Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Micah W. J. Smith Nominee to the United States District Court for the District of Hawaii

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 this statement. All judges are bound, under Article VI, to support the Constitution; they may not substitute their own independent value judgments for those of the Constitution. In addition, district judges are required to apply binding Supreme Court and Circuit precedent to the particular cases before them.

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 strongly disagree with this statement. A lower-court federal judge is duty-bound to apply binding Supreme Court precedent. It would not be consistent with that duty to attempt to evade or circumvent binding Supreme Court precedent.

3. **In a concurrence in the denial of rehearing en banc in *Al–Bihani v. Obama* then-Judge Kavanaugh wrote: "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms." Is this a correct statement of law?**

   Response: Yes, it is a correct statement of law. *See Medellin v. Texas*, 552 U.S. 491, 504-505 (2008) (recognizing that "not all international law obligations automatically constitute binding federal law enforceable in United States courts," and that "while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statements or the treaty itself conveys an intention that it be self-executing and is ratified on those terms") (citation and internal quotation marks omitted).

4. **In your essay *Popular Metadoctrinalism: The Next Frontier* you wrote "[m]ost constitutional words and phrases have a clear meaning only at such a high level of generality that . . . their meaning alone cannot decide concrete cases."**

   a) Do you still hold this view?

   Response: No. In the sixteen years since I wrote the essay quoted above, I have practiced as a litigator, including as a federal prosecutor for the last eleven years, and

have frequently argued that the meaning of the Constitution may be discerned by faithfully following Supreme Court and relevant Circuit precedent and applying recognized tools of interpretation to the Constitution's words and phrases. As a result of this practical experience, I no longer hold the view that most constitutional words and phrases cannot decide concrete cases. In addition, I recognize that even in those cases where the words and phrases of the Constitution alone cannot decide concrete cases, the historical background of those words and phrases can provide sufficient clarity about their meaning. *See, e.g.*, *Crawford v. Washington*, 124 S. Ct. 1354, 1359 (2004) (recognizing that the "Constitution's text does not alone resolve this case" and that "[w]e must therefore turn to the historical background of the [Confrontation] Clause to understand its meaning"); *Giles v. California*, 128 S. Ct. 2678, 2682-86 (2008) (considering the right of confrontation at common law to determine whether the Confrontation Clause embraced the theory of forfeiture by wrongdoing).

b) Do you hold the same view regarding statutory interpretation?

Response: No. In the sixteen years since I wrote the essay quoted above, I have practiced as a litigator, including as a federal prosecutor for the last eleven years, and have frequently argued that the meaning of a statute may be discerned by following Supreme Court and relevant Circuit precedent and applying recognized tools of interpretation. In light of that practical experience, I hold the view that statutes can be interpreted by interpreting their text, applying recognized tools of interpretation, and faithfully following Supreme Court and relevant Circuit precedent.

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: A person in custody pursuant to a judgment of a State court may petition for a writ of habeas corpus if they contend that their custody is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In considering such a petition, a federal district court must proceed with the recognition that "[g]ranting habeas relief to a state prisoner intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022) (citation and internal quotation marks omitted). A federal district court must apply the Supreme Court's "precedents governing [and imposing constraints on] the appropriate exercise of equitable discretion," *id.* at 1524, and, in addition, must apply the statutory conditions to relief that Congress enacted in 28 U.S.C. § 2254. Among those statutory conditions are (1) a requirement that a state inmate exhaust available state remedies or demonstrate that they are insufficient or unavailable; (2) a requirement that the state inmate demonstrate that the state court's ruling was either contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, or based on an unreasonable determination of the facts presented in the state-court proceeding (which the inmate must demonstrate by clear and convincing evidence); and

(3) a strict one-year time limit for filing a petition in federal court.

5. **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: A prisoner in custody under sentence of a federal court may file a motion to vacate, set aside, or correct a federal sentence when the motion alleges that (1) the sentence was imposed in violation of the Constitution or federal law; (2) the court was without jurisdiction to impose the sentence; or (3) the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack. 28 U.S.C. § 2255. In applying Section 2255, federal district courts must proceed with the recognition that the "United States has an interest in the finality of sentences imposed by its own courts" and that "how to balance that interest against error correction is a judgment about the proper scope of the writ that is normally for Congress to make." *Jones v. Hendrix*, 599 U.S. 465, 491 (2023) (citations, internal quotation marks, and alterations omitted). Among the judgments Congress made in Section 2255 are (1) that Section 2255 motions should be filed with the sentencing court, rather than with the court where the inmate is detained; (2) that second or successive Section 2255 motions should be strictly limited to claims based either on newly discovered evidence that would have resulted in an acquittal, or on a new and previously unavailable rule of constitutional law made retroactive by the Supreme Court; and (3) that Section 2255 motions must be filed within a strict one-year time limit. Apart from Section 2255, Congress has granted federal district courts limited authority to modify terms of imprisonment under sentence of a federal court under 18 U.S.C. § 3582(c).

6. **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: Both the University of North Carolina and Harvard College used race as a factor in making student admission decisions. The Supreme Court first held that the plaintiff, Students for Fair Admissions, had organizational standing to sue on behalf of its members. It then turned to the merits of the case and applied strict scrutiny to the universities' race-based admissions policies. Concluding that the policies did not survive strict scrutiny, the Court held that they were unconstitutional under the Fourteenth Amendment's Equal Protection Clause, which applied directly to the University of North Carolina (as a State institution) and which applied through Title VI of the Civil Rights Act of 1964 to Harvard College (as a private institution that received federal funds).

7. **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?**

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

   Response: Yes. As a law clerk to Judge Guido Calabresi and Justice David

Souter between 2006 and 2008, I participated in the initial screening of law clerk applications. As an associate (2008 to 2010) and then counsel (2010 to 2012) at O'Melveny & Myers LLP, I participated in interviews of candidates for associate positions. I might also have interviewed candidates for summer associate positions at O'Melveny, but cannot recall with certainty. Finally, during my service at the U.S. Attorney's Offices in the Southern District of New York (2012 to 2018) and the District of Hawaii (2018 to present), I have on multiple occasions participated in interviews of candidates for employment as Assistant U.S. Attorneys.

8. **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.

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

   Response: No.

10. **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: No, not to my knowledge.

    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.

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

    Response: Yes. Both the Supreme Court and the Ninth Circuit apply strict scrutiny to government classifications on the basis of race. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); *Mitchell v. Washington*, 818 F.3d 436, 444 (9th Cir. 2016) (observing that "the Supreme Court has insisted on strict scrutiny in every context, even for so-called benign racial classifications" (citation and internal quotation marks omitted)).

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

    Response: Colorado threatened to compel a wedding website designer to create websites conveying messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. The Supreme Court held that the First Amendment's free speech guarantee (incorporated against States through the Fourteenth Amendment's Due Process Clause) prohibited Colorado from compelling the wedding website designer to "speak as the State demands or face sanctions for expressing her own beliefs . . . ." *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023).

13. **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: Yes. This passage from *Barnette* has been quoted favorably in recent decisions of the Supreme Court. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 584-85 (2023); *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018). It is binding precedent, and if fortunate to be confirmed, I would apply it where relevant to the cases before me.

14. **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: The Supreme Court has explained that content-neutral regulations are those that are justified without reference to the content of the regulated speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). By contrast, government regulation of speech is content based if it "target[s] speech based on its communicative content . . . ." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). A regulation is facially content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 164. Moreover, laws that are "facially content neutral" will be "considered content-based regulations of speech" if they "cannot be justified without reference to the content of the regulated speech" or they "were adopted by the government because of agreement with the message the speech conveys." *Id.* (citation, internal quotation marks, and alteration omitted).

    The Supreme Court has identified various key questions that must inform any analysis of this issue—including in *Reed* and, more recently, in *City of Austin, Texas v. Reagan Nat'l*

Advertising of Austin, LLC, 596 U.S. 61 (2022)—and if fortunate to be confirmed, I would faithfully apply these precedents, as well as binding Ninth Circuit precedent. Among other things, I would be mindful of the Supreme Court's admonition that while some "facial distinctions based on a message are obvious, defining speech by particular subject matter, others are more subtle, defining regulated speech by its function or purpose." *Id.*

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

    Response: The Supreme Court recently provided guidance on this question in *Counterman v. Colorado*, 600 U.S. 66 (2023). As the Court there explained, true threats are "serious expressions conveying that a speaker means to commit an act of unlawful violence." *Id.* at 74 (citation, internal quotation marks, and alteration omitted). Before a speaker can be held liable for communicating a true threat, there must be a showing of recklessness—that is, a showing that the speaker was "aware that others could regard his statements as threatening violence and deliver[ed] them anyway." *Id.* at 79 (citation and internal quotation marks omitted).

16. **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: The Supreme Court has acknowledged that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). In the context of 28 U.S.C. § 2254 petitions, the Supreme Court has spoken of issues of fact as "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators . . . ." *Thompson v. Keohane*, 516 U.S. 99, 109-110 (1995) (citation and internal quotation marks omitted). By contrast, the Supreme Court has identified the voluntariness of a confession, the effectiveness of counsel's assistance, and the potential conflict of interest arising out of an attorney's representation of multiple defendants as issues of law for Section 2254 purposes. *Id.* at 111.

    The sources that courts may consider in deciding whether an issue is a question of fact or question of law may depend on the context in which the issue arises (e.g., whether it arises in the Section 2254 context or another context). For example, in considering what standard of review to apply on appeal, the Ninth Circuit has described an "essentially factual finding" as "one requiring an inquiry that is founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct." *United States v. Franklin*, 18 F.4th 1105, 1115 (9th Cir. 2021) (citation, internal quotation marks, and alterations omitted). By contrast, the Ninth Circuit has defined as "essentially legal questions" those that "require us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." *Id.* (citation, internal quotation marks, and alterations omitted). If fortunate to be confirmed, I would

carefully research Supreme Court and Ninth Circuit precedent on this issue and faithfully apply binding precedent.

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

    Response: Congress has required federal sentencing judges to consider each of the above-listed purposes in making a sentencing decision under 18 U.S.C. § 3553(a), but Congress has not ranked or weighed those purposes as a categorical matter. Instead, as the Supreme Court has explained, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district court should then consider *all* of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (emphasis added). In considering all of the Section 3553(a) factors, a sentencing court should consider how those factors bear on the individualized facts of the case at hand. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) ("The district court must make an individualized determination based on the facts."). If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent in making any sentencing decisions.

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

    Response: As nominee for a lower federal court, it is generally inappropriate for me to comment on the correctness or quality of reasoning of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be duty-bound to apply all binding Supreme Court and Ninth Circuit precedent.

19. **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 nominee for a lower federal court, it is generally inappropriate for me to comment on the correctness or quality of reasoning of Ninth Circuit precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be duty-bound to apply all binding Supreme Court and Ninth Circuit precedent.

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

    Response: 18 U.S.C. § 1507 makes it a crime for any person "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." Penalties for violating Section

1507 include a fine and a term of imprisonment of not more than one year.

21. **Is 18 U.S.C. § 1507 constitutional?**

Response: I am aware that a state statute "modeled after" Section 1507 was held to be facially constitutional in *Cox v. Louisiana*, 379 U.S. 559, 561 (1965). But as a judicial nominee, it would not be appropriate for me to opine on the constitutionality of Section 1507, because matters pertaining to this statute could come before me or another court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would carefully consider the facts of any case raising this issue and faithfully apply binding Supreme Court and Ninth Circuit precedent.

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

Response: The Constitution is a domestic document, ratified by the People of the United States. Foreign law does not govern its interpretation. The Supreme Court has recognized, however, that English historical materials may sometimes shed light on the original public meaning of the Constitution's provisions. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (studying English historical materials and concluding that by "the time of the founding, the right to have arms had become fundamental for English subjects"). If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent.

23. **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?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
    k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**
    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?**
    m. **Was *303 Creative LLC v. Elenis* correctly decided?**

    Response to subparts a and b: Because it is highly unlikely that litigation over *de*

jure racial segregation of public elementary schools or government prohibition of interracial marriage will arise in my lifetime, it is appropriate for me to say that I believe *Brown* and *Loving* were correctly decided.

Response to subparts c through m: The remaining cases address issues that are being litigated in federal court or that could be in the foreseeable future. For that reason, as a judicial nominee, it would not be appropriate for me to comment on the correctness of those cases. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be duty-bound to apply all binding Supreme Court and Ninth Circuit precedent. *Roe* and *Casey* are not among those binding precedents, because they were expressly overruled by *Dobbs*.

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

Response: I would apply the legal standard set forth in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). There, the Supreme Court explained that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects the conduct and the government bears the burden of justifying its regulation by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-2130. In *Bruen*, *Heller*, and *McDonald*, the Court has held that the Second Amendment's plain text and original public meaning protect an individual right to keep arms at home and carry arms in public for self-defense, that this right is not limited to those participating in militia service, and that this right restricts both the federal government (through the Second Amendment) and the States (through the Fourteenth Amendment). Accordingly, the government would bear the burden of justifying, in the manner *Bruen* describes, any regulation or statutory provision that infringes on this individual right.

25. **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, not to my knowledge.

    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, not to my knowledge.

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

   Response: No, not to my knowledge.

26. **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, not to my knowledge.

    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, not to my knowledge.

    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: No, not to my knowledge.

27. **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, not to my knowledge.

    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, not to my knowledge.

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, not to my knowledge.

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, not to my knowledge.

28. **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, not to my knowledge.

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

       Response: No, not to my knowledge.

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

       Response: No, not to my knowledge.

29. **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, not to my knowledge.

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, not to my knowledge.

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, not to my knowledge.

30. **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 15, 2023, Senator Brian Schatz and Senator Mazie K. Hirono announced the formation of a Federal Judicial Selection Commission, comprised of three members, to make recommendations on candidates to fill potential vacancies on the U.S. District Court for the District of Hawaii. I submitted an application to the Commission and was then invited to sit for an interview. I was interviewed by the Commission on April 26, 2023. Following that interview, I was invited to interview with Senator Schatz and Senator Hirono. Those interviews took place on May 22, 2023, and May 23, 2023. On June 22, 2023, the White House Counsel's Office contacted me to schedule an interview. I was interviewed by staff from the White House Counsel's Office on June 23, 2023. Since that time, I have been in contact with staff from the White House Counsel's Office and Justice Department staff working with the Office of Legal Policy about the nomination and confirmation process. On August 30, 2023, the President announced his intent to nominate me.

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

Response: No, not to my knowledge.

32. **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, not to my knowledge.

33. **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, not to my knowledge.

34. **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, not to my knowledge.

35. **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, not to my knowledge.

36. **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?**

    Response: No.

    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?**

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

    Response: On June 22, 2023, I was contacted by the White House Counsel's Office to schedule an interview, and on June 23, 2023, I was interviewed by staff from that office. Since that time, I have communicated on numerous occasions with staff from the White House Counsel's Office and Justice Department staff working with the Justice Department's Office of Legal Policy about the nomination and confirmation process.

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

    Response: The Office of Legal Policy provided me these questions on October 11, 2023. I drafted responses to the questions, submitted these draft responses to the Office of Legal Policy, and received comments on the draft responses. I reviewed the comments and made the revisions that I believed were appropriate. I then submitted my final draft

to the Office of Legal Policy for submission to the Committee.

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

Micah W.J. Smith, to be U.S. District Court Judge for the District of Hawaii
For over a decade you have served as an Assistant U.S. Attorney, first in the Southern District of New York, and then in the District of Hawaii. In the District of Hawaii you have served as the Co-Chief of the Violent Crime and Drug Section and as the Chief of Appeals and Legal Strategy. You have been awarded the Attorney General's Award for Exceptional Service twice, and have also been praised for your investigative skills by the Justice Department.

- **In your view, what aspects of your record, performance, and demeanor has earned you the respect of your colleagues and from leaders of the law enforcement community throughout your career?**

  Response: It has been an incredible privilege to serve as an Assistant U.S. Attorney for the last eleven years. I have worked alongside dedicated public servants who care deeply about protecting their communities from violence, drug trafficking, and other threats. To the best of my ability, I have tried in my own work to live up to these high standards.

  In my work as a prosecutor, I have remained mindful of the sacrifices that law enforcement officers make, as well as the challenges witnesses and victims face. I make sure to thank and acknowledge witnesses and victims for their willingness to come forward with information, as well as law enforcement officers whose dedication makes it possible for justice to be done. I also recognize how important it is for a prosecutor to get things right, and I therefore am always sensitive to the possibility that my current understanding of available evidence might be superseded by further information as an investigation continues. It has been my solemn responsibility to carefully assess the evidence, to never rush to any conclusions, and to follow the facts wherever they lead. It is my hope that my work over the last eleven years has done honor to the important position of public service that I have been privileged to hold.

- **How will your experience as a career prosecutor inform your approach to interpreting and applying the law?**

  Response: I recognize that if fortunate to be confirmed, I would no longer be an advocate but instead must be an impartial arbiter of the facts and law. I believe my experience as a career prosecutor would aid me as in making this transition in at least three significant ways. First, over the last eleven years, I have had a substantial amount of experience speaking with victims of crimes and helping them to understand the legal process and their rights. I have regularly met with victims and witnesses from a wide array of backgrounds and life experiences. If fortunate to be confirmed, I believe these experiences would help me ensure that victims and other witnesses are treated fairly and with respect in my courtroom. This will, in turn, ensure that I have the best, most

accurate record possible to which to apply the law in an evenhanded and faithful manner. Second, as a federal prosecutor, my client has been the United States, and my overriding obligation has been to see that justice is done. In carrying out this responsibility, I have strived to keep an open mind during investigations, to see the evidence objectively and with clear eyes, and to reach firm conclusions only after having had the full opportunity to carefully assess the facts and the law. I believe that my experience with handling matters in this careful, open-minded way would inform my approach as a judge, where it would be my duty to approach cases with a careful, open mind. Third, beginning in 2016, I have been privileged to serve in various supervisory capacities, which has given me valuable managerial experience and has also given me a broader perspective on how to ensure that a public institution carries out its mission justly. These supervisory experiences would also benefit me and inform my work as a judge.

Senator Mike Lee
Questions for the Record
Micah W.J. Smith, Nominee to the United States District Court for the District of Hawaii

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

   Response: I have served as a federal prosecutor for the last eleven years, principally litigating matters in trial court, and my judicial philosophy would be informed by that practical experience. I would try to be the kind of district judge that I always want to appear before: one who approaches each case with an open mind, treats all attorneys and litigants with respect and patience, prepares diligently, listens carefully to the arguments of the parties, thoroughly researches and faithfully applies all binding Supreme Court and Ninth Circuit precedent, and then explains the bases for his or her decision in a clear and respectful manner.

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

   Response: If a case turned on the interpretation of a federal statute, I would begin by looking to any binding Supreme Court or Ninth Circuit precedent interpreting that statute and would faithfully apply any such precedent. If the Supreme Court and Ninth Circuit have not yet interpreted the relevant text, I would follow Supreme Court and Ninth Circuit guidance on what interpretive methods should be used. Supreme Court precedent instructs a court to begin with the statute's text, analyzing the original public meaning of its words in context. I would also consider the structure of the statute, recognizing that a statute should, where possible, be interpreted in a manner that gives effect to all of its provisions. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022). And I would consider whether the major questions doctrine, or any other such doctrine, requires a clear statement or clear congressional authorization before the statute may be interpreted in a particular manner. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023). If the text of the statute reveals an unambiguous meaning after applying the tools of statutory interpretation, I would apply that meaning. Where the statute's text does not provide an unambiguous meaning, I would apply any relevant canons of construction and consult any persuasive, non-binding authority from other Circuits or district courts. In addition, to the extent consistent with Supreme Court or Ninth Circuit precedent, I would consult the legislative history of the statute. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750 (2020) (recognizing that the understandings of the law's drafters may sometimes help to "ferret out shifts in linguistic usage or subtle distinctions between literal and ordinary meaning").

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

   Response: If a case turned on the interpretation of a constitutional provision, I would begin by looking to any binding Supreme Court or Ninth Circuit precedent interpreting that text and would faithfully apply any such precedent. If the Supreme

Court and Ninth Circuit have not yet interpreted the relevant text, I would follow Supreme Court or Ninth Circuit guidance on what interpretive methods should be used. In many contexts, the Supreme Court has instructed lower courts to apply the original public meaning of a constitutional provision, informed by history and tradition. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (explaining that *Heller* began with a textual analysis focused on the normal and ordinary meaning of the Second Amendment, and then assessed whether its initial conclusion was confirmed by the historical background of the Second Amendment); *Crawford v. Washington*, 124 S. Ct. 1354, 1359 (2004) (recognizing that the "Constitution's text does not alone resolve this case" and that "[w]e must therefore turn to the historical background of the [Confrontation] Clause to understand its meaning"). In other contexts, the Supreme Court has employed other types of interpretive methods. *See, e.g.*, *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) (adopting a 14-day break-in-custody rule on the ground that confessions "obtained after a 2-week break in custody and a waiver of *Miranda* rights are most unlikely to be compelled"). If fortunate to be confirmed, I would be duty-bound as a lower court judge to apply the approach dictated by binding Supreme Court and Ninth Circuit precedent.

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

   Response: Please see my response to Question 3, above. If confirmed, I would faithfully apply all binding Supreme Court and Ninth Circuit precedent, including as to the interpretive method that should be used.

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

   Response: Please see my response to Question 2, above.

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: The plain meaning of a statute or constitutional provision refers to the public understanding of the relevant language at the time of enactment. Although the meaning of a text does not change as social norms and linguistic conventions evolve, the Supreme Court has explained that the plain meaning of a text might nonetheless apply to situations beyond those contemplated by the drafters. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (explaining that "the limits of the drafters' imagination supply no reason to ignore the law's demands"); *Bruen*, 142 S. Ct. at 2132 (explaining that "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense"). If fortunate to be confirmed, I would faithfully apply all binding Supreme Court and the Ninth Circuit precedent,

including as to the interpretive method that should be used.

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

Response: The constitutional requirements for Article III standing—the "irreducible constitutional minimum"—are an injury-in-fact, causation, and redressability. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Supreme Court has explained that to establish an injury in fact, "a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (citation and internal quotation marks omitted). To establish causation, a plaintiff must demonstrate "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation, internal quotation marks, and alterations omitted). Finally, to establish redressability, the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561.

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

Response: The Constitution creates a federal government of limited, enumerated powers. Congress therefore does not have implied powers beyond those enumerated in the Constitution. One of the enumerated powers of Congress, however, is the Necessary and Proper Clause of Article I, Section 8. That Clause authorizes Congress to "make all laws which shall be necessary and proper for carrying into execution" the powers enumerated in the Constitution. The Supreme Court has recognized that "[a]lthough the Clause gives Congress authority to legislate on that vast mass of incidental powers which must be involved in the constitution, it does not license the exercise of any great substantive and independent powers beyond those specifically enumerated." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (citation, internal quotation marks, and alterations omitted).

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

Response: Under Supreme Court precedent, Congress is not required to refer to a specific Constitutional enumerated power. *See NFIB*, 132 S. Ct. at 2598 ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.") (citation and internal quotation marks omitted). If fortunate to be confirmed, I would evaluate the constitutionality of a law by faithfully applying all binding Supreme Court and Ninth Circuit precedent.

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

Response: As the Supreme Court explained in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Due Process Clause of the Fourteenth Amendment "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The Supreme Court has recognized, as unenumerated rights, "the right to marry while in prison," "the right to obtain contraceptives," "the right to reside with relatives," "the right to make decisions about the education of one's children," "the right not to be sterilized without consent," "the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures," the "right to engage in private, consensual sexual acts," and the "right to marry a person of the same sex." *Dobbs*, 142 S. Ct. at 2257-58 (citing cases).

11. **What rights are protected under substantive due process?**

Response: Please see my response to Question 10, above.

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: The Supreme Court recognizes "the right to obtain contraceptives" as a fundamental right for substantive due process purposes. *Dobbs*, 142 S. Ct. at 2257. By contrast, the Court does not recognize economic rights such as those at stake in *Lochner* as fundamental rights for substantive due process purposes. *Id.* at 2262-63. If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent, and would not allow any personal views to play a role in my application of those precedents.

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

Response: The Supreme Court has recognized Congress's power to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce [including] persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). But Congress does not have the authority to compel individuals to engage in commerce. *NFIB*, 132 S. Ct. 2566. Nor does Congress have the authority to commander the executive or legislative branches of State government. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Moreover, the Commerce Clause does not authorize Congress to abrogate State governments' Eleventh Amendment immunity from certain suits in federal court,

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), or State governments' sovereign immunity against suits in their own state courts to which they have not consented, *Alden v. Maine*, 527 U.S. 706 (1999).

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

    Response: The Supreme Court has recognized race, religion, national origin, and alienage as suspect classifications. The Court has described the qualities of suspect classes in varying ways, but generally has identified them as involving classifications "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne, Texas v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985).

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

    Response: The Framers recognized that checks and balances and separation of powers were essential to the Constitution's design, both to ensure the proper functioning of government and to preserve individual liberty. As the Supreme Court has explained, "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). Similarly, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 2364.

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: The Supreme Court has resolved a number of separation-of-powers disputes. *See Bond*, 131 S. Ct. at 2365 (citing cases). In *INS v. Chadha*, 462 U.S. 919 (1983), for example, the Court struck down a "one-House veto" provision of the Immigration and Nationality Act. This provision was unconstitutional, the Court explained, because the text of the Constitution requires legislative action to be passed by both Houses of Congress and presented to the President before becoming law. *Id.* at 946-959 (discussing Article I's presentment and bicameralism requirements and their historical background). And the Court emphasized that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 943. If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to any separation-of-powers case that came before me.

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

Response: Merriam-Webster defines "empathy" as the "action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another." Judges should apply the law evenhandedly to the facts of every case before them, and their personal views should not play a role in that process. But in applying the law, judges should make every effort to understand and be aware of the arguments and positions of the parties who appear before them.

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

Response: Both are undesirable. Judges must endeavor, to the best of their ability, to avoid either outcome.

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 am generally familiar with the data showing that the Supreme Court exercised its power of judicial review far less frequently in the first seven decades of its experience, but I have not had occasion to study this issue with the care that would be needed to offer an informed causal opinion. With respect to aggressive judicial review and judicial passivity, if fortunate to be confirmed, I would endeavor to avoid either of those approaches, but would instead faithfully apply Supreme Court and Ninth Circuit precedent to uphold statutes that are constitutional and strike down statutes that are not.

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

Response: Black's Law Dictionary defines "judicial review" as a "court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." I understand judicial review to be the authority of a court, recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to invalidate laws that violate the Constitution.

Black's Law Dictionary defines "judicial supremacy" as the "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." I understand judicial supremacy to be the rule, recognized in *Cooper v. Aaron*, 358 U.S. 1 (1958), that the

interpretations of the Constitution by the federal judiciary are, under Article VI, binding on the coordinate branches of the federal government and on 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: Article V provides mechanisms for amending the Constitution, and pursuant to that authority, constitutional amendments have been passed to overturn or reject decisions of the Supreme Court. For example, the Eleventh Amendment overturned the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. 419 (1793), and the Fourteenth Amendment overturned the Supreme Court's decision in the *Dred Scott* case. But elected officials are required, under *Cooper v. Aaron*, 358 U.S. 1 (1958), to respect duly rendered judicial decisions.

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: This is important to keep in mind when judging because the role of a court is a limited one. A court's sole authority is to interpret and apply the law, and it has no authority to substitute its policy views for those of the legislature or the executive.

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 fortunate to be confirmed, I would be duty-bound, as a lower court judge, to faithfully apply binding Supreme Court and Ninth Circuit precedent. Although the Supreme Court and Ninth Circuit may decide to reverse their own precedent, as a federal district judge, I would not have any such authority.

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: As the Sentencing Guidelines firmly recognize, a defendant's "race, sex,

national origin, creed, religion, and socio-economic status" should play no role in a sentencing judge's determination of the appropriate sentence. U.S.S.G. § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status are "not relevant in the determination of a sentence"); *see also* 28 U.S.C. § 994(d). Sentencing requires an individualized assessment, and a sentencing judge must consider the individual and the particular circumstances of the case, rather than any group identity or identities.

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 statement described above or the context in which it was made. Black's Law Dictionary defines "equity" as, among other things, "[f]airness; impartiality; evenhanded dealing." If fortunate to be confirmed, I would conduct my work in a manner that is fair, impartial, and evenhanded.

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

Response: As the words written on the Supreme Court's building recognize, judges must perform their duties impartially and ensure equal justice under law. I believe these obligations are consistent with the duty to be fair, impartial, and evenhanded.

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

Response: As noted in my response to Question 25 above, I am not familiar with the statement or the context in which it was made. But the text of the Fourteenth Amendment does not protect "equity." It instead prohibits a State from denying persons within its jurisdiction the equal protection of the laws. The Supreme Court and the Ninth Circuit have developed a substantial body of precedent interpreting this constitutional provision, and if fortunate to be confirmed, I would faithfully apply those precedents.

28. **How do you define "systemic racism?"**

Response: I am not an academic or social scientist, and have not had occasion to develop a definition of systemic racism. I know that the phrase can mean different things to different people. Moreover, Black's Law Dictionary does not define "system racism," and I am not aware of any cases authoritatively interpreting the

phrase. Black's Law Dictionary defines "systemic discrimination" as "an ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to the facts before me to determine the appropriate approach.

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

Response: I am not an academic or social scientist, and have not had occasion to develop a definition of critical race theory. I know that the phrase can mean different things to different people. Black's Law Dictionary defines the phrase as "a reform movement within the legal profession, particular within academia, whose adherents believe that the legal system has disempowered racial minorities." If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to the facts before me to determine the appropriate approach.

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

Response: As noted in my responses to Questions 28 and 29, I am not an academic or social scientist, and am not positioned to offer an informed distinction between critical race theory and systemic racism.

31. **As a prosecutor in 2013, you orchestrated a plea deal with admitted child rapist Antonio Gonzalez. The plea agreement stipulated a Guidelines range of 97 to 121 months, despite the recommended Guidelines range of 121 to 151 months for his crimes. The court disagreed with your recommendation, sentencing Gonzalez to a total of 180 months with an additional 120 months of supervision. Gonzalez' sentence was nearly seven years longer than the range you stipulated. In your nominations hearing on October 4, 2023, you implied that you "endeavored to follow the law faithfully" in all of your decisions—including this extreme downward variance. Do you consider recommending that a child abuser receive a sentence of nearly half of the duration recommended by the Guidelines following the law faithfully?**

Response: As I stated at my confirmation hearing, although I was assigned this case early in my tenure at the U.S. Attorney's Office for the Southern District of New York, I recognized the seriousness of the criminal conduct involved and worked to ensure that Mr. Gonzalez was arrested expeditiously. As a line prosecutor, I did not have the authority to enter into plea agreements, but instead could only extend offers that received supervisory approval. The government eventually authorized a plea agreement with Mr. Gonzalez that included a calculation of the anticipated Guidelines range for Mr. Gonzalez's offense conduct; that calculation anticipated that Mr. Gonzalez would face a sentencing range of 97 to 121 months' imprisonment. When the Probation Department later issued its presentence investigation report, however, it determined that the Guidelines range should be higher. In light of the plea

agreement's stipulations, the government recommended 121 months' imprisonment, which was at the top of the sentencing range that had been contemplated in the plea agreement. I filed a 35-page written sentencing memorandum that laid out, in detail, the seriousness of Mr. Gonzalez's conduct for the district court's consideration. I defended, in my role as advocate, the government's sentencing position in court. And when Mr. Gonzalez appealed his sentence to the Second Circuit, I successfully defended the reasonableness of the district court's 180-month sentence on appeal. *See United States v. Gonzalez*, 528 F. App'x 48 (2d Cir. Nov. 7, 2014).

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

Questions for the Record for Micah W. J. Smith, nominated to be United States District Judge for the District of Hawaii

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. Federal law makes racial discrimination unlawful in a variety of contexts. *See, e.g.*, Civil Rights Act of 1964.

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: As the Supreme Court explained in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Due Process Clause of the Fourteenth Amendment "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). If fortunate to be confirmed, I would faithfully apply this test to any case raising the question of whether an as yet unarticulated unenumerated right can or should be identified, as well as any other relevant binding Supreme Court or Ninth Circuit precedent.

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: I have served as a federal prosecutor for the last eleven years, principally litigating matters in trial court, and my judicial philosophy would be informed by that practical experience. I would try to be the kind of district judge that I always want to appear before: one who approaches each case with an open mind, treats all attorneys and litigants with respect and patience, prepares diligently, listens carefully to the arguments of the parties, thoroughly researches and faithfully applies all binding Supreme Court and Ninth Circuit precedent, and then explains the bases for his or her decision in a clear and respectful manner.

   I have not studied the individual judicial philosophies of each of the Supreme Court Justices from the last seventy years to determine which of those Justices has a judicial philosophy that most closely resembles what I have described above. I recognize, too, that if fortunate to be confirmed, my role as a federal district court judge would be substantially different from that of a Supreme Court Justice. As a lower court judge, my duty would be to faithfully apply binding Supreme Court and Ninth Circuit precedent.

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

   Response: I understand originalism to refer to the interpretive method under which a court interprets and applies the Constitution based on the original public meaning of

the Constitution's text. The Supreme Court has applied originalism to First Amendment Establishment Clause, Second Amendment, and Sixth Amendment Confrontation Clause issues, among others. If fortunate to be confirmed, as a lower court judge, I would faithfully apply the originalist interpretive method in all areas where the Supreme Court or Ninth Circuit has instructed me to do so.

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

   Response: I do not have my own definition of "living constitutionalism," but Black's Law Dictionary defines it as the theory that the Constitution "should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." In the specific context of the Eighth Amendment's Cruel and Unusual Clause, the Supreme Court has, at times, considered contemporary standards of decency. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560-561 (2005) (observing that "we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual'" (quoting *Trop v. Dulles*, 356 U.S 86, 100-101 (1958) (plurality op.)). It is not clear to me whether this approach would be considered "living constitutionalism," which I understand may mean different things to different people. If fortunate to be confirmed, as a lower court judge, I would faithfully apply all binding Supreme Court and Ninth Circuit precedent.

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 the resolution of a constitutional issue of first impression were not controlled by binding precedent, I would still begin by looking to Supreme Court and Ninth Circuit precedent for guidance on the interpretive methods that should be used in the context presented. For example, in the context of the First Amendment's Establishment Clause, the Second Amendment, and the Sixth Amendment's Confrontation Clause, the Supreme Court has instructed that courts should apply an originalist method of interpretation that considers the original public meaning of the Second Amendment and the historical background of that text. *See Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004). If fortunate to be confirmed, I would faithfully apply that methodology to any areas where binding Supreme Court or Ninth Circuit precedent instructs me to do so.

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

Response: The Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). Similarly, the Supreme Court has explained that the language of the Constitution "offers a fixed standard for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2245 (2022) (citation and internal quotation marks omitted). If fortunate to be confirmed, I would faithfully follow Supreme Court and Ninth Circuit precedent, and would only consider the public's current understandings when directed to do so by such precedent. For example, in considering whether materials are obscene and therefore unprotected by the First Amendment, Supreme Court precedent requires a trier of fact to consider, among other things, contemporary community standards. *Miller v. California*, 413 U.S. 15, 24 (1973).

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

Response: No. The mechanism for changing the meaning of the Constitution is Article V. Moreover, although the Supreme Court sometimes applies the Constitution to circumstances the founding generation could not have anticipated, the Constitution's meaning does not change. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (explaining that "[j]ust as the First Amendment protects modern forms of communications . . . and the Fourth Amendment applies to modern forms of search . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding").

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

Response: Yes. The Supreme Court's decision in *Dobbs* is binding precedent, and if fortunate to be confirmed, I would faithfully apply it.

a. **Was it correctly decided?**

Response: As nominee for a lower federal court, it is generally inappropriate for me to comment on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be duty-bound to apply all binding Supreme Court precedent.

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

Response: Yes. The Supreme Court's decision in *Bruen* is binding precedent, and if fortunate to be confirmed, I would faithfully apply it.

a. **Was it correctly decided?**

Response: As nominee for a lower federal court, it is generally inappropriate for me to comment on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be duty-bound to apply all binding Supreme Court precedent.

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

Response: Yes. The Supreme Court's decision in *Brown* is binding precedent, and if fortunate to be confirmed, I would faithfully apply it.

a. **Was it correctly decided?**

Response: Because it is highly unlikely that litigation over *de jure* racial segregation of public elementary schools will arise in my lifetime, it is appropriate for me to say that I believe *Brown* was correctly decided. If fortunate to be confirmed, I would be duty-bound to apply it.

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

Response: Yes. The Supreme Court's decision in *Students for Fair Admissions* is binding precedent, and if fortunate to be confirmed, I would faithfully apply it.

a. **Was it correctly decided?**

Response: As nominee for a lower federal court, it is generally inappropriate for me to comment on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would not be duty-bound to apply all binding Supreme Court precedent.

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

Response: Yes. The Supreme Court's decision in *Gibbons v. Ogden* is binding precedent, and if fortunate to be confirmed, I would faithfully apply it. I am also aware that the Supreme Court recently cited *Gibbons* favorably on the issue of the dormant commerce clause in *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1152 (2023).

a. **Was it correctly decided?**

Response: As nominee for a lower federal court, it is generally inappropriate for me to comment on the correctness of Supreme Court precedents. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would be duty-bound to apply all binding Supreme Court precedent.

14. **What sort of offenses trigger a presumption in favor of pretrial detention in the**

federal criminal system?

Response: Under the Bail Reform Act of 1984, there is a presumption in favor of pretrial detention when a defendant is charged with a drug trafficking offense carrying a maximum term of imprisonment of ten years or more; a firearm offense under 18 U.S.C. § 924(c); certain specified terrorism offenses; certain slavery and human trafficking offenses; and certain offenses involving minor victims. The complete listing of offenses creating a presumption in favor of detention is found in 18 U.S.C. § 3142(e).

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

Response: I am not aware of any Supreme Court or Ninth Circuit decisions authoritatively identifying the policy rationales underlying such a presumption. I am aware that in *United States v. Moore*, 607 F. Supp. 489, 494 (N.D. Cal. 1985), a district court, in rejecting constitutional challenges to the Bail Reform Act's presumptions, observed that the "legislative history of this statute contains a lengthy discourse on the reasons Congress believed drug offenders constituted a danger to the community and a risk of flight." And in *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985), then-Judge Breyer discussed some of this legislative history, including Congress's judgment that "flight to avoid prosecution is particularly high among persons charged with major drug offenses." *Id.* at 385 (quoting Senate Report).

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 First Amendment's Free Exercise Clause imposes identifiable limits on what government may impose or require of such private institutions, requiring, among other things, that (1) government act in a manner that is free of hostility or bias toward religious beliefs, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); and (2) any law or government action that is not neutral toward religion or generally applicable survive strict scrutiny, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The First Amendment's ministerial exception protects the autonomy of religious institutions with respect to internal management decisions that are essential to their central mission, including in the selection of individuals who play certain key roles. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). In addition, federal statutes, including the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, impose additional identifiable limits. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

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

Response: The Supreme Court has held that under the Free Exercise Clause, the government may not "impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes

the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018). In addition, the Supreme Court has held that any law that treats any comparable secular activity more favorably than religious exercise is subject to strict scrutiny, and will be upheld only "to further interests of the highest order by means narrowly tailored in pursuit of those interests." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citation and internal quotation marks omitted).

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 in *Roman Catholic Diocese of Brooklyn* held that a preliminary injunction was appropriate for three reasons. First, the religious organizations were likely to succeed on the merits of their lawsuit because "statements made in connection with the challenged rules c[ould] be viewed as targeting the ultra-Orthodox Jewish community," because "the regulations c[ould not] be viewed as neutral because they single[d] out houses of worship for especially harsh treatment," and because the regulations could not survive strict scrutiny because they were not narrowly tailored to stemming the spread of COVID-19. 141 S. Ct. at 66-67 (citation, internal quotation marks, and alteration omitted). Second, the religious organizations would suffer irreparable injury without injunctive relief because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 67 (citation and internal quotation marks omitted). Third, the state had failed to show that "granting the applications will harm the public," because it had not "shown that public health would be imperiled if less restrictive measures were imposed." *Id.* at 68.

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

Response: The Supreme Court in *Tandon* held that the religious organization was entitled to a preliminary injunction against a COVID-19 restriction. It identified four principles that led to this result. First, the Court explained that government regulations are not neutral and generally applicable if they treat *any* comparable secular activity more favorably than religious exercise. *Tandon*, 141 S. Ct. at 1296. The mere fact that *some* comparable secular activities are treated as poorly as religious activities does not render a government regulation neutral. *Id.* Second, the Court explained that in considering whether activities are comparable, a court should assess "the risks various activities pose, not the reasons people gather." *Id.* Third, the Court explained that when a law is not neutral or generally applicable, and therefore faces strict scrutiny, the government bears the burden of establishing that strict scrutiny has been satisfied. This

includes an obligation to demonstrate that "measures less restrictive of the First Amendment activity could not address [the government's] interest in reducing the spread of COVID." *Id.* at 1296-97. Fourth, the Court explained that a case is not mooted merely because the government "withdraws or modifies a COVID restriction in the course of litigation," where government officials remain free to "use their power to reinstate the challenged restrictions." *Id.* at 1297. The Court also reiterated that in the Free Exercise Clause context, strict scrutiny is not watered down, but rather means what it says. *Id.* at 1298.

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

Response: Yes. The First Amendment's Free Exercise Clause protects their right to their religious beliefs outside the walls of their houses of worship and homes.

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

Response: The Colorado Civil Rights Commission determined that a baker had violated Colorado's Anti-Discrimination Act by declining to create a cake for a wedding because of his religious opposition to same-sex marriages. The Supreme Court in *Masterpiece Cakeshop* held that the Commission violated the Free Exercise Clause rights of the baker by demonstrating hostility toward the baker's religious beliefs in its consideration of the case. As the Court explained, the Commission failed to meet its obligation to "proceed in a manner neutral toward and tolerant of [the baker's] religious beliefs." 138 S. Ct. at 1731. For that reason, the Court invalidated the Commission's order.

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 beliefs are constitutionally protected so long as they are sincere. Those beliefs need not be consistent with the teachings of the faith tradition to which they belong. *See Frazee v. Illinois Dep't of Employee Sec.*, 109 S. Ct. 1514 (1989).

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

Response: Yes. An individual's religious beliefs are constitutionally protected so long as they are sincere.

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

Response: Yes. An individual's religious beliefs are constitutionally protected so long as they are sincere.

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

Response: As a judicial nominee, it would not be appropriate for me to opine on religious doctrine. If fortunate to be confirmed, my role would be limited to assessing whether any individual's religious beliefs are sincerely held. I would have no authority to consider whether those views are acceptable or morally righteous.

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: The Supreme Court in *Our Lady of Guadalupe School* held that the First Amendment's ministerial exception precluded teachers from bringing employment discrimination claims against a religious school. The Court held that the ministerial exception applied because the teachers performed, among other things, religious functions for the school. As the Court explained, the "First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe School*, 140 S. Ct. at 2052 (citation and internal quotation marks omitted).

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: Catholic Social Services (CSS) had long contracted with the City of Philadelphia to place children in foster care. But in 2018, Philadelphia refused to further contract with CSS on the ground that CSS would not place children in foster care with same-sex couples. The Supreme Court in *Fulton* held that Philadelphia's foster care policy was subject to strict scrutiny under the Free Exercise Clause because it was not generally applicable. The Court reached this conclusion because Philadelphia's policy included a mechanism for making individualized exemptions and yet the City refused to grant such an exemption to CSS. And the Court held that Philadelphia's policy could not satisfy strict scrutiny because while "[m]aximizing the number of foster families and minimizing liability are important goals," the City failed to "show that granting CSS an exemption will put those goals at risk." 141 S. Ct. at 1881-82.

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: Maine adopted a program of tuition assistance for parents who lived in school districts that did not themselves provide a secondary school option. But Maine limited tuition assistance payments to "nonsectarian" schools. The Supreme Court in *Carson* held that because Maine's program disqualified certain private schools from public funding solely because they are religious, the program was not neutral and generally applicable and strict scrutiny applied. 142 S. Ct. at 1997. The Court further held that Maine's program failed to satisfy strict scrutiny because "an interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling in the face of the infringement of free exercise." *Id.* at 1998 (citation, internal quotation marks, and alteration omitted).

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

Response: A football coach at a public high school engaged in personal prayers at midfield at the conclusion of games. The school responded by forbidding the coach from continuing his religious exercise. The Supreme Court in *Kennedy* held that this was a violation of the coach's Free Exercise Clause rights, and that the school's actions were not justified by Establishment Clause concerns. In resolving the Establishment Clause issue, the Court recognized that it had long ago abandoned the so-called *Lemon* test that had once applied to Establish Clause questions. 142 S. Ct. at 2427. In place of the *Lemon* test, the Court in *Kennedy* recognized that it had "instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 2428 (citation and internal quotation marks omitted); *see also id.* ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the Court's 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: Officials in a county in Minnesota insisted that the Amish adopt certain modern technologies or risk jail, fines, and even losing their farms. The Supreme Court in *Mast* granted certiorari, vacated the decision of the Court of Appeals of Minnesota, and remanded for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). Concurring in the order, Justice Gorsuch wrote to "highlight a few issues the lower courts and administrative authorities may wish to consider on remand." *Id.* at 2430. Justice Gorsuch explained that under the Religious Land Use and Institutionalized Persons Act, the government bore the burden of showing that its regulations served a compelling government interest and that its regulations were narrowly tailored. *Id.* at 2432. Justice Gorsuch further explained that a court should not treat the government's *general* interest as compelling "without reference to the *specific* application of those rules to *this* community." *Id.* (emphasis in original). Furthermore, Justice Gorsuch noted that "the County and lower courts erred by failing to give due weight to

exemptions other groups enjoy." *Id.* More fundamentally, Justice Gorsuch emphasized that "RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort." *Id.* at 2433.

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: As a judicial nominee, it would not be appropriate for me to opine on the proper interpretation of Section 1507 in hypothetical future cases. *See* Code of Conduct for United States Judges, Canon 3(A)(6). But I am aware that a state statute "modeled after" Section 1507 was held to be facially constitutional in *Cox v. Louisiana*, 379 U.S. 559, 561 (1965).

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: Yes.

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 Constitution's Appointments Clause authorizes the President, with advice and consent of the Senate, to make political appointments. As a judicial nominee, it would not be appropriate for me to comment on what the President and Senate should consider in exercising their constitutional authorities. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, and if the legality of a political appointment were to come before me, I would faithfully apply binding Supreme Court and Ninth Circuit precedent.

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, in certain circumstances, evidence of a program or policy that has a racially disparate outcome can constitute evidence of illegal discrimination under Title VII. *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2672-73 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact")). But the Supreme Court has made clear that disparate impact is not a valid theory under the Fourteenth Amendment's Equal Protection Clause. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (explaining that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose"). If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to any case that came before me involving a claim of racially disparate impact.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the appropriate number of justices on the U.S. Supreme Court. If fortunate to be confirmed, I would faithfully apply the decisions of the Supreme Court, and the number of Justices sitting on that Court would have no bearing on my work as a lower court judge.

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: In *Heller* and *Bruen*, the Supreme Court authoritatively settled the original public meaning of the Second Amendment. The Court in those cases held that the text of the Second Amendment recognizes a preexisting individual right to keep and bear arms for purposes of self-defense, and that this right is not dependent upon militia service.

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: In *Heller* and *McDonald*, the Supreme Court struck down laws that precluded individuals from possessing operable handguns in their homes for self-defense. In *Bruen*, the Supreme Court struck down a state licensing scheme that required individuals to demonstrate a special need before they would be permitted to carry handguns in public for self-defense. More broadly, the Court in *Bruen* established that whenever the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects the conduct and the government bears the burden of justifying its regulation by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129-2130.

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

Response: Yes. The Supreme Court in *McDonald* recognized that the individual right to keep and bear arms for purposes of self-defense is a fundamental right protected by the Constitution.

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

Response: No. The Supreme Court has recognized that the Second Amendment is not a "second-class right." *Bruen*, 142 S. Ct. at 2156.

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

Response: No. The Supreme Court has recognized that the Second Amendment is not a "second-class right." *Bruen*, 142 S. Ct. at 2156.

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

Response: The Supreme Court has long recognized that the executive has the authority under the Constitution to take care that the laws are faithfully executed, and that this constitutional authority grants the executive discretion in determining how to use limited resources and set enforcement priorities. *See United States v. Texas*, 143 S. Ct. 1964 (2023). But it would not be appropriate for me, as a judicial nominee, to opine on the

propriety of executive action or inaction in any particular cases or circumstances. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to any such case that came before me.

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

    Response: My understanding is that prosecutorial discretion involves the decision of the executive branch to determine how to use limited resources and set enforcement priorities. By contrast, I understand a substantive administrative rule change to be a change that requires the executive branch to follow appropriate administrative-law procedures to change an existing rule.

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

    Response: No.

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

    Response: An association of realtors challenged a nationwide eviction moratorium for residential rental properties that had been imposed by the CDC. The Supreme Court held that the association had a substantial likelihood of success on the merits. 141 S. Ct. at 2488. Among other things, the Court noted that even if the relevant statutory text were ambiguous as to whether the CDC had the authority to impose such a moratorium, "the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation." *Id.* at 2489. As the Court explained, "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* (citation and internal quotation marks omitted).

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: No.

Questions from Senator Thom Tillis
for Micah W. J. Smith, nominee to the U.S. District Court for the District of Hawaii

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: A judge's personal views and background are irrelevant to their duty to apply the law evenhandedly and faithfully to the cases before them.

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

   Response: I believe impartiality is an expectation for a judge, as well as a duty. The Code of Conduct for United States Judges requires a judge to "perform the duties of the office fairly, impartially, and diligently."

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

   Response: Black's Law Dictionary defines judicial activism as "judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Defined in this manner, I consider judicial activism to be completely inappropriate, inconsistent with the duty of a federal judge, and incompatible with 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: Yes. Because a judge is required to faithfully apply the law, and must set aside their own personal views, a judge should sometimes reach conclusions with which they may personally disagree. If fortunate to be confirmed, I would reconcile this by always keeping in mind that it is for policymakers to decide what policies the law should enact, and that the judge's only task is to apply the law faithfully, not to assess its desirability.

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

   Response: If fortunate to be confirmed, I would ensure this by faithfully applying binding Supreme Court and Ninth Circuit precedent recognizing and protecting Second Amendment rights. This includes the Supreme Court's holdings in *Heller* and *McDonald* that the Second Amendment protects an individual right to keep a firearm in one's home for self-defense purposes, and the Supreme Court's holding in *Bruen* that the Second Amendment protects an

individual right to carry a firearm in public for self-defense purposes. I would also faithfully apply the standard that *Bruen* establishes for scrutinizing laws or regulations that burden the individual right to keep and bear arms for self-defense: whenever the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects the conduct and the government bears the burden of justifying its regulation by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-2130 (2022).

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: If fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to any qualified immunity issue presented to me. Under that precedent, a court must grant qualified immunity to law enforcement personnel and departments when either (1) the plaintiff fails to adduce facts sufficient to make out a constitutional or statutory violation, or (2) the alleged unconstitutionality of the officers' conduct was not clearly established at the time of the conduct at issue. The Supreme Court in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), clarified that a court may grant qualified immunity for either of those reasons standing alone, and need not resolve whether the plaintiff's allegations make out a violation before concluding that any such violation would not have been clearly established at the time of the alleged misconduct.

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: The Supreme Court has recognized that qualified immunity aims to balance "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 129 S. Ct. at 815. As both the Supreme Court and the Ninth Circuit have recognized, applied properly, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mills v. Graves*, 930 F.2d 729, 731 (9th Cir. 1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Beyond recognizing these general principles, however, I believe it would not be appropriate for me, as a judicial nominee, to opine on the question of whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety, in order to avoid creating the impression that I have prejudged issues that could come before me if I am fortunate to be confirmed.

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

   Response: As a judicial nominee, I believe it would not be appropriate for me to opine on the question of the proper scope of qualified immunity protections for law enforcement, in order

to avoid creating the impression that I have prejudged issues that could come before me if I am fortunate to be confirmed.

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

    Response: While in private practice at the law firm of O'Melveny & Myers LLP, I worked on a few briefs involving patent disputes, both in the Federal Circuit and in the Supreme Court. As an Assistant U.S. Attorney, I have investigated and prosecuted criminal copyright infringement cases. And I studied copyright law while in law school. From these experiences, I understand the importance of ensuring that IP rights are faithfully enforced, and if fortunate to be confirmed, I would faithfully apply binding Supreme Court and Ninth Circuit precedent concerning IP rights.

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: The District of Hawaii is not broken down into divisions, and as I understand it, cases here are randomly assigned to any of the four active judges as well as senior judges. The Southern District of New York, where I previously practiced, likewise assigned matters randomly to its numerous active and senior judges. I am not sufficiently familiar with how other judicial districts (including those with divisions having only one judge) assign cases to be able to offer an informed opinion about the challenges those districts might face. But as noted above, if fortunate to be confirmed, I would not be faced with those types of issues in the District of Hawaii.

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 judicial nominee, I believe it would not be appropriate for me to opine on the quality of the Supreme Court's patent eligibility jurisprudence, in order to avoid creating the impression that I have prejudged issues that could come before me if I am fortunate to be confirmed. As mentioned above, however, I have had occasion to work on patent cases while in private practice, and as a result am aware of some of the challenges that parties face when litigating patent cases.