multiple factors in determining and imposing fair sentences.

  My many hours in the courtroom—engaging with attorneys, litigants, and the general public—have helped me develop patience and practice humility. If confirmed, I will come to the bench with an established reputation in the District of Oregon as a fair and

impartial judge—a judge who will take the time to listen to everyone's case, ask questions to fully understand the parties' positions, and then issue rulings that are clear and respectful so that litigants, win or lose, will know they were heard.

- **What steps have you taken to ensure that those who appear before you have confidence that the court reached a fair and just decision, regardless of the outcome?**

  Response: In every case, I endeavor to treat everyone with respect and dignity. To do so, prior to taking the bench for a hearing or trial, I ensure that I am prepared. I read the briefs and discuss the issues with my law clerks so that I am as fully informed on the law and facts as possible. I schedule extended time for oral arguments, so I do not rush the attorneys' presentation. I ask lots of questions with the intent to understand the parties' arguments from every conceivable angle. In this way, I get the benefit of the attorneys' expertise in the case to "stress test" my own understanding of the issues. I do this while maintaining an environment in the courtroom where the attorneys and I are engaged in a discussion. The trust I try to build with the litigants and lawyers helps me to understand the issues as well as possible. My engagement with the litigants communicates to them that I am genuinely interested in what they have to say. This develops comfort in the courtroom and with me, and this gives them the chance to deliver their best.

  After arguments, I work hard to make sure I issue timely written opinions. I approach drafting opinions with a focused and consistent method so that the structure of my opinions is predictable and readable. I intentionally avoid "flair" in my written opinions out of respect for the parties who have worked hard to present their best cases. I remain aware that at least one of the parties' efforts may not lead to a win; "flair" in opinions can sometimes trivialize a parties' position, and it is unnecessary.

  For years, whether I was ruling from the bench in state court or writing an opinion in District Court, I have been mindful of the image of a pilot flying a passenger plane. For the case before me, I am the pilot and the parties, attorneys, witnesses, and jurors are the passengers. It is my responsibility to not merely get them from the beginning of the case to the end but to also ensure that the experience is as turbulence-free as possible. At the journey's end, I am obliged to land the plane as gently as possible. As a pilot, if I have done my job well, the least noticeable part of the journey is that they were thousands of feet above solid ground inside a thin aluminum cylinder. As a judge, if I have done my job well—including treating people with graciousness and dignity in the courtroom and writing well-reasoned and readable opinions—the parties, attorneys, witnesses, and jurors will close out the case, get on with their lives and do so with more respect for the judiciary and the rule of law.

Senator Mike Lee
Questions for the Record
Mustafa Taher Kasubhai, Nominee to the United States District Court for the District of Oregon

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

   Response: Humility is the foundation of my judicial philosophy. Striving to practice humility in my judicial work supports my effort to treat everyone who appears in my courtroom with dignity and patience. It supports my effort to listen carefully and work hard to evaluate the facts, understand the legal arguments, and comprehend the law which I will apply to the facts. Finally, humility is the necessary support for upholding the rule of law and remaining faithful to all binding precedent.

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

   Response: The first step is to consider the text of the statute and to give the words their public meaning at the time the statute was adopted. If the text is ambiguous and there is no prior binding precedent, I would apply the principles of statutory interpretation as directed by the Ninth Circuit and Supreme Court.

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

   Response: I would first apply binding Ninth Circuit and Supreme Court precedent interpreting a constitutional provision. If no prior binding precedent exists, I would analyze the text of the provision and determine its public meaning based on historical practices and understandings as directed by the Supreme Court in cases such as *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York State Rifle & Pistol Ass'n, Inv. v. Bruen*, 142 S. Ct. 2111 (2022).

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

   Response: The text and original meaning of a constitutional provision is of paramount importance. Please see my answer to Question 3.

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

   Response: Please see my answer to Question 2. When a statute's text is unambiguous, the plain meaning of the text is singularly relevant.

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

   Response: Please see my answers to Questions 2, 3, and 4. The plain meaning of a statute or constitutional provision is of paramount importance, and its meaning needs to be determined as of the time of enactment.

7. **What are the constitutional requirements for standing?**

   Response: There are three elements to satisfy Article III standing. First, a plaintiff must show that he or she has suffered an "injury in fact" that is concrete and particularized and actual or imminent rather than hypothetical. Second, there must be a causal connection between the alleged injury and the complained of actions. Finally, the harm must be redressable by a decision in plaintiff's favor. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

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

   Response: Congress is authorized with the powers identified in the U.S. Constitution, Article I, § 8. It is further authorized to make all laws that are necessary and proper to effectuate its authority.

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

   Response: The Supreme Court has explained that Congress is not required to cite to its source of its authority when enacting legislation. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). If confirmed and presented with a question of Congress' authority to enact a statute, I would follow Ninth Circuit and Supreme Court precedent when evaluating whether the enactment of the law was in the scope of Congress' constitutionally established authority.

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

Response: The Constitution is generally one of enumerated rights. However, the Supreme Court recognized in *Washington v. Glucksberg*, 521 U.S. 702 (1997), that it also protects certain unenumerated rights through the Fifth and Fourteenth Amendments. Examples of those unenumerated rights include (but are not limited to) the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and the right to keep one's family together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). When a right is not expressly enumerated, the Supreme Court looks to whether a claimed individual right is deeply rooted in our nation's history and tradition and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, at 720-721.

11. What rights are protected under substantive due process?

Response: Please see my answer to Question 10.

12. If you believe substantive due process protects some personal rights such as a right to contraceptives, 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: I distinguish protected rights from unprotected rights based on the precedence of the Supreme Court and Ninth Circuit. The Supreme Court held in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that the Constitution protected the right of marital privacy against state restrictions on contraception, and that while the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create zones that establish the right to privacy. The Supreme Court held in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that the Constitution does not protect the economic rights at stake in *Lochner v. New York*. I am bound, and I will faithfully uphold all binding precedent of the Supreme Court and the Ninth Circuit.

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

Response: The Commerce Clause is found in Article I, Section 8, Clause 3, of the U.S. Constitution. It is one of Congress' enumerated powers. The clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In *U.S. v. Lopez*, 514 U.S. 549 (1995), the Supreme Court explained that Congress could regulate the use of channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect or substantially relate to interstate commerce. The Court in *Lopez* imposed limits on Congress' power to legislate activities that substantially affected or substantially related to interstate

commerce, explaining that indirect effects on commerce are insufficient bases for legislative authorization under the Commerce Clause.

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

Response: Some of the criteria the Court has considered in determining a suspect class include whether the group has historically been discriminated against, whether the group possesses an immutable or highly visible trait, and whether the group is a discrete or insular minority. In *Graham v. Richardson*, 403 U.S. 365, 372-373 (1971), the Supreme Court identified classifications based on alienage, similar to those based on nationality, or race as "inherently suspect and subject to close judicial scrutiny." The Supreme Court described the "traditional indicia of suspectness" as applying to a class "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." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

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

Response: The separation of powers within our Constitution ascribes separate and independent powers among the legislative, executive, and judicial branches of the government. This separation of powers is intended to ensure that no one branch is more powerful than another. *See generally*, *Morrison v. Olson*, 487 U.S. 654 (1988).

16. 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 approach a case like this as I have approached all cases that have come before me over the last 16 years on the state and federal benches. I would meticulously consider the parties' arguments and evaluate the relevant statutes and all binding precedent. I would follow the Ninth Circuit and Supreme Court precedent.

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

Response: For the 16 years I have served on the state and federal benches, I have approached all cases with an open mind, considered the issues fairly and impartially, and faithfully applied the law to the facts of the case without regard to any personal views. If I am confirmed as a district judge, I will continue to faithfully uphold the rule of law.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both hypothetical choices are unacceptable. Constitutional laws must be upheld and unconstitutional laws invalidated. Upholding the rule of law in every instance is that which ensures the legitimacy of the judiciary and fulfills its obligation under the U.S. Constitution.

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

Response: I have not had the opportunity to study this issue. In my 16 years on the state and federal benches I have upheld the rule of law and followed binding precedent from the appellate courts, including the Ninth Circuit and the Supreme Court. If confirmed, I will continue to follow all binding precedent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" as "A court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional…" and "judicial supremacy" as "[t]he 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."

21. 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: In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court, in affirming that the federal judiciary is "supreme in the exposition of the law of the Constitution…" concluded it is necessarily incumbent on all state legislators, and federal officers who take an oath pursuant to Art. VI, to support the Constitution. If such officers could disregard the judgments of the courts, the Constitution itself would become a mockery. *Id.* at 18.

22. 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: Judicial restraint serves the Court's limited role in interpreting statutes and the U.S. Constitution. For judges to attempt to extend their authority beyond this limited role can undermine the court's legitimacy.

23. 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 I am confirmed as a U.S. District Judge, I would be duty bound to apply all binding precedent from the Ninth Circuit and the Supreme Court. A trial court judge is obliged to ensure the proper development of the factual record and apply the law to the facts. It is not the trial court's role to disregard or reinterpret binding precedent.

24. 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.

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

Response: I am not familiar with the definition offered in this question. Black's Law Dictionary (11th ed. 2019) defines the term "equity" as "[f]airness; impartiality; evenhanded dealing." If I am fortunate to be confirmed, I would treat all persons in a fair, impartial, and evenhanded manner without regard to their race, gender, or status as I have done as a judge over the last 16 years.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing." It defines "equality" as "[t]he quality, state, or condition of being equal."

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

Response: While the Fourteenth Amendment includes the word "equal," it does not include the word "equity."

28. How do you define "systemic racism?"

Response: The Merriam-Webster dictionary defines this term to mean "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems…"

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

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

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

Response: As described in my responses to Questions 28 and 298, "systemic racism" is "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems…" and "critical race theory" is defined as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

31. In notes you prepared for a speech you gave to the incoming class at Oregon Law in 2019, you spoke about Ibram X. Kendi. You stated to those students, "I'd like to push some of Ibram's ideas a bit further." Kendi is well-known for saying:

> **"[t]he only remedy to racist discrimination is anti-racist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."**

During the nominations hearing in this committee on October 4, 2023, you stated several times that you "didn't recall" telling the students you wanted to push Kendi's ideas further. Was it appropriate for you as a federal magistrate judge to praise Kendi, a person who encourages overt discrimination?

Response: At the Committee hearing on October 4, 2023, I was unable to recall the statement to which you referred. I have reviewed my speech notes and located the reference: I was giving a speech to incoming law students at the University of Oregon School of Law. It was not until the Committee hearing that I became aware of the quotation from Mr. Kendi, and so I would not have referred to it during my speech to the law students or in any other speech.

Rather, in the speech I referred to Mr. Kendi's idea that when someone takes a public position on a matter it is likely that someone else will take an opposing public position. Mr. Kendi described this back-and-forth in the context of race. As my notes indicate, in my speech I said I'd like to "push" it further by applying this idea to the experiences of students and the hard choices they would face. I specifically referred to the idea that when students embark on anything worthwhile, oftentimes they may find an obstacle or an opposing force that may make them question whether they made the right choice. In my speech I gave a few examples. One example involved an attorney who, upon declaring her intent to retire, was suddenly approached with the case of a lifetime. Another example involved someone accepting a job offer out of necessity, and then, soon after, receiving a call about the job they really wanted. I took what I understood to be Mr. Kendi's idea about action and reaction, and I turned it into motivation for students to stay engaged and not second-guess their hard choices. I explained that the goal is not about getting to the finish line but simply staying in the race.

I do not condone or profess discrimination. In my work on the bench for over 16 years, I have treated every litigant with fairness and respect. As a sitting federal judge and former state court judge, I have applied the law to the facts in an evenhanded way with a focus on abiding all applicable precedent of the Supreme Court, the Ninth Circuit, and state appellate law. In my work with students and other members of the public, I encourage people to remain engaged and to believe in our systems of government.

32. Do you now distance yourself from Kendi's extreme ideology? If not, how would you push Kendi's message of overt discrimination "a bit further" as a federal district court judge?

Response: Please see my response to Question 31. I am generally familiar with Mr. Kendi's work as he has written several New York Times Bestsellers. However, I have not read every book he has written, and I am not aware of every idea that he has expressed. I have never adopted Mr. Kendi's ideology about remedying racism by discriminating, which I first

learned of during my hearing. I do not condone any ideology or practice that discriminates. My interest outside of my judicial work is dedicated to finding ways to build community. I am committed to finding ways to increase access to our courts so that everyone, regardless of their backgrounds, can present their best selves, their best arguments, and their best cases to the court.

33. You stated that "DEI: diversity, equity, and inclusion is the heart and soul of the court system. Can we say that? Yeah, I just did, and I say it proudly" to the Oregon State Bar in May of this year. Does your commitment to DEI come before your commitment to the Constitution, to the law itself, or to equal justice under the law?

Response: No. The rule of law is the foundational principle of our Constitutional democracy. In my public service over the last 16 years on the state and federal courts, I have taken an oath to defend our Constitution and apply all laws faithfully and impartially. I continue to abide by my oath.

I can appreciate that people may have different understandings of what diversity, equity, and inclusion can mean. In the context I use those terms, I mean a commitment to finding ways to increase opportunities for all people from all backgrounds in our legal system. When I referred to DEI being the heart and soul of the court system, my intent, and the meaning I believe the audience in Oregon understood those terms to mean, was increasing access to the courts. In no way did I intend the use of those terms to mean that I supplanted our Constitution, the law, or equal justice under the law.

34. Your speech to the Oregon State Bar included your justification for enforcing a rigorous "pronoun" policy in your courtroom. You acknowledged that this is a political subject. You stated, "If I start doing this, won't it appear political? This is political, and I shouldn't be doing political things. I shouldn't be the source of controversy." Now, you have embraced the controversy and have become an advocate for forcing others to use an individual's pronouns. Is it appropriate for a federal judge to proactively become the source of political controversy? How do you plan on separating your passion for the ubiquitous adoption of pronoun ideology from your judgments?

Response: As I testified during my hearing, my courtroom practices are designed to ensure that all parties, counsel, jurors, witnesses, courtroom staff, and public observers are treated with respect and dignity. As such, I instruct that "attorneys and parties should conduct themselves with decorum and manners." These and other practices I have adopted are consistent with Canon 3(A)(3) of the Code of Conduct for the United States Judges which provides that "a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process." No party or

attorney who has appeared before me has declined to address another party or attorney by their identified pronouns. If such an issue arose in my courtroom, I would address that issue consistent with my obligations to accord the persons before me the full right to be heard and to dispose of matters promptly, efficiently, and fairly while also affording full and complete respect for the First Amendment rights of every person appearing before the court.

With respect to my judicial service, I have served for 16 years on the state and federal benches and as a neutral appellate decision maker for 4 years on the Oregon Workers' Compensation Board. I have presided over 5,000 matters in my judicial career, and I have issued over 400 written opinions as a United States Magistrate Judge. My judicial opinions have been upheld over ninety-nine percent of the time. In these 20 years I have faithfully fulfilled my oath to defend our Constitution and all state and federal laws. My record reflects that commitment, and I will continue to steadfastly apply the law to the facts in all cases, and I will faithfully apply all binding precedent of the Ninth Circuit and Supreme Court.

Last year the Oregon State Bar recognized my judicial service by awarding me with the Wallace P. Carson Jr. Award for Judicial Excellence. The award recognizes service to the law and the profession. The Oregon State Bar notified me that it is conferring on me its annual Judge John Acosta Professionalism Award. In this District Court nomination process, the American Bar Association unanimously found me well-qualified. I point to these recognitions as evidence that the Oregon legal community trusts my judicial service. My work to find ways in my courtroom to respectfully acknowledge all parties has been consistent with the ideals of ensuring equal access to our courts, and it does not affect my legal decision making.

35. The Trevor Project reported on a survey conducted in 2020, indicating that twenty five percent of youth use pronouns other than "he/him" or "she/her," including "neopronouns such as ze/zir or fae/faer." You stated that "misgendering is harmful, plain and simple," and using the wrong pronouns "erases [that person's] identity." If a person in your courtroom asks to be called by pronouns such as "Kitten/Kittenself," or perhaps by neopronouns of a vulgar nature, would you do so? Would you require every other person in your courtroom to refer to them by those pronouns as well?

Response: No, and no. I am unfamiliar with the expansive use of pronouns described as neopronouns in this question. As I testified during my hearing, my courtroom practices are designed to ensure that all parties, counsel, jurors, witnesses, courtroom staff, and public observers are treated with respect and dignity. As such, I instruct that "attorneys and parties should conduct themselves with decorum and manners." These and other practices I have adopted are consistent with Canon 3(A)(3) of the Code of Conduct for the United States Judges which provides that "a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control,

including lawyers to the extent consistent with their role in the adversary process." No party or attorney who has appeared before me has declined to address another party or attorney by their identified pronouns. If such an issue arose in my courtroom, I would address that issue consistent with my obligations to accord the persons before me the full right to be heard and to dispose of matters promptly, efficiently, and fairly while also affording full and complete respect for the First Amendment rights of every person appearing before the court.

36. In the October 4th, 2023 hearing, you told Senator Kennedy that "it's an offer, not a requirement" to use another person's declared pronouns or honorifics. However, in the speech you gave to the Oregon State Bar on May 19, 2023, you stated the following: "If somebody has identified themselves by a particular honorific, I say explicitly, opposing counsel is obliged to comply. It is not voluntary, it is not optional, and you will be called on it." (59:34-1:00:10). Is it your intention to apply your pronoun policy as an offer, or as an obligation? How would you deal with an individual who exploits your courtroom pronoun policy, and how would you judge their sincerity?

Response: My guidance on pronouns is an offer not an obligation. As I testified during my hearing, my courtroom practices are designed to ensure that all parties, counsel, jurors, witnesses, courtroom staff, and public observers are treated with respect and dignity. As such, I instruct that "attorneys and parties should conduct themselves with decorum and manners." These and other practices I have adopted are consistent with Canon 3(A)(3) of the Code of Conduct for the United States Judges which provides that "a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process." No party or attorney who has appeared before me has declined to address another party or attorney by their identified pronouns. If such an issue arose in my courtroom, I would address that issue consistent with my obligations to accord the persons before me the full right to be heard and to dispose of matters promptly, efficiently, and fairly while also affording full and complete respect for the First Amendment rights of every person appearing before the court.

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

Questions for the Record for Mustafa Taher Kasubhai, nominated to be United States District Judge for the District of Oregon

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

   Response: Yes.

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

   Response: If a case concerning a potential unenumerated right were to come before me, I would apply the test set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997). *Glucksberg* provides that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. at 720-21 (internal quotation marks and citations omitted).

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

   Response: Humility is the foundation of my judicial philosophy. Striving to practice humility in my judicial work supports my effort to treat everyone who appears in my courtroom with dignity and patience. It supports my effort to listen carefully and work hard to evaluate the facts, understand the legal arguments, and comprehend the law which I will apply to the facts. Finally, humility is the necessary support for upholding the rule of law and remaining faithful to all binding precedent. I have not closely studied the judicial philosophies of the many justices who have served on the Supreme Court, and I would not identify any one justice or judge that exemplifies this philosophy at the risk of excluding countless justices and judges who embody this philosophy.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted" and, more specifically, as "the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I would not characterize myself by any label. As a judge and a judicial nominee, I am faithful to the rule of law and will apply all Ninth Circuit and Supreme Court precedent. For example, the Supreme Court has provided

instruction on interpretive methods. *See*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

   Response: Black's Law Dictionary (11th ed. 2019) defines the term "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I would not characterize myself by any label. The Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: If I were presented with such an issue of first impression, I would look to the text and the Supreme Court guidance as to the method of interpreting the text, the role of the provision in the constitutional structure, and any evidence of the original public meaning of the provision. If the original public meaning of the Constitution were clear and resolved the issue, my inquiry would end there. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: I would interpret the Constitution consistent with the holdings of the Supreme Court and Ninth Circuit. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), the Court held that courts must look to the original public meaning of a provision of the U.S. Constitution. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Court explained that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id*. at 1738. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court advised it was appropriate to consider "evolving standards of decency that mark the progress of a maturing society" in determining whether a form of punishment violates the Eighth Amendment. *Id. at 58.*

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

Response: The Constitution is a written document, the text of which does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has explained that the Constitution is an enduring document with a "historically fixed meaning" that can "appl[y] to new circumstances." *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), is binding precedent.

a. Was it correctly decided?

Response: As a judge and a judicial nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts, and I would not want litigants to think I have prejudged such issues. See Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I would apply it fully and faithfully.

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

Response: *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), is binding precedent.

a. Was it correctly decided?

Response: As a judge and a judicial nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts, and I would not want litigants to think I have prejudged such issues. See Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen* is binding precedent, and I would apply it fully and faithfully.

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

Response: *Brown v. Board of Education*, 347 U.S. 483 (1954), is binding precedent.

a. Was it correctly decided?

Response: As a judge and a judicial nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts, and I would not want litigants to think I have prejudged such issues. See Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Brown v. Board of Education* is binding precedent, and I would apply it fully and faithfully. As prior judicial nominees have noted, the legal issues presented in *Brown* are unlikely to become the subject of litigation. Accordingly, I am comfortable expressing my view that *Brown* was correctly decided.

12. Is the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* settled law?

Response: *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), is binding precedent.

a. Was it correctly decided?

Response: As a judge and a judicial nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts, and I would not want litigants to think I have prejudged such issues. See Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Students for Fair Admissions v. Harvard* is binding precedent, and I would apply it fully and faithfully.

13. Is the Supreme Court's ruling in *Gibbons v. Ogden* settled law?

Response: *Gibbons v. Ogden*, 22 U.S. 1 (1824) is binding precedent.

a. Was it correctly decided?

Response: As a judge and a judicial nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts, and I would not want litigants to think I have prejudged such issues. See Code of Conduct for United

States Judges, Canon 3(A). The Supreme Court's decision in *Gibbons v. Ogden* is binding precedent, and I would apply it fully and faithfully.

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

Response: The Bail Reform Act of 1984, 18 U.S.C. §§3141, et seq., provides for the rebuttable presumption in favor of pretrial detention for certain enumerated drug offenses carrying a sentence of ten years or more, certain crimes involving acts of terrorism, certain crimes of violence, and certain crimes involving minors. Specifically, 18 U.S.C. §3142 (f)(1) lists the offenses or criteria that create a presumption in favor of pre-trial detention.

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

Response: While I am unaware of any explicitly stated policy reason for this presumption, the Bail Reform Act requires a judicial officer to consider the risks of flight and danger to the community in determining whether to order pre-trial release or detention.

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

Response: Yes, The Free Exercise Clause of the First Amendment prohibits discrimination on the basis of religion, and it constrains the federal government's interactions with private institutions, including religious organizations and small businesses operated by observant owners. If a law or policy burdens religion and is not "neutral and of general applicability," the government must establish that the law or policy satisfies strict scrutiny. To survive that standard, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *See*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (per curiam). If the government cannot meet this high burden, the action is unconstitutional. The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, imposes statutory limits. In *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682 (2014), the Supreme Court held that RFRA protects the religious exercise of religious organizations and small businesses operated by observant owners. *Id*. at 719.

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

Response: Please see my response to Question 15.

17. 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: The Supreme Court held that the church and synagogues were entitled to a preliminary injunction because they had "made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Roman Catholic 6 Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (internal punctuation omitted). The Supreme Court reached this conclusion, in part, because of evidence that the rules appeared to be targeting Orthodox Jews as well as evidence that comparable secular activity was not subject to the same restrictions. *Id*. at 66-67. The Supreme Court further concluded that the challenged restrictions, if enforced, would cause irreparable harm in the form of lost First Amendment freedoms. *Id*. *See also*, *Tandon v. Newsom*, 141 S. Ct. 1294, (2021).

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court enjoined California from imposing Covid-19 restrictions on private gatherings to at-home religious exercise. The Court explained that where a regulation treats comparable religious activity less favorably than secular activity, it fails strict scrutiny unless the government can "show that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id*. at 1297.

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

Response: Yes. *See Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's initiation of an enforcement action against a cake shop owner, who declined for religious reasons to make a wedding cake for a same-sex couple, violated the First Amendment. Examining the evidentiary record, the Supreme Court found that the Commission demonstrated "clear and

impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." *Id*. at 1729.

21. 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: Yes. An individual's religious belief, if "sincerely held," need not be "logical, consistent and comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act also include broad language protecting "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See Burwell v. Hobby Lobby*, 573 U.S. 682, 695–696 (2014).

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

Response: Yes. Please see my response to Question 21.

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

Response: Yes. Please see my response to Question 21.

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

Response: I am not familiar with the official positions of the Catholic Church on this subject, and, as a sitting U.S. Magistrate Judge and as a judicial nominee, it would not be appropriate for me to opine on the positions of a religious institution.

22. 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), Catholic school teachers sued their employers alleging employment discrimination. The Supreme Court held that the "ministerial exception" protects religious institutions from certain discrimination claims and that such institutions are permitted to "decide matters of faith and doctrine without government intrusion." *Id*. at 2060. The Court found that, even

though the teachers were not "ministers," the specific role of the teachers was "educating young people in their faith, inculcating its teachings, and training them to live their faith," which the Court concluded was central to the school's mission. *Id*. at 2064.

23. 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 held that "[t]he refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id*. at 1882. The Court applied strict scrutiny after determining that Philadelphia's policy burdened the organization's religious beliefs and was not a generally applicable policy.

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

Response: The Supreme Court held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause because a State may not exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits. *Carson v. Makin*, 142 S. Ct. 1987, 1997-98, 2002 (2022).

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), "a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." *Id*. at 2433. The Supreme Court held that "[t]he Constitution neither mandates nor tolerates that kind of discrimination." Additionally, the Court abrogated the Lemon Test relating to Establishment Clause jurisprudence.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court granted the petition for certiorari, vacated the judgment below, and remanded for further proceedings in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch wrote that the lower courts had not properly applied the strict scrutiny test required by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a). *See Mast*, 141 S. Ct. at 2432-34 (Gorsuch, J., concurring).

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

Response: If confirmed and confronted with a case that required interpretation of Title 18, United States Code, Section 1507 considering its constitutionality, I would assess the matter based on the facts before me, the parties' arguments, and the governing law, including all binding Ninth Circuit and Supreme Court precedent.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

29. 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 that the District Court for the District of Oregon provides such trainings. If confirmed, I would not support such trainings.

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

Response: Yes.

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

Response: The executive and legislative branches are required to follow the Constitution in making political appointments. If confirmed, and if such an issue were to come before me, I would faithfully apply all binding precedent from the Ninth Circuit and Supreme Court to resolve the case.

32. If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?

Response: The Supreme Court has held that disparate impact claims are cognizable under certain federal anti-discrimination laws. *See*, *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534, 539 (2015). I am not aware of any Ninth Circuit or Supreme Court precedent that address subconscious racial discrimination as evidence of disparate impact. If this issue came before me as a district court judge, I would fully and faithfully apply binding Ninth Circuit and Supreme Court precedent to the facts before me.

33. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: Whether the Supreme Court should be expanded is a question for policymakers to consider. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent regardless of its composition.

34. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

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

Response: The Supreme Court described in detail the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). In summary, the right to bear arms is a fundamental right that extends to state actions, and restrictions or regulations on the right to bear arms may not be any more restrictive than the regulations imposed on the right to bear arms at the time the Second Amendment was adopted. As a U.S. Magistrate Judge I am oath-bound to faithfully apply these binding precedents. If confirmed, I would continue to faithfully apply these binding precedents and any other binding Ninth Circuit and Supreme Court precedent interpreting the Second Amendment.

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

Response: Please see my response to Question 35. In *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the Supreme Court held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

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

Response: Yes. *See*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: No. In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "the constitutional right to bear arms in public for self-defense is not a second class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id*. at 2156 (quoting *McDonald v. City of Chicago*, 561 U.S. 742 (2010)) (internal quotation marks omitted).

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

Response: No. Please see my answer to Question 38.

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

Response: The executive branch has broad discretion in deciding how to prosecute cases. *See*, *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (the court held that the decision not to prosecute or enforce, whether through criminal or civil process, is a decision generally committed to an agency's absolute discretion). As a sitting judge and judicial nominee, it would be inappropriate for me to offer an opinion as to how this discretion should be exercised.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "prosecutorial discretion" as a "prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." "Administrative rule" is defined as "[a]n officially promulgated agency regulation that has the force of law." My understanding of a "substantive administrative rule change" is a substantive change to an administrative rule.

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

Response: The federal death penalty is codified in 18 U.S.C. § 3591, and the President does not have the power to unilaterally abolish federal statutes. The Supreme Court stated in *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) "there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."

43. 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*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control lacked the authority to impose a nationwide moratorium on evictions to protect tenants from COVID-19, and to slow the spread of disease. Finding that petitioners were likely to succeed on the merits of their claim, the Court vacated a stay imposed pending appeal of a district court's nationwide injunction against the imposition of the moratorium.

44. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: As a U.S. Magistrate Judge and a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, research the applicable law, and apply any binding Ninth Circuit and Supreme Court precedent.

45. Your sympathy for Marxism seems to be a core belief of yours. During a 2020 speech titled "Reflections on Equity and Privilege" you said "First, the world is wide enough for all of us. Privilege derives its power from the belief in scarcity. Scarcity of money, natural resources, food, and power itself. The desire to control it all drives privilege. I want to suggest to you that equity, the ideal of equity rejects this model of scarcity."

a. Do you believe that in America there is a system of artificial scarcity that reinforces systems of privilege? Your answer should begin with a yes or no.

Response: In 2020, I gave a speech about the value of diversity in our communities and why I regard it as important to consider everybody's voice and to afford everyone personal dignity. I made the point that, while people may have differential access to scarce resources such as money, food, power, and natural resources, personal dignity is an endless resource that I strive to afford to anyone and everyone with whom I interact. As a judge, and as a proud American, I have committed to the value that no one should have more or less access to personal dignity than any other person.

I did not say and do not believe that there is an artificial scarcity that reinforces systems of privilege. Indeed, scarcity is a key economic concept, and a reality of the American economic system. My comments did not endorse an alternative economic or political model in any way whatsoever. The point I made was that there should be no scarcity when it comes to the concept of personal dignity.

The more complete quote reads "privilege derives its power from the belief in scarcity. Scarcity of money, natural resources, food, and power itself. The desire to control it all, drives privilege. Equity rejects the model of scarcity. I must be committed to the idea that your voice need not deprive me of mine. Equity also subscribes to the ideal that dignity is the foundational currency. I need not deprive another of her dignity to preserve mine."

My intent was to share the idea that dignity and respect for one another is an unlimited resource and to set out the ways in which I strive to treat others with an abundance of dignity and respect. Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

b. Do you think the protection of private property as found in the Fifth Amendment is valid? Is it equal to the other rights found in our Bill of Rights?

Response: Yes. The protection of private property as found in the Fifth Amendment is valid, and it is equal to other rights found in our Bill of Rights.

46. What is white privilege?

Response: The Merriam-Webster dictionary defines "white privilege" as "the set of social and economic advantages that white people have by virtue of their race."

47. You have encouraged litigants to use personal pronouns, stating on your court website that using pronouns "earns the public's trust," correct?

Response: As I testified during my hearing, my courtroom practices are designed to ensure that all parties, counsel, jurors, witnesses, courtroom staff, and public observers are treated with respect and dignity. As such, I instruct that "attorneys and parties should conduct themselves with decorum and manners." These and other practices I have adopted are consistent with Canon 3(A)(3) of the Code of Conduct for the United States Judges which provides that "a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process." No party or attorney who has appeared before me has declined to address another party or attorney by their identified pronouns or honorifics. If such an issue arose in my courtroom, I would address that issue consistent with my obligations to accord the persons before me the full right to be heard and to dispose of matters promptly, efficiently, and fairly while also affording full and complete respect for the First Amendment rights of every person appearing before the court.

With respect to my judicial service, I have served for 16 years on the state and federal bench, and as a neutral appellate decision maker for 4 years on the Oregon Workers' Compensation Board. I have presided over 5,000 matters in my judicial career, and I have issued over 400 written opinions as a United States Magistrate Judge. My judicial opinions have been upheld

over ninety-nine percent of the time. In these 20 years I have faithfully fulfilled my oath to defend our Constitution and all state and federal laws. My record reflects that commitment, and I will continue to steadfastly apply the law to the facts in all cases, and I will faithfully apply all binding precedent of the Ninth Circuit and Supreme Court.

Last year the Oregon State Bar recognized my judicial service by awarding me with the Wallace P. Carson Jr. Award for Judicial Excellence. The award recognizes service to the law and the profession. The Oregon State Bar notified me that it is conferring on me its annual Judge John Acosta Professionalism Award. In this District Court nomination process, the American Bar Association unanimously found me well-qualified. I point to this recognition as evidence that the Oregon legal community trusts my judicial service. My work to find ways in my courtroom to respectfully acknowledge all parties has been consistent with the ideals of ensuring equal access to our courts, and it does not affect my legal decision making.

a. Is it true that you require litigants to address other parties by their preferred pronouns, correct?

Response: No. Please see my response to Question 47.

b. What is the penalty if they fail to observe your rule?

Response: Please see my response to Question 47. No party or attorney who has appeared before me has declined to address a party or attorney by their identified pronouns. If such an issue arose in my courtroom, I would address that issue consistent with my obligations to accord the persons before me the full right to be heard and to dispose of matters promptly, efficiently, and fairly, while also according full and complete respect for the First Amendment rights of everyone who appears in court. I have not ever imposed a penalty of any kind with respect to the use of honorifics or pronouns.

c. Could forcing pronoun usage violate the free speech rights of a party before you?

Response: Please see my responses to Questions 47 and 47b.

48. In *Boudjerada v. City of Eugene* you granted a motion for summary judgment holding that a city-wide curfew imposed by the City of Eugene during the course of destructive rioting in the summer of 2020 violated the First Amendment. Further, you also faulted the city for not leaving "alternate channels" open during the nighttime demonstrations.

a. What Ninth Circuit or Supreme Court precedent supports your claim that alternate channels must be available for twenty-four hours?

Response: My opinion did not require that alternate channels must be available for twenty-four hours. In the case before me, the city-wide curfew for all of Eugene, Oregon, was imposed for a period of seven hours. It was a complete ban on demonstrations in all public forums, and without any public alternative channels. The court in *Menotti* discusses appropriate alternative channels. There, the court found Seattle's provision for protesting outside of the restricted area satisfied the alternative channels requirement. *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005).

b. Did you cite any in your opinion?

Response: Please see my answer to Question 48a. My opinion does not require that alternate channels must be available for twenty-four hours.

c. Does any Supreme Court precedent contradict that assertion? If so, please list them and their holdings.

Response: Please see my answer to Question 48a. My opinion does not require that alternate channels must be available for twenty-four hours.

49. In 2020, while serving as a magistrate judge, you delivered a speech where you condemned America as Islamaphobic, stating "the identity of Muslims also need to be normalized in a country that is so deeply Islamophobic"

a. Do you still believe that America is Islamophobic?

Response: First, I respectfully object to the characterization that I condemn our country. Offering criticism and remaining engaged in the systems that make our country great and resilient is patriotic. I am proud to be an American citizen, and I value the freedoms our Constitution affords all of us. I am grateful to our form of government that recognizes we always have room to be better as we strive to form that more perfect union every day. Although we live in a great country, I have unfortunately experienced exclusion and discrimination because of my heritage. I have also seen family members and friends, who are Muslim, experience discrimination over the years. For example, while a state

court judge and in the courthouse, I was called sandn****r and camel jockey. In another instance, a litigant who did not agree with my ruling exclaimed something to the effect that "we don't need Muslims in this country and someone should take him out," referring to me. Because of the credible threat, the sheriff's office posted security patrols at my home for several months. These were the kinds of experiences to which I referred in the speech you referenced.

b. If so, why?

Please see my response to Question 49a.

50. The Supreme Court upheld President Trump's so-called "travel ban" in *Trump v. Hawaii*. You referred to President Trump's action as a "Muslim Ban."

a. Was the Supreme Court's opinion in *Trump v. Hawaii* correctly decided?

Response: *Trump v. Hawaii* is binding precedent. As a judge and a judicial nominee, it is generally not appropriate for me to comment on whether a Supreme Court decision was correctly or incorrectly decided, because it is possible that a related issue could come before the courts. See Code of Conduct for United States Judges, Canon 3(A). The Supreme Court's decision in *Trump v. Hawaii* is binding precedent, and I would apply it fully and faithfully.

51. You have also praised Ibram X. Kendi. Kendi has argued that "the only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."

a. Do you agree with these statements?

Response: No, I do not agree with those statements. I learned about these statements for the first time at the Committee hearing. My understanding of diversity and equity does not include fighting discrimination with discrimination. I am absolutely opposed to such an idea or practice. As Gandhi once said, "an eye for an eye leaves the whole world blind." I am generally familiar with Mr. Kendi's work as he has written a number of New York Times Bestsellers. However, I have not read every book he has written, nor am I aware of every idea he has expressed.

Questions from Senator Thom Tillis
for Mustafa Taher Kasubhai, nominee to United States District Judge for the District of Oregon

1. **Can a judge's personal views and background benefit them in interpreting and applying the law, or would you say that they are irrelevant?**

   Response: As a sitting judge on the state and federal courts for over 16 years, it is my view that a judge should not let personal views and background interfere with their responsibility to impartially interpret and apply the law.

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

   Response: Impartiality is a necessary expectation and requirement for all judges.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Judicial activism is antithetical to the rule of law and would undermine the necessary and appropriate role of judges who take an oath to uphold the rule of law.

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: There can be no undesirable outcome where a judge is concerned, when he or she faithfully interprets the law according to binding precedent. As a sitting federal judge and formerly a state court judge for over 16 years, I have strived, and continue to strive, to faithfully apply the law to the facts in reaching a decision, without regard to the outcome.

6. **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 continue, as I have done for the last 16 years serving on the court, to faithfully apply all laws and binding precedent from the Ninth Circuit and Supreme Court. With respect to rights arising out of the Second Amendment, I will adhere to the binding precedent of our Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." *Id*. at 595. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), this right is incorporated and applied to the states via the Fourteenth Amendment. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court further clarified that any laws regulating the right to keep and bear arms must be "consistent with the Nation's historical tradition of firearm regulation." *Id*. at 2130.

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

Response: The qualified immunity inquiry is a two-part test. Government officials are entitled to immunity from claims brought under 42 U.S.C. § 1983 unless (1) they violate a "statutory or constitutional right" and (2) that right was "clearly established at the time" of the violation. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). I would carefully consider the record and the issues presented before me, and I would evaluate and apply all binding precedent in considering qualified immunity cases.

8. **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: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety is a question of policy properly addressed by policy makers. If confirmed as a district judge, I would faithfully apply binding precedent from the Ninth Circuit and Supreme Court to the facts of the cases that would come before me, including in cases raising questions about qualified immunity.

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

Response: Please see my answer to Question 8.

10. What are your thoughts regarding the importance of ensuring that all IP rights are in fact enforced?

Response: The Constitution empowers Congress to enact patent and copyright legislation. Article I, Section 8, Clause 8. If confirmed, I would ensure that all litigants in all cases, including IP cases, would be able to make their best case before me. I would accomplish this by ensuring equal access to the courts. Moreover, I would faithfully follow the binding precedent from the Ninth Circuit, Federal Circuit, and Supreme Court to all cases that come before me.

11. In the context of patent litigation, in some judicial districts plaintiffs are allowed to request that their case be heard within a particular division. When the requested division has only one judge, this allows plaintiffs to effectively select the judge who will hear their case. What are your thoughts on this practice, which typically is referred to as "forum shopping" and/or "judge shopping?"

Response: In the District Court for the District of Oregon where I serve as a United States Magistrate Judge, all cases are assigned randomly. It has been my observation and experience with this method of random assignment that no one kind of case is directed to a limited number of judges. This helps to provide for fair and impartial evaluations of all cases that come before the court.

12. 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 shambles. What are your thoughts regarding the Supreme Court's patent eligibility jurisprudence?

Response: As a judge and judicial nominee, it would not be appropriate to comment on the correctness or clarity of Supreme Court patent eligibility precedent in accordance with the Code of Conduct for United States Judges, Canon 3(A)(6). I am bound to abide by the Code of Conduct and to apply precedent of the Federal Circuit, the Ninth Circuit, and the United States Supreme Court for patent cases, and if confirmed I will continue to abide by the Code and to apply all binding precedent.

13. While sitting as a federal magistrate judge, you made a speech in 2020 in which you suggested that scarcity of natural resources was a fiction create by privilege. This is an idea that is far outside of mainstream political and economic theory. Some would even call it Marxist. You are certainly entitled to your opinion. But my question is why did you feel the need to publicly make these claims while sitting as a federal judge?

Response: In 2020 I gave a speech about the value of diversity in our communities and why I regard it as important to consider everybody's voice and to afford everyone personal dignity.

I made the point that, while people may have differential access to scarce resources such as money, food, power, and natural resources, personal dignity is an endless resource that I strive to afford to anyone and everyone with whom I interact. As a judge, and as a proud American, I have committed to the value that no one should have more or less access to personal dignity than any other person.

I did not say, and do not believe, that scarcity of natural resources is a fiction. Indeed, scarcity is a key economic concept and a reality of the American economic system. My comments did not endorse an alternative economic or political model in any way whatsoever. The point I made was that there should be no scarcity when it comes to the concept of personal dignity.

The more complete quote reads "privilege derives its power from the belief in scarcity. Scarcity of money, natural resources, food, and power itself. The desire to control it all, drives privilege. Equity rejects the model of scarcity. I must be committed to the idea that your voice need not deprive me of mine. Equity also subscribes to the ideal that dignity is the foundational currency. I need not deprive another of her dignity to preserve mine."

My intent was to share the idea that dignity and respect for one another is an unlimited resource, and to set out the ways in which I strive to treat others with an abundance of dignity and respect. Let me state unequivocally as I did during my hearing: I am not, and never have been, a Marxist. I have never espoused, nor subscribed to, Marxist theories. Rather, I have been an active participant in, and beneficiary of, the American capitalist system, as is clear from my own holdings of private property and securities as detailed in the statement of net worth as provided to this Committee.

14. How would your views on property rights inform your rulings? Particularly, will you commit to following the law as written, or will you interpret the law based on your expressed views of property rights?

Response: Please see my answer to Question 13. For over 16 years I have served on the state and federal courts. Before joining the bench, I served as a neutral appellate decision maker for 4 years on the Oregon Workers' Compensation Board. I have presided over more than 5,000 matters in my judicial career, and I have issued over 400 written opinions as a United States Magistrate Judge. In these 20 years in public service, I have faithfully fulfilled my oath to defend our Constitution and all state and federal laws. My record reflects that commitment, and I will continue to steadfastly apply the law to the facts in all cases, and I will faithfully apply all binding precedent of the Ninth Circuit and Supreme Court. As my record on the bench and in legal practice shows, my views on property rights are consistent with state and federal laws, and I commit to following the law as written.

15. Because of your strongly stated beliefs, parties before you may legitimate have concerns about your ability to fairly consider their cases. How would your views on property rights impact your ability to fairly consider cases before you under existing U.S. property law?

Response: Please see my answers to Questions 13 and 14.