Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Holly Thomas
Nominee to the Court of Appeals for the Ninth Circuit
October 27, 2021

1. **As Special Counsel to the Solicitor General of New York, you were the counsel of record for an amicus brief filed in support of the United States' Motion for Preliminary Injunction against North Carolina's H.B. 2. This brief was joined by nine other states and the District of Columbia.**

    a. **Generally speaking, as an advocate on behalf of a state, what factors go into deciding to file an amicus brief supporting the litigation position of another party?**

    Response: As an advocate, I did not make independent decisions about what litigation to pursue. Those decisions were made by my clients. Speaking at a high level of generality, whether the litigation impacted the interests of the state's residents, or whether the litigation impacted the state's own interests, were the types of factors a state might consider in determining whether to file an amicus brief supporting the litigation position of another party.

    b. **Can you tell us about how your work as an advocate in this capacity differs from your work as a judge?**

    Response: Serving as an attorney or advocate and serving as a judge are fundamentally different roles. The role of an advocate is to represent the views of their clients zealously and ethically, and within the bounds of the rules of professional conduct. This means, among other things, making good-faith arguments regarding the client's position, based on the facts in the record and the legal precedent at the time of the representation, and presenting those arguments for review by the courts. The role of a judge is to review the individual cases that come before the court, and to apply controlling law and precedent faithfully and impartially to those cases.

    An attorney may share the views of the client, but zealous and ethical advocacy by an attorney does not require this; it does require that the attorney present arguments in good faith and abide by the rules of professional conduct. Of course, it is never appropriate for a judge's personal views to influence the judge's determination of a case.

    In each case I handle as a judge, I am guided by law and precedent. I carefully and impartially consider the briefs and the arguments; thoroughly familiarize myself with the record; review applicable law and apply precedent; engage in open-minded and collegial discussion with colleagues; and endeavor to provide decisions that offer litigants a clear statement of why the law commanded me to reach the outcome I

reached in their case. In each case, moreover, I strive to communicate respect for the litigants and the attorneys and to convey the dignity of the judicial process.

2. **You have served as a Judge for the Los Angeles County Superior Court since 2018 and recently spent four months as a Judge Pro Tem on the California Court of Appeal, Second Appellate District. But prior to your judgeship, you had a wide range of appellate litigation experiences at the NAACP Legal Defense and Educational Fund, the Appellate Section of the Justice Department's Civil Rights Division, and the New York Attorney General's Office of the Solicitor General. You have also helped oversee a state agency as the Deputy Director for Executive Programs at the California Department of Fair Employment and Housing.**

   a. **How did your previous experiences help shape your approach to judicial decisionmaking?**

   b. **What lessons have you learned from your current judicial role that will serve you well on a federal court of appeals?**

   Response: While, as I described in response to Question 1(b), my role as a judge is fundamentally different than my role as an advocate, my broad practice background has served me well on the bench. In my career as an advocate, I filed nearly three dozen briefs before the United States Courts of Appeals or the United States Supreme Court and over dozen briefs before state appellate courts. I argued eight appeals before the United States Courts of Appeals for the First, Second, Fourth, Fifth, and Ninth Circuits, and four appeals before the New York Supreme Court, Appellate Division. I have handled cases ranging from immigration and criminal matters, to the Uniformed Services Employment and Reemployment Rights Act of 1994, to voting rights cases, to the Prison Litigation Reform Act.

   As a trial court judge, I estimate that I have presided over thousands of hearings and several hundred trials. While sitting pro tem on the California Court of Appeal, I authored seven unanimous opinions and sat on nearly two dozen panels.

   Because of these diverse experiences, I am able to quickly come up to speed on areas of law with which I am unfamiliar. I believe that this skill will continue to serve me well as a federal court judge, if confirmed.

   I have taken a few lessons from these experiences:

   First, I have found that the process of working with colleagues who have a variety of viewpoints and approaches to legal questions has been one of the most rewarding aspects of my professional career. I have always endeavored to understand the views of colleagues and to communicate effectively and diplomatically, including on matters where passionate views are held.

I particularly enjoyed the opportunity to collegially discuss complex issues of law during the time I spent sitting pro tem on the state appellate court; a role in which decisionmaking is ultimately a group endeavor. Although each judge is, of course, tasked with exercising independent judgment, these collegial discussions led me to revise drafts; to consider a middle ground; or to approach a legal problem from an angle I had not yet considered. I would look forward to continuing to take this open-minded approach on the Ninth Circuit if confirmed.

Second, during my time on the Superior Court and as a judge pro tem on the California Court of Appeal, I have come to believe that my role as a judge is best carried out in the following way: carefully and impartially considering the briefs and the arguments; thoroughly familiarizing myself with the record; reviewing applicable law and applying precedent; engaging in open-minded and collegial discussion with colleagues; and providing decisions that offer litigants a clear statement of why the law commanded me to reach the outcome I reached in their case. In each case, moreover, I strive to communicate respect for the litigants and the attorneys and to convey the dignity of the judicial process. I plan to continue this approach as a federal court judge, if confirmed.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Holly A. Thomas
Nominee to be United States Circuit Judge for the Ninth Circuit Court of Appeals

1. **While you were Deputy Director of California's Department of Fair Employment and Housing, the Department filed a lawsuit against Crunch Fitness, a gym, for allegedly discriminating against a transgender member.**

    a. **Please describe your involvement in DFEH's lawsuit against Crunch Fitness.**

    Response: I was not on the litigation team in this case. I was listed as the press contact on a press release related to the lawsuit during the time that DFEH's Deputy Director for Communications was on leave and I was serving as the Department's press contact.

    b. **Did you communicate with Christynne Wood before DFEH filed suit against Crunch Fitness? If so, please describe the nature of those communications.**

    Response: No.

    c. **Does federal law require private businesses to allow individuals access to sex-segregated facilities that align with their gender identity or gender expression? If yes, please identify the legal basis for this requirement.**

    Response: As this question is one that is pending or impending before the courts, and is a current subject of legal and societal debate, I cannot comment.

2. **While serving as Special Counsel to New York's Solicitor General, you authored or contributed to two amicus briefs arguing against bathroom safety laws. In *Texas v. United States*, your brief argued that there is "no data or tangible evidence in support of the claim that allowing people to use bathrooms corresponding with their gender identity will lead to increased violence or crime in restrooms." In *United States v. North Carolina*, your brief suggested that the privacy and safety concerns underlying North Carolina's proposed bathroom law were "unfounded," and that "privacy curtains as well as separate restroom and changing spaces" would sufficiently protect the privacy and safety of school-aged girls.**

    Earlier this week, a Virginia juvenile court judge concluded that a transgender teenager sexually assaulted a female student in a Loudoun County high school bathroom in May.[1] Court documents "confirm the offender was wearing a skirt

[1] *See* Caroline Downey, *Judge Rules Loudoun County Teen Sexually Assaulted Female Student in Girls' Bathroom*, Nat'l Rev., Oct. 26, 2021, https://www.nationalreview.com/news/judge-rules-loudoun-county-teen-sexually-assaulted-female-student-in-girls-bathroom/; Neal Augenstein, *Loudoun Co. Judge Rules Teen Sexually Assaulted Girl in School Bathroom*, WTOP News, Oct. 25, 2021, https://wtop.com/loudoun-county/2021/10/loudoun-co-judge-rules-teen-sexually-assaulted-girl-in-school-bathroom/.

when the assault took place," and after the assault the perpetrator "was transferred to another school where he allegedly assaulted a second female student in early October."[2]

a. In light of the judge's ruling regarding the assaults in Loudoun County, do you still believe that concerns about safety and privacy in school bathrooms are invalid?

Response: The Texas brief was filed in 2016 by the State of Washington on behalf of the states of Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, and Vermont, and the District of Columbia. I represented New York as counsel on the brief.

I filed the North Carolina brief in 2016 as counsel of record in my capacity as Special Counsel to the Solicitor General of New York. The brief was filed on behalf of the states of New York, Washington, California, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Oregon, and Vermont, and the District of Columbia.

I would note that serving as an attorney or advocate and serving as a judge are fundamentally different roles. The role of an advocate is to represent the views of their clients zealously and ethically, and within the bounds of the rules of professional conduct. This means, among other things, making good-faith arguments regarding the client's position, based on the facts in the record and the legal precedent at the time of the representation, and presenting those arguments for review by the courts. The role of a judge is to review the individual cases that come before the court, and to apply controlling law and precedent faithfully and impartially to those cases.

Based upon the information provided here, the Loudon County case appears to be pending in court. As a sitting judge and a nominee for a federal judicial position, I therefore cannot comment on any specific information stemming from that matter. If a case involving these issues were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

b. Is it legally permissible for a state or locality concerned with the safety and privacy of school-aged girls to prohibit biological males from using women's bathrooms and locker rooms? Why or why not?

Response: Because I am a sitting judge and a nominee for a federal judicial position, and this is a matter of current legal and societal debate, I cannot comment. If a case raising issues regarding privacy and safety in school

[2] Downey at *1.

bathrooms and locker rooms were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

3. **In *Simmons v. Galvin*, you submitted an amicus brief on behalf of the United States. In the brief, you argued that a Massachusetts law banning felons from voting in elections did not violate Section 2 of the Voting Rights Act. You argued that "neutrally designed and enforced laws prohibiting currently incarcerated felons from voting are not subject to challenge under Section 2."**

   a. **Do you still believe that some neutrally designed and enforced laws restricting voting are not subject to challenge under Section 2 of the Voting Rights Act? Why or why not?**

      Response: Observing that Section 2(b) of the Voting Rights Act "requires consideration of 'the totality of circumstances,'" the Court in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2338 (2021), held that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered" in a Section 2 case, *id*. The Court held that while it would "not attempt to compile an exhaustive list, . . . several important circumstances should be mentioned." *Id*. These circumstances included: (1) "the size of the burden imposed by a challenged voting rule;" (2) "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982;" (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups;" (4) "the opportunities provided by a State's entire system of voting;" and (5) "the strength of the state interests served by a challenged voting rule." *Id*. at 2338-39.

      If a case involving a neutrally designed and enforced law restricting voting were to come before me on a Section 2 challenge, I would apply *Brnovich* and any other applicable Supreme Court and Ninth Circuit precedents.

   b. **Is requiring a postage stamp to mail an absentee ballot a poll tax? Why or why not?**

      Response: As this question asks about an issue that is pending or impending before the courts, I cannot comment.

   c. **Voting often involves incidental costs like transportation, parking, and taking time off work. Does the existence of these incidental costs give rise to valid Section 2 claims? To valid constitutional claims about burdening the right to vote? Why or why not?**

      Response: Please see my response to Question 3(a). In addition, if a case raising a constitutional claim regarding voting were to come before me, I would

carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent.

4. **As a law student, you signed an amicus brief in *Grutter v. Bollinger* arguing that universities may use race and ethnicity as factors in admissions decisions. In 2009, you expressed support for a district court's decision that the University of Texas could use race in determining whether to admit or deny applicants.**

    a. **Is it constitutionally permissible for universities to deny Asian American applicants admission because of their ethnicity? Why or why not?**
    b. **Is it constitutionally permissible for universities to deny white applicants admission because of their race? Why or why not?**
    c. **If a school determines that racial diversity is a compelling interest and that white students are underrepresented among the student body, may that school decline to admit non-white students on the basis of their race?**

    Response: The Supreme Court has held that "because racial characteristics so seldom provide a relevant basis for disparate treatment, [r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny. Strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose." *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016).

5. **Please describe your involvement with the Los Angeles Judges Election Protection political action committee ("LAJ-PAC").**

    Response: Since 2019, I have been a member of the Los Angeles Judges Election Protection Committee (LAJ-PAC). The LAJ-PAC was formed in April 2018 to support Los Angeles County Superior Court judges who face an election challenge. A judge must be a member of the LAJ-PAC to be a recipient of the PAC support. The LAJ-PAC is not affiliated with any political party. I have no role in the LAJ-PAC other than my financial contributions as a member.

6. **Do you support LAJ-PAC's efforts to discourage competition for elected judicial positions? Why or why not?**

    Response: The stated purpose of the LAJ-PAC is to help and support incumbent Los Angeles County Superior Court judges who face an election challenge. I joined the LAJ-PAC as a newly-appointed judge because I wanted to be able to rely on the LAJ-PAC's support should I ever be challenged in a judicial election.

7. **Please describe your legal philosophy and your approach to deciding cases.**

Response: I believe my role as a judge is best carried out in the following way: carefully and impartially considering the briefs and the arguments; thoroughly familiarizing myself with the record; reviewing applicable statutes and applying precedent; engaging in open-minded and collegial discussion with colleagues; and providing decisions that offer litigants a clear statement of why the law commanded me to reach the outcome I reached in their case. In each case, moreover, I strive to communicate respect for the litigants and the attorneys and to convey the dignity of the judicial process.

8. Do you believe in "living Constitutionalism"? Why or why not.

Response: I do not identify with "living Constitutionalism" or any other particular legal philosophy beyond that described in Question 7. I further understand the phrase "living Constitutionalism" to have various and contested meanings.

My view is that the Constitution is an enduring document that has carried the United States through a variety of times and circumstances, and that I should look to Supreme Court and Ninth Circuit precedent if a question were to come before me regarding its meaning.

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

Response: In *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), the Supreme Court held that Plaintiff Meyer's "right thus to teach, and the right of parents to engage him so to instruct their children, we think, are within the liberty" of the Fourteenth Amendment.

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

Response: I am not familiar with this statement or the context in which it was made. The role of a judge is to impartially apply the law to the facts of the case, which are to be determined, on appellate review, by reviewing the record. As a lower court judge, I would be bound by Supreme Court precedent. I would also be bound by Ninth Circuit precedent, unless such precedent had been reversed or overruled by the Supreme Court, or by the Ninth Circuit sitting *en banc*.

11. In your view, what role do federal judges play in making laws?

Response: Making laws is the province of policymakers. The job of a judge is to apply the law faithfully and impartially.

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

Response: The role of a judge is to apply the law faithfully and impartially to the facts of the case. Law and precedent are appropriate considerations for judicial decisions.

13. 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 *Gonzales v. Carhart* correctly decided, and is it settled law?
f. Was *McDonald v. City of Chicago* correctly decided, and is it settled law?
g. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided, and is it settled law?
h. Was *Juliana v. United States* (9th Cir.) correctly decided, and is it settled law?

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

Per the practice of prior judicial nominees, I make an exception for *Brown v. Board of Education,* 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967). I believe the issue of de jure segregation of schools and the constitutionality of anti-miscegenation laws are issues unlikely to ever come before me. For these reasons, I can ethically state that I believe these cases were correctly decided.

14. Is it appropriate for the government to use law enforcement to enforce social distancing mandates and gathering limitations for individuals attempting to practice their religion in a church, synagogue, mosque or any other place of religious worship? Why or why not?

Response: To the extent this question is asking for a policy opinion, it is within the province of policymakers. To the extent that this is a legal question, if this issue were to come before me, I would apply relevant Supreme Court and Ninth Circuit precedents. Based upon the limited information offered by the question, such relevant precedents could include *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). In those cases, the court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise," *Tandon*, 141 S. Ct. at 1296, or "single out houses of worship for especially harsh treatment," *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66.

15. Do you believe that states or cities should defund police departments? Please explain.

Response: Questions regarding funding of police departments are policy questions not within the province of the judicial branch. To the extent that such questions might come before me in a case, moreover, it would not be appropriate for me to opine.

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

Response: Questions regarding allocation of funding to police departments and other support services are policy questions not within the province of the judicial branch. To the extent that such questions might come before me in a case, moreover, it would not be appropriate for me to opine.

17. Is the federal judiciary systemically racist?

Response: The question whether there are systemic issues in any governmental institution, including the judiciary, is an important one for policy makers to consider.

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

Response: The Ninth Circuit has "created a two-step framework to review Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (2021). First, the court "ask[s] if the challenged law affects conduct that is protected by the Second Amendment." *Id*. The determination is based "on the historical understanding of the scope of the right." *Id*. (quotation marks and citation omitted). The court has held that "[l]aws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis." *Id*. "Similarly," the Ninth Circuit "may uphold a law without further analysis if it falls within the presumptively lawful regulatory measures" identified by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Young*, 992 F.3d at 783 (quotation marks and citation omitted).

"If," however, "the challenged restriction burdens conduct protected by the Second Amendment—either because the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful," the Ninth Circuit has held that the court is to "move to the second step of the analysis and determine the appropriate level of scrutiny." *Young*, 992 F.3d at 784 (quotation marks and citation omitted). The Ninth Circuit has held that this requires the application of "one of three levels of scrutiny: If a regulation amounts to a destruction of the Second Amendment right, it is unconstitutional under any level of scrutiny; a law that implicates the core of the Second Amendment right and severely burdens that right receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way" the court applies "intermediate scrutiny." *Young*, 992 F.3d at 784 (quotation marks and citation omitted).

As a lower court judge, if confirmed, I will be bound to follow Supreme Court and Ninth Circuit precedent.

19. Please describe the standard used by the Ninth Circuit in determining whether supervised release standard conditions are unconstitutionally vague.

Response: In *United States v. Evans*, 883 F.3d 1154, 1160 (9th Cir. 2018), the Ninth Circuit held that "[a] condition of supervised release violates due process 'if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' *United States v. Hugs*, 384 F.3d 762, 768 (9th Cir. 2004) (quoting *United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001))."

20. Under the Ninth Circuit's current case law, conditions of supervised release that prohibit a defendant from associating with a person implicates a particularly significant liberty interest can trigger "enhanced procedural requirement[s]." Who bears the burden in establishing whether or not such a relationship exists, and is that burden a burden of persuasion, a burden of production, a pleading requirement, or something else? Does the requirement apply to all conditions of supervised release or only special conditions of supervised release?

Response: The Ninth Circuit has held that prior to imposing a special condition implicating the fundamental right to familial association, a district court is required to "support its decision to impose the condition on the record with record evidence that the condition ... is necessary to accomplish one or more of the factors listed in [18 U.S.C.] § 3583(d)(1) and involves no greater deprivation of liberty than is reasonably necessary." *United States v. Wolf Child*, 699 F.3d 1082, 1092 (9th Cir. 2012) (quotation marks and citation omitted). The Ninth Circuit has held that "the government must bear its burden of demonstrating that the conditions satisfy the statutory standards" for supervised release, and that "[t]his is particularly true when a special condition targets a specific person, and even more so when that person is the 'life partner' of the individual sentenced to supervised release." *United States v. Napulou*, 593 F.3d 1041, 1047 (9th Cir. 2010).

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

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

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

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

Response: No.

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

Response: No.

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

Response: I spoke to Christopher Kang, who provided me background information on the nominations process. I was introduced to Mr. Kang in January 2021 by a friend from law school, who informed me that Mr. Kang had previously worked at the White House on judicial nominations.

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

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

Response: No.

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

Response: No.

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

Response: If this question is asking about Alliance for Justice, I spoke to Nan Aron and Spencer Myers, who provided me background information on the nominations process. I was introduced to Ms. Aron in February 2021 by a professor I know from law school.

24. 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?
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.
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.
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: I have never, to my knowledge, spoken to anyone from Arabella Advisors or any associated subsidiaries.

25. 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?
b. Are you currently in contact with anyone associated with the Open Society Foundations?
c. Have you ever been in contact with anyone associated with the Open Society Foundations?

Response: To my knowledge and recollection, I have not had contact with anyone from the Open Society Foundations since 2010, when I left the NAACP Legal Defense and Educational Fund, Inc. (LDF). Prior to that time, I had contact with the Open Society Institute in connection with my work at LDF.

26. Fix the Court is purportedly 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?**
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?**
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: I have never, to my knowledge, spoken to anyone from Fix the Court.

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

Response: In February 2021, I submitted applications to the bipartisan Judicial Advisory Committees established by Senator Dianne Feinstein and Senator Alex Padilla. I was interviewed by Senator Padilla's committee on March 25, 2021, and April 8, 2021. I was interviewed by Senator Feinstein's committee on April 29, 2021. I was interviewed by Senator Feinstein's State Chairperson on May 20, 2021, and May 24, 2021. On May 25, 2021, I was contacted by the White House Counsel's Office about a potential nomination. On May 26, 2021, the White House Counsel's Office asked me to confirm my interest in being considered for an opening on the United States Court of Appeals for the Ninth Circuit. On May 28, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 7, 2021, an attorney from the White House Counsel's Office notified me that I would be considered for an opening on the Ninth Circuit. Since June 7, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 1, 2021, I was interviewed by Senator Padilla. On September 8, 2021, President Biden announced his intent to nominate me. On September 20, 2021, President Biden submitted my nomination to the Senate.

28. 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: Please see my response to Question 22.

29. 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: Not to my knowledge.

30. 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: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: On October 27, 2021, I received the questions from the Office of Legal Policy. Based upon my own knowledge and legal research, including a review of case law and statutes, I prepared draft answers to the questions. The Office of Legal Policy provided me feedback on my draft. I took this feedback into consideration while finalizing my answers for submission to the Committee.

Senator Marsha Blackburn
Questions for the Record to Hon. Holly Thomas
Nominee for the Ninth Circuit Court of Appeals

1. **You've taken the view that students should be permitted to use bathrooms of their choosing, irrespective of their biological gender. In response to concerns that such a policy would lead to increased violence in restrooms, you argued that this concern is "nothing more than unsupported speculation." Recently, a 14-year-old girl was sexually assaulted by a gender-fluid individual in a girls' restroom at a Loudon County school.**
    a. **Do you still hold the view that these concerns are "unsupported"?**
    b. **What would you say to this 14-year-old girl?**
    c. **Do you still believe that parents concerned for their children's safety in school restrooms have no reason to worry?**

    Response: The quoted brief was filed in 2016 by the State of Washington on behalf of the states of Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, and Vermont, and the District of Columbia. I represented New York as counsel on the brief.

    I would note that serving as an attorney or advocate and serving as a judge are fundamentally different roles. The role of an advocate is to represent the views of their clients zealously and ethically, and within the bounds of the rules of professional conduct. This means, among other things, making good-faith arguments regarding the client's position, based on the facts in the record and the legal precedent at the time of the representation, and presenting those arguments for review by the courts. The role of a judge is to review the individual cases that come before the court, and to apply controlling law and precedent faithfully and impartially to those cases.

    Because, based upon the information presented to me during the hearing, the Loudon County case appears to be either pending or impending in court, I cannot comment on any specific information stemming from that matter. I also cannot comment on matters that might come before me as a federal judge, if confirmed. If a case involving these issues were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

2. **During your career as an advocate, you have taken strong and clear positions on issues like transgender rights, voting rights, and race-based college admissions. These positions suggest an outcome-based approach to the law, and they also raise questions about your ability to be an impartial arbiter.**

a. **In your view, must judges impartially apply the law, even if this leads to undesirable outcomes?**

Response: As a judge, I am duty-bound to set aside any personal views about the law or the outcome, and to interpret and apply the law impartially and faithfully. Doing so is a fundamental part of judging, and is necessary to our Constitutional order.

b. **How can Americans be confident that, if confirmed, you will impartially apply the law in cases concerning issues you've advocated on?**

Response: If confirmed, I would faithfully and impartially apply the law in all cases, as I do now. This includes cases raising issues that I may have advocated on.

3. **In your questionnaire to the Committee, you mentioned that you were a registered lobbyist on behalf of the NAACP Legal Defense and Education Fund. You noted that you do not recall the nature of those activities, even though you served in that role for five years. Please share all that you remember about your years as an NAACP lobbyist.**

Response: A search of the United States Senate's Lobbying Disclosure Website reveals that I was listed on two 2005 lobbying reports filed by the NAACP Legal Defense and Educational Fund, Inc. (LDF), as having conducted lobbying activities regarding S.B. 1088, Streamlined Procedures Act. I have no independent recollection of engaging in any lobbying activities, and have not located any other records reflecting any activity as a lobbyist during the five years I worked at LDF.

Nomination of Holly A. Thomas
to be United States Circuit Judge for the Ninth Circuit Questions
for the Record
Submitted October 27, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

3. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: The Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding precedent, which, as with all other binding Supreme Court precedent, I would faithfully and impartially apply. The Supreme Court held in *Heller* that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *Id*. at 592. The Court held that the Second Amendment "codified a pre-existing right," one "'not granted by the Constitution'" nor "'in any manner dependent upon that instrument for its existence.'" *Id*. (citation omitted). I would faithfully and impartially apply this holding.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

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

5. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).**

   Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," and made clear that "the government has the burden to establish that the challenged law satisfies" the strict

scrutiny test. The Court further held that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. Moreover, the Court held that "litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id*. at 1297 (citation omitted).

6. Please describe what you believe to be the Supreme Court's holding in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).

Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2330 (2021), the Supreme Court was "called upon for the first time to apply § 2 of the Voting Rights Act of 1965 to regulations that govern how ballots are collected and counted." Observing that Section 2(b) of the Voting Rights Act "requires consideration of 'the totality of circumstances,'" the Court held that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered" in a Section 2 case. *Id*. at 2338. The Court held that while it would "not attempt to compile an exhaustive list, . . . several important circumstances should be mentioned." *Id*. These circumstances included: (1) "the size of the burden imposed by a challenged voting rule;" (2) "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982;" (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups;" (4) "the opportunities provided by a State's entire system of voting;" and (5) "the strength of the state interests served by a challenged voting rule." *Id*. at 2338-39.

7. Please describe what you believe to be the Supreme Court's holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Response: In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court held that the Court of Appeals misapplied the canon of constitutional avoidance when examining provisions 8 U.S.C. § 1125(b), 8 U.S.C. § 1226(c), and 8 U.S.C. § 1226(a) of the Immigration and Nationality Act (INA). The Court held that the INA could not plausibly be read as placing a six-month limit on detention or requiring periodic bond hearings.

8. Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392, 2408, 2423 (2018), the Supreme Court held that Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), was "well within" the Immigration and Nationality Act's "comprehensive delegation" of authority to suspend the entry of aliens, and that, under a rational basis review, plaintiffs did not demonstrate a "likelihood of success on the merits of their constitutional claim" under the Establishment Clause. The Proclamation

had "suspended for 90 days the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen." *Id*. at 2403.

9. What is your view of arbitration as a litigation alternative in civil cases?

Response: As a sitting judge who is called upon to rule on issues involving alternative dispute resolution, I must refrain from expressing a personal view on arbitration as a litigation alternative in civil cases. If confirmed, however, I will faithfully and impartially apply binding Supreme Court and Ninth Circuit precedent regarding arbitration and all other issues.

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

Response: On October 27, 2021, I received the questions from the Office of Legal Policy. Based upon my own knowledge and legal research, including a review of case law and statutes, I prepared draft answers to the questions. The Office of Legal Policy provided me feedback on my draft. I took this feedback into consideration while finalizing my answers for submission to the Committee.

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

Response: No.

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

Questions for the Record for Holly Aiyisha Thomas, Nominee for the Ninth Circuit

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. Does the First Amendment declare a right of the people of the United States to peaceably assemble?

Response: The First Amendment to the Constitution states that, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble." U.S. Const. Amend. I.

2. Does the First Amendment declare a right of the people of the United States to petition their Government for a redress of grievances?

Response: The First Amendment to the Constitution states that, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I.

3. Does the First Amendment apply to state and local governments?

Response: Yes.

4. Do parents have a First Amendment right to protest their elected school boards for promoting curriculum including sexually explicit content, transgenderism, or other gender theories?

Response: The First Amendment to the Constitution states that, "Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. If a case involving a parental protest against an elected school board were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

5. Do First Amendment protections extend to non-threatening 'hate speech'?

Response: While the Supreme Court has not defined the phrase "hate speech" in its cases, the Court has placed limits on governmental efforts to limit speech on the basis of its content. *See, e.g., R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 395–96 (1992) ("The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. . . . [T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out."); *see also United States v. Stevens*, 559 U.S. 460, 468–69 (2010) ("From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations. . . . These historic and traditional categories long familiar to the bar, . . . including obscenity, . . .

fraud, . . . incitement, . . . and speech integral to criminal conduct . . . are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.") (Internal quotation marks and citations omitted).

6. Do First Amendment protections extend to speech that *you* personally dislike?

Response: As a judge, I am duty-bound to set aside any personal views about the law, and to interpret and apply the law impartially and faithfully. Doing so is a fundamental part of judging, and is necessary to our Constitutional order.

7. Please identify and describe any criminal convictions or dispositions since 2015 involving violence by transgender, "gender fluid," or "gender nonconforming" individuals in school bathrooms.

Response: I do not have access to a database that would allow me to accurately research and respond to this question.

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

Response: The President has the power, with the advice and consent of the Senate, to make appointments to high-level political positions in the federal government. U.S. Constitution, Art. II, §2, cl. 2. As a sitting judge and a nominee for a federal judicial position, it would be inappropriate for me to comment on the President's and Senate's considerations with respect to appointments made consistent with the Constitution. If a case involving this issue were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

9. If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will 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;

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

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

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

Response: I am not aware of what human resources programs or employee trainings are offered by the Ninth Circuit. I am also not aware what role, if any, I would have in developing or determining the content of such trainings. All trainings by federal courts, however, must conform to the Constitution and to any applicable laws.

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

Response: Please see my response to Question 9.

11. Is the criminal justice system systemically racist?

Response: The question whether there are systemic issues in the criminal justice system, including racism, is an important question for policy makers to consider.

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

Response: In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990), the Court reaffirmed the principle that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." The Court thus set forth the principle that laws that incidentally burden religion are not subject to strict scrutiny—need not be justified by a compelling interest—as long as they are both neutral and generally applicable. *See id*. at 878-82.

Subsequent Supreme Court decisions have provided clarity regarding the meaning of neutrality and general applicability.

For instance, the Court has held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), or "single out houses of worship for especially harsh treatment," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Nor is the neutrality requirement met when a free exercise defense is adjudicated by a body that is "hostile to the religious beliefs of affected citizens" or that acts "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018). And a law is not generally applicable when, for example, it includes "a formal system of entirely discretionary exceptions" that are nevertheless not extended to cases of religious hardship. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877-78 (2021).

"Facial neutrality," moreover, "is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and also "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *Id*. (citations omitted); *accord Masterpiece Cakeshop*, 138 S. Ct. at 1731.

There are, of course, numerous other Supreme Court precedents regarding these issues, including in the employment context, where the Supreme Court has, in applying the "ministerial exception," emphasized that "State interference" in "matters 'of faith and doctrine' . . . would obviously violate the free exercise of religion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020) (citations omitted); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) ("The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church.").

In addition to these constitutional principles, the Religious Freedom Restoration Act of 1993 prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b).

As a lower court judge, I would apply relevant Supreme Court and Ninth Circuit precedent to any cases raising these issues that came before me.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020), the Supreme Court held that "the applicants ha[d] clearly established their entitlement to [injunctive] relief pending appellate review." The Court held that "[t]he applicants ha[d] made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." *Id*. (citation omitted). The Court further found that the regulations could not "be viewed as neutral because they single out houses of worship for especially harsh treatment." *Id*.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Supreme Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," and made clear that "the government has the burden to establish that the challenged law satisfies" the strict scrutiny test. The Court further held that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. Moreover, the Court held that "litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id*. at 1297 (citation omitted).

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

Response: Yes.

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

Response: The government may not act in a manner that is "hostile to the religious beliefs of affected citizens" or that "passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018).

17. Describe how you would characterize your judicial philosophy on the bench in California thus far, and 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 believe my role as a judge is best carried out in the following way: carefully and impartially considering the briefs and the arguments; thoroughly familiarizing myself with the record; reviewing applicable law and applying precedent; engaging in open-minded and collegial discussion with colleagues; and providing decisions that offer litigants a clear statement of why the law commanded me to reach the outcome I reached in their case. In each case, moreover, I strive to communicate respect for the litigants and the attorneys and to convey the dignity of the judicial process. As I have not studied the judicial philosophies of Supreme Court Justices, I am unable to comment on what Justice's philosophy is most analogous to mine.

18. Describe your approach to statutory interpretation with regard to an issue of first impression.

a. Please describe textualism as a method of statutory interpretation.

b. Would you characterize yourself as a textualist?

Response: I can specifically recall only one occasion as a Superior Court judge or a temporary judge on the California Court of Appeal where I conducted statutory interpretation on an issue of first impression. To the best of my recollection, after conducting research to determine whether the issue truly was one of first impression, I heard argument, reviewed the memoranda of law, analyzed the text, conducted research regarding the state appellate courts' evaluation of other statutes covering the same subject matter, and examined the overall statutory scheme. Because I do not recall the name of the case, and therefore cannot search for it in our court's database, I am unable to offer any details beyond these that I offer to the best of my recollection.

Black's Law Dictionary defines textualism as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Black's Law Dictionary (11th ed. 2019). I have not characterized my own jurisprudence by way of reference to textualism or any other particular doctrine; I follow binding precedent in all cases. As a lower federal court judge, if confirmed, I would be bound by Supreme Court and Ninth Circuit precedent, and would faithfully follow that precedent, including with respect to interpretive methods.

19. Describe your approach to Constitutional interpretation with regard to an issue of first impression.

a. Please describe originalism as a method of Constitutional interpretation.

b. Would you characterize yourself as an originalist?

c. Do you believe in a living constitution—that is, that the Constitution's meaning changes over time even when it hasn't been amended by the American people?

Response: I cannot recall a specific instance of having engaged in Constitutional interpretation on a matter of first impression as a Superior Court judge or a temporary judge on the California Court of Appeal.

Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specifically, the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Black's Law Dictionary (11th ed. 2019). I have not characterized my own jurisprudence by way of reference to originalism or any other particular doctrine; I follow binding precedent in all cases. As a lower federal court judge, if confirmed, I would be bound by Supreme Court and Ninth Circuit precedent, and would faithfully follow that precedent, including with respect to interpretive methods.

The Constitution does not change unless it is amended pursuant to Article V. It is an enduring document. If confirmed, I will apply Supreme Court and Ninth Circuit precedent about the meaning of the Constitution in any cases coming before me.

20. 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: As a lower court judge, if confirmed, my role would be to follow Supreme Court precedent regarding the interpretive methods to be used when confronting questions of constitutional and statutory meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (courts should be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'") (citation omitted); *Bostock v. Clayton Cty., Georgia,* 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.").

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

Response: The Constitution does not change unless it is amended pursuant to Article V. It is an enduring document. If confirmed, I will apply Supreme Court and Ninth Circuit precedent about the meaning of the Constitution in any cases coming before me.

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

Response: As a sitting judge and a nominee for a federal judicial position, it would be inappropriate for me to comment on the question whether the size of the Supreme Court should be changed. I am bound by Supreme Court precedent regardless of the composition of the Court.

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

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

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

Response: Cases involving specific Constitutional rights must be evaluated under the precedent set forth by the Supreme Court or binding circuit precedent regarding those rights. To my knowledge, the Supreme Court has not addressed this question.

The Ninth Circuit has "created a two-step framework to review Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021). First, the court "ask[s] if the challenged law affects conduct that is protected by the Second Amendment." *Id*. The determination is based "on the historical understanding of the scope of the right." *Id*. (quotation marks and citation omitted). The court has held that "[l]aws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis." *Id*. "Similarly," the Ninth Circuit "may uphold a law without further analysis if it falls within the presumptively lawful regulatory measures" identified by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Young*, 992 F.3d at 783 (quotation marks and citation omitted).

"If," however, "the challenged restriction burdens conduct protected by the Second Amendment—either because the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful," the Ninth Circuit has held that the court is to "move to the second step of the analysis and determine the appropriate level of scrutiny." *Young*, 992 F.3d at 784 (quotation marks and citation omitted). The Ninth Circuit has held that this requires the application of "one of three levels of scrutiny: If a regulation amounts to a destruction of the Second Amendment right, it is unconstitutional under any level of scrutiny; a law that implicates the core of the Second Amendment right and severely burdens that right receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way" the court applies "intermediate scrutiny." *Young*, 992 F.3d at 784 (quotation marks and citation omitted).

As a lower court judge, if confirmed, I will be bound to follow Supreme Court and Ninth Circuit precedent.

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

Response: Cases involving specific Constitutional rights must be evaluated under the precedent set forth by the Supreme Court or binding circuit precedent regarding those rights. To my knowledge, the Supreme Court has not addressed this question. Please see my response to Question 24 regarding the Ninth Circuit's "two-step framework" for "review[ing] Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021).

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

Response: As a general matter, the executive branch is charged with enforcement of the laws. In *Wayte v. U.S.*, 470 U.S. 598, 607 (1985), the Supreme Court held that as long as a

"'prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (Citation omitted). "This broad discretion," the Court continued, "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Id*. That said, because the question whether the executive branch may decline to enforce a category of laws in particular contexts is an issue of active debate, it would be inappropriate for me to address this issue with greater specificity.

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

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

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2486 (2021), the Supreme Court vacated the stay of the district court's decision vacating "a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID–19 transmission and who make certain declarations of financial need." The district court had applied the test from *Nken v. Holder*, 556 U.S. 418, 434, (2009), "listing the four traditional stay factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Alabama Association of Realtors*, 141 S. Ct. at 2487.

In vacating the stay, the Court held that it "strains credulity to believe that [42 U.S.C. § 264(a)] grants the CDC the sweeping authority that it asserts." *Alabama Association of Realtors*, 141 S. Ct. at 2486.

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

Response: To the extent that this question is inquiring about matters of current legal debate, as a sitting judge and a nominee for a federal judicial position, it would not be appropriate for me to opine. If the question were to come before me whether an act constituted prosecutorial discretion or a substantive rule change, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

30. Do you believe that unlawfully setting a building on fire, amidst general rioting, is a violent act?

Response: To the extent that this question calls for a comment on pending or impending matters, it would not be appropriate for me to comment. If a case involving this question were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

31. Are students accused of sexual misconduct entitled to due process?

Response: The answer to this question would vary depending on the identity of the accusing or prosecuting authority. *See Goss v. Lopez*, 419 U.S. 565, 579 (1975) (holding, in a public school context, that "[a]t the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."); *cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982) (stating that "the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities," and that "[i]f the action of the respondent school is not state action, our inquiry ends.") (Quotation marks omitted).

32. In *Carpenter v. United States*, what criteria did the U.S. Supreme Court use to distinguish between phenomena that are covered by the Fourth Amendment Third Party Doctrine and those that are not?

Response: The Supreme Court has, in the Fourth Amendment context, "drawn a line between what a person keeps to himself and what he shares with others." *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). It has thus held that "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,'" even when "'the information is revealed on the assumption that it will be used only for a limited purpose.'" *Id*. (citations omitted). "[T]he Government" is thus "typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Id*. In *Carpenter*, reviewing the application of the Fourth Amendment to cell-site location information (CSLI), the Court used several criteria to determine that, "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." *Id*. at 2217.

The Court stated that in prior third-party doctrine cases it had "considered 'the nature of the particular documents sought' to determine whether 'there is a legitimate "expectation of privacy" concerning their contents.'" *Carpenter*, 138 S. Ct. at 2219 (citation omitted). The Court found that in contrast to other types of documents, "there are no comparable limitations on the revealing nature of CSLI." *Id*. The Court considered that CSLI constituted a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years;" that "carrying [a cell phone] is indispensable to participation in modern society;" and that because "[v]irtually any activity on the phone

generates CSLI" and, "[a]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data," in "no meaningful sense does the user voluntarily 'assume[ ] the risk' of turning over a comprehensive dossier of his physical movements." *Id*. at 2219-20 (citation omitted).

33. Do Americans have a privacy interest in their financial affairs?

Response: Discussing whether the Fourth Amendment applied to bank records, the Supreme Court held in *United States v. Miller,* 425 U.S. 435, 443 (1976), that "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." "Congress, in response to Miller, enacted the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422 (1982)." *United States v. Mann*, 829 F.2d 849, 851 (9th Cir. 1987). The Ninth Circuit has held that the Right to Financial Privacy Act creates "statutory rights," that "apply . . . to financial institutions within the United States." *See* 12 U.S.C. § 3401(1)." *Id*.

34. Are there any limitations on the Third Party Doctrine as applied to an individual's banking records? What are they?

Response: In *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018), the Court stated that it "has drawn a line between what a person keeps to himself and what he shares with others," and that it had "previously held that 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" (Quoting *Smith v. Maryland*, 442 U.S. 735, 743–744 (1979). The Court further held that, this "remains true 'even if the information is revealed on the assumption that it will be used only for a limited purpose.'" *Id*. (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)). The Court held that, "[a]s a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Id*. This includes "canceled checks, deposit slips, and monthly statements," which the Court has described as "business records of the banks." *Id*. (quotation marks omitted).

If confronted with a question regarding any limitations on the third-party doctrine as applied to an individual's banking records, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply *Carpenter*, *Miller*, *Smith*, and any other applicable Supreme Court and Ninth Circuit precedent to the record.

35. In *Americans for Prosperity Foundation v. Bonta,* the Court majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Please explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382-83 (2021), Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, stated that the

standard of review that applies to First Amendment challenges to compelled disclosure is known as "exacting scrutiny." Under an "exacting scrutiny" review, "there must be a 'substantial relation between the disclosure requirement and a sufficiently important government interest.'" *Id.* at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

Justice Thomas, concurring in part and in the judgment, would have applied strict scrutiny. *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. at 2390 (Thomas, J., concurring in part and concurring in the judgment).

Justice Alito, joined by Justice Gorsuch, stated that there was "no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. at 2392 (Alito, J., concurring in part and concurring in the judgment).

Because the majority was split on the standard of review, and because the issue may therefore come before the courts, as a sitting judge and a nominee for a federal judicial position, I cannot opine on what standard of scrutiny should apply to such cases.

36. Please explain your understanding of the Supreme Court's holding and rationale in *Apple v. Pepper*. How does it reconcile with *Illinois Brick*?

Response: In *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), the Court reviewed the issue whether consumers who had purchased apps from Apple's App Store were proper plaintiffs for an antitrust suit, and, specifically, whether the consumers were "direct purchasers" from Apple under the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Court observed that under its precedents "*indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue," and that its "decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple*, 139 S. Ct. at 1520. The Court held that "unlike in *Illinois Brick*," which dealt with the manufacture of concrete blocks, sold to masonry contractors who, in turn, sold to general contractors, "the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer." *Id*. at 1521. Because "the iPhone owners bought the apps directly from Apple," the Court held that "the iPhone owners were direct purchasers who may sue Apple for alleged monopolization" under *Illinois Brick*. *Id.* at 1520.

37. 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. Please explain the Court's holding in the case.

Response: The Court's holding in *Fulton* is that a law is not generally applicable—and is therefore subject to strict scrutiny—when it includes "a formal system of entirely discretionary exceptions" that are nevertheless not extended to cases of religious hardship. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877-78 (2021). The Court concluded that Philadelphia's policy did not survive strict scrutiny because the City "offer[ed] no compelling reason why it has a particular interest in denying an exception to [Catholic Social Services] while making them available to others." *Id*. at 1882.

38. Please explain the Supreme Court's holding and rationale in *Associated Press v. United States*.

Response: In *Associated Press v. United States*, 326 U.S. 1, 4 (1945), the Supreme Court considered the question whether the bylaws and contract of the Associated Press, which "prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership," violated the Sherman Antitrust Act. The Court held that "the By-Laws on their face, and without regard to their past effect, constitute[d] restraints of trade." *Id*. at 12. The Court found that the undisputed evidence showed that the "By-Laws had tied the hands of all of [the AP's] numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors." *Id*. at 13. The Court held that "[t]rade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect." *Id*. at 13-14.

39. Should courts place significant weight on underlying First Amendment considerations when making antitrust determinations relating to the dissemination of information to the public, as the *Associated Press* majority suggests?

Response: *Associated Press v. United States*, 326 U.S. 1 (1945), is certainly susceptible of that reading. The Court held that "[t]he First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." *Id*. at 20. The Court observed that the "Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Id*. This "command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." *Id*. The Court further held that, "[f]reedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction

repression of that freedom by private interests." *Id*. It concluded that, "the First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." *Id*. If a case involving these issues were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply *Associated Press* and any other applicable Supreme Court and Ninth Circuit precedent to the record.

Senator Josh Hawley
Questions for the Record

Judge Holly Thomas
Nominee, U.S. Court of Appeals for the Ninth Circuit

1. **In 2016, you joined an amicus brief filed by the State of New York, among other states, opposing the State of Texas's view that individuals should use the bathroom facilities consistent with their biological sex. Your brief argued that Texas had put forward "no data or tangible evidence in support of the claim that allowing people to use bathrooms corresponding with their gender identity will lead to increased violence or crime in restrooms," and you described the State of Texas's concerns as "conjecture" and a "thin, speculative allegation of harm." In similar litigation in North Carolina, you were counsel of record on a brief making a version of that same argument. Your brief said that the "privacy and public-safety concerns" of the state were "unfounded" and that the state had "not demonstrated any public-safety risk."**

    a. **At the time, did the statements in these briefs represent your personal views on the subject of students using bathrooms not in accordance with their biological sex?**

    Response: The Texas brief was filed in 2016 by the State of Washington on behalf of the states of Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, and Vermont, and the District of Columbia. I represented New York as counsel on the brief.

    I filed the North Carolina brief in 2016 as counsel of record in my capacity as Special Counsel to the Solicitor General of New York. The brief was filed on behalf of the states of New York, Washington, California, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Oregon, and Vermont, and the District of Columbia.

    I would note that serving as an attorney or advocate and serving as a judge are fundamentally different roles. The role of an advocate is to represent the views of their clients zealously and ethically, and within the bounds of the rules of professional conduct. This means, among other things, making good-faith arguments regarding the client's position, based on the facts in the record and the legal precedent at the time of the representation, and presenting those arguments for review by the courts. The role of a judge is to review the individual cases that come before the court, and to apply controlling law and precedent faithfully and impartially to those cases.

    Questions regarding students' use of bathrooms consistent with their gender identity, gender expression, or transgender status are matters of continuing

political, legal, and societal debate. As a sitting judge and a nominee for a federal judicial position, it would not be appropriate for me to respond further to this question.

b. If so, have your views changed in light of recent reports of violent assaults occurring in school bathrooms?

Response: Please see my response to Question 1(a).

c. Do you believe that more than two genders exist?

Response: Questions regarding gender identity are matters of current political, legal, and societal debate. As a sitting judge and a nominee for a federal judicial position, it would not be appropriate for me to answer this question. If a case involving a question about the number of genders were to come before me, I would carefully consider the arguments presented by the parties, and research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

d. If so, please state which genders you believe to exist.

Response: Please see my response to Question 1(c).

2. Do you believe that there are meaningful physical differences between biological males and biological females?

Response: In *Tuan Anh Nguyen v. I.N.S.,* 533 U.S. 53, 73 (2001), the Supreme Court held that "[t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."

3. Do you believe that religious and religiously-affiliated organizations should be compelled to provide restroom facilities to individuals who identify with a gender inconsistent with their biological sex and seek to use the restroom designated for members of that gender?

Response: The Supreme Court has set forth a framework for questions involving the application of state and federal law to religious and religiously-affiliated organizations.

In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990), the Court reaffirmed the principle that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." The Court thus set forth the principle that laws that incidentally burden religion are not subject to

strict scrutiny—need not be justified by a compelling interest—as long as they are both neutral and generally applicable. *See id*. at 878-82.

Subsequent Supreme Court decisions have provided clarity regarding the meaning of neutrality and general applicability.

For instance, the Court has held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), or "single out houses of worship for especially harsh treatment," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Nor is the neutrality requirement met when a free exercise defense is adjudicated by a body that is "hostile to the religious beliefs of affected citizens" or that acts "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018). And a law is not generally applicable when, for example, it includes "a formal system of entirely discretionary exceptions" that are nevertheless not extended to cases of religious hardship. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877-78 (2021).

"Facial neutrality," moreover, "is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and also "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *Id*. (citations omitted); *accord Masterpiece Cakeshop*, 138 S. Ct. at 1731.

There are, of course, numerous other Supreme Court precedents regarding these issues, including in the employment context, where the Supreme Court has, in applying the "ministerial exception," emphasized that "State interference" in "matters 'of faith and doctrine' . . . would obviously violate the free exercise of religion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020) (citations omitted); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) ("The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church.").

Moreover, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014) the Supreme Court held that the Religious Freedom Restoration Act of 1993 "ensure[s] broad protection for religious liberty" by "provid[ing] that 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.' [42 U.S.C.] § 2000bb–1(a). If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least

restrictive means of furthering that compelling governmental interest.' [42 U.S.C.] § 2000bb–1(b)."

If called upon to answer a question regarding whether religious and religious-affiliated organizations are required to provide particular restroom facilities to transgender individuals, I would carefully consider the arguments presented by the parties, and research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

4. **As a law student, you signed an amicus brief by several thousand other law students in the Supreme Court case of *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Grutter* stated that "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 310. Do you agree with the Court's statement in *Grutter* that by 2028, the need for racial discrimination in university admissions will have come to an end?**

   Response: As a lower court judge, if confirmed, I would be bound by Supreme Court precedent regarding universities' consideration of race in their admissions processes. In *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), the Court held that "the Equal Protection Clause does not prohibit the [University of Michigan] Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." In *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2214–15 (2016), the Court held that the University of Texas at Austin must continue to use the data at its disposal "to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary." The Court stated that its "affirmance of the University's admissions policy" did "not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies." *Id*. at 2215.

5. **The Supreme Court has recognized that the state has an interest in "protecting the potentiality of human life." *Roe v. Wade*, 410 U.S. 113. 162 (1973). Do you believe that this interest is legitimate?**

   Response: The Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), is binding precedent, which, as with all other binding Supreme Court precedent, I would faithfully and impartially apply. In *Roe*, the Court held that states have an "important and legitimate interest in protecting the potentiality of human life." *Id*. at 162.

6. **Please provide a detailed summary of the process that led to your nomination. Include the following details in particular:**

   a. **Who first raised the possibility of your nomination?**

b. Have you spoken with any interest groups, such as Demand Justice, concerning your nomination?

c. How many conversations did you have with White House staff leading up to your nomination?

Response: In February 2021, I submitted applications to the bipartisan Judicial Advisory Committees established by Senator Dianne Feinstein and Senator Alex Padilla. I was interviewed by Senator Padilla's committee on March 25, 2021, and April 8, 2021. I was interviewed by Senator Feinstein's committee on April 29, 2021. I was interviewed by Senator Feinstein's State Chairperson on May 20, 2021, and May 24, 2021. On May 25, 2021, I was contacted by the White House Counsel's Office about a potential nomination. On May 26, 2021, the White House Counsel's Office asked me to confirm my interest in being considered for an opening on the United States Court of Appeals for the Ninth Circuit. On May 28, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 7, 2021, an attorney from the White House Counsel's Office notified me that I would be considered for an opening on the Ninth Circuit. Since June 7, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 1, 2021, I was interviewed by Senator Padilla. On September 8, 2021, President Biden announced his intent to nominate me. On September 20, 2021, President Biden submitted my nomination to the Senate.

I spoke to Christopher Kang of Demand Justice and Nan Aron and Spencer Myers of the Alliance for Justice, each of whom provided me with background information about the nominations process.

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

a. Do you agree with that philosophy?

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

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

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

Response: There are a number of abstention doctrines that would be binding upon me as a lower court judge, if confirmed.

R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941): Under the *Pullman* abstention doctrine, if the resolution of a state law claim might obviate a federal constitutional claim, and the state law issue is unclear, the federal court should abstain from deciding the case. "*Pullman* requires that the federal court abstain from deciding the *federal* question while it awaits the state court's decision on the state law issues." *United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1209 (9th Cir. 2021).

Burford v. Sun Oil Co., 319 U.S. 315 (1943): "*Burford* is concerned with protecting complex state administrative processes from undue federal interference" in instances where the states are attempting to resolve an "'essentially local problem.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989) (citation omitted). The Ninth Circuit "requires certain factors to be present for [*Burford*] abstention to apply: (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

Younger v. Harris, 401 U.S. 37 (1971): *Younger* abstention prohibits federal courts from acting to enjoin certain pending state court proceedings. In *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013), the Supreme Court reaffirmed that only "exceptional circumstances . . . justify a federal court's refusal to decide a case in deference to the States." (Internal quotation marks and citation omitted). "First, *Younger* preclude[s] federal intrusion into ongoing state criminal prosecutions. . . . Second, certain civil enforcement proceedings warrant[ ] abstention. . . . Finally, federal courts refrain[ ] from interfering with pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id*. (internal quotation marks and citations omitted).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976): "*Colorado River* and its progeny provide a multi-pronged test for determining whether 'exceptional circumstances' exist warranting federal abstention from concurrent federal and state proceedings." *Seneca Ins. Co., Inc. v. Strange Land, Inc*., 862 F.3d 835, 841 (9th Cir. 2017). The Ninth Circuit applies an eight-part test for evaluating the appropriateness of such abstention:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Id. at 841-42.

Rooker-Feldman (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)): "The *Rooker–Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003) ("[T]he Supreme Court's decisions in *Rooker* and *Feldman,* and our seven decisions applying the *Rooker–Feldman* doctrine to deny jurisdiction, fall into a relatively clear pattern: It is a forbidden de facto appeal under *Rooker–Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court.").

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

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

Response: To the best of my recollection, no.

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

Response: As a lower court judge, if confirmed, my role would be to follow Supreme Court precedent regarding the interpretive methods to be used when interpreting Constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (courts should be "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'") (citation omitted).

11. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

b. Do you agree or disagree with this statement?

Response: I understand this statement to mean that the role of a judge is not to make the law, but to apply it impartially and faithfully in each case. If that is the meaning of this statement, then I agree with it entirely.

12. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your

understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: The Supreme Court has not affixed a numerical value to reasonable doubt. The Ninth Circuit's model jury instructions state that, "Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt." Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit 46 (2021).

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

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

Response: If confirmed as a lower court judge, I would be bound to follow the Supreme Court's holdings regarding the use of legislative history. The "Court has explained many times over many years that, when the meaning of the statute's terms is plain," a court's "job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020). The Court has been clear that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011). "When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Id*.

The Court has, moreover, held that while "[t]hose of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text," the Court will "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner*, 562 U.S. at 572. The Court has cited that principle as "a good example of why floor statements by individual legislators rank among the least illuminating forms of legislative history." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

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

Response: The Constitution is a domestic document, and the courts are not bound by the laws or judicial decisions of other nations. The Supreme Court has at times, however, considered ancient English law or the form of ancient English actions in determining the meaning or scope of constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Tull v. United States,* 481 U.S. 412 (1987) (Seventh Amendment).

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

Response: As the Supreme Court held in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019), "where . . . the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."

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

Response: Yes. (But please note that I am assuming that this question refers to *Glossip v. Gross*, 576 U.S. 863 (2015), rather than *Warner v. Gross*, 574 U.S. 1112, 135 S. Ct. 824 (2015)).

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

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

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

Response: No.

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

Response: In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990), the Court reaffirmed the principle that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." The Court thus set forth the principle that laws that incidentally burden religion are not

subject to strict scrutiny—need not be justified by a compelling interest—as long as they are both neutral and generally applicable. *See id*. at 878-82.

Subsequent Supreme Court decisions have provided clarity regarding the meaning of neutrality and general applicability.

For instance, the Court has held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), or "single out houses of worship for especially harsh treatment," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Nor is the neutrality requirement met when a free exercise defense is adjudicated by a body that is "hostile to the religious beliefs of affected citizens" or that acts "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018). And a law is not generally applicable when, for example, it includes "a formal system of entirely discretionary exceptions" that are nevertheless not extended to cases of religious hardship. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877-78 (2021).

"Facial neutrality," moreover, "is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination" and also "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *Id*. (citations omitted); *accord Masterpiece Cakeshop*, 138 S. Ct. at 1731.

There are, of course, numerous other Supreme Court precedents regarding these issues, including in the employment context, where the Supreme Court has, in applying the "ministerial exception," emphasized that "State interference" in "matters 'of faith and doctrine' . . . would obviously violate the free exercise of religion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020) (citations omitted); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) ("The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church.").

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

Response: Please see my response to Question 18.

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

Response: The Ninth Circuit has held that "the First Amendment does not extend to 'obvious[ ] shams and absurdities.'" *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (citation omitted). Moreover, a free exercise claim "must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id*. It is not, however, for the courts to say whether "religious beliefs . . . are mistaken or unreasonable." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 686 (2014). The question is rather whether an individual's beliefs reflect "'an honest conviction.'" *Id.* (citation omitted); *see also Welsh v. United States,* 398 U.S. 333, 339 (1970) (holding that "'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect'" can "come within the meaning of 'religious belief'") (citation omitted).

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

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." The Court held that the Second Amendment "codified a *pre-existing* right," one "'not granted by the Constitution'" nor "'in any manner dependent upon that instrument for its existence.'" *Id*. (citation omitted).

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: To the best of my recollection, no.

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

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

Response: I take Justice Holmes' statement to reflect his view that "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

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

Response: I understand *Lochner v. New York*, 198 U.S. 45 (1905) to have been largely abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). As a lower court judge, if confirmed, I will follow all binding Supreme Court precedent.

23. If any of your previous jobs required you to track billable hours:

a. What is the maximum number of hours that you billed in a single year?

b. What portion of these were dedicated to pro bono work?

Response: To the best of my recollection, I have never been required to track billable hours.

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

Response: In *Trump v. Hawaii*, which concerned a Presidential Proclamation "suspend[ing] for 90 days the entry of foreign nationals from seven countries," the Court held that "*Korematsu* has nothing to do with this case." *Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2423 (2018). The Court explained that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority," and that such a policy is "morally repugnant" and was "gravely wrong the day it was decided." *Id*. at 2423. I understand the quoted language to mean that *Korematsu* was incorrect when it was decided and remains incorrect today.

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

a. If so, what are they?

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

Response: As a lower court judge, if confirmed, I will faithfully and impartially apply all binding Supreme Court precedents.

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

a. Do you agree with Judge Learned Hand?

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

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

Response: The Supreme Court held in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), that evidence of control of 80% of a market was "sufficient to survive summary judgment under" the standard for finding a monopoly. If a case involving an alleged monopoly were to come before me, I would carefully consider the arguments presented by the parties, and research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

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

Response: "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States. See Art. I, § 1; Amdt. 10." *Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713, 717 (2020). As the Supreme Court has stated, there is 'no federal general common law.' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez*, 140 S. Ct. at 717.

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

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

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

Response: While state courts may look to federal precedent, they are not required to rely on the federal constitution to interpret state constitutional provisions. The federal constitution provides a floor, but states are free to offer greater protections.

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

Response: As a sitting judge and a nominee for a federal judicial position, it would generally be inappropriate for me to comment on the merits of the Supreme Court's binding precedents, all of which I would faithfully apply as a lower court judge. It would,

further, be inappropriate for me to comment on issues that might come before me or that are pending or impending in the courts.

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

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

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

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

Response: As the Supreme Court held in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010), "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course"; "[i]f a less drastic remedy [is] sufficient to redress" the injury in question, then "no recourse to the additional and extraordinary relief of an injunction [is] warranted."

31. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: Please see my response to Question 30.

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

Response: Please see my response to Question 8.

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

Response: Generally speaking, injunctive relief is awarded to prevent future harm and damages are awarded to remedy past harm. I would not apply my personal views, if any, to this or any other question that came before me as a federal court judge, if confirmed.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997), the Court held that the "Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." (Citation omitted). The Court stated that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'"

and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 720-21 (citations omitted).

The Court recited in *Glucksberg* its recognition of the following rights:

- to marry, *Loving v. Virginia,* 388 U.S. 1 (1967)
- to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942)
- to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925)
- to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965)
- to use contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972)
- to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952)
- to abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)

See Glucksberg, 521 U.S. at 720.

The Court further noted that it had "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *See Glucksberg*, 521 U.S. at 720.

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

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

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

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

Response: To my knowledge, the Supreme Court has not indicated whether there is a difference in meaning between these phrases. However, in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 570–71 (1942), the Court referred to it being "clear that Freedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action," and that "[f]reedom of worship is similarly sheltered." (Internal quotation marks and citation omitted).

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

Response: Please see my responses to Questions 3 and 18.

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

Response: Please see my response to Question 20.

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

Response: The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). The Supreme Court held in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020), that RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections."

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

Response: To the best of my recollection, no.

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

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

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by

definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

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

Response: Because the subparts of this question raise issues that could come before me as a federal judge, if confirmed, it would be inappropriate for me to opine. If presented with these questions, I would carefully consider the arguments presented by the parties, and research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

37. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

c. If confirmed, would you treat unpublished decisions as precedential?

d. If not, how is this consistent with the rule of law?

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: If confirmed, I would follow the Ninth Circuit Rules and the Federal Rules of Appellate Procedure with respect to unpublished opinions. *See* Circuit Rules 36-1, 36-2, 36-3, 36-4, 36-5; Federal Rule of Appellate Procedure 32.1.

38. In your legal career:

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

Response: I did not try cases as an attorney. As a trial judge, I estimate that I have presided over several hundred cases that have gone to verdict or judgment, in addition to presiding over thousands of hearings.

b. How many have you tried as second chair?

Response: Please see my response to Question 38(a).

c. How many depositions have you taken?

Response: I estimate that I have participated in fewer than five depositions in an advisory capacity.

d. How many depositions have you defended?

Response: I have not defended any depositions.

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

Response: I have argued eight cases before the United States Courts of Appeals, including before the First, Second, Fourth, Fifth, and Ninth Circuits. I have briefed nearly three dozen appeals before the Courts of Appeals or the Supreme Court.

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

Response: I have argued four cases before the New York Supreme Court, Appellate Division. I have briefed over a dozen appeals before state appellate courts.

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

Response: I have not appeared before a federal agency.

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

Response: I have not argued motions before trial courts. While I was Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc., I served as counsel on several matters during trial court proceedings. In criminal cases, I filed a complaint, briefs, and motions before the United States District Court for the Southern District of Alabama; filed briefs before the United States District Court for the Middle District of Alabama; and interviewed witnesses in preparation for an Arkansas state-court evidentiary hearing. In an education matter, I was co-lead counsel on an amicus brief filed before the United States District Court for the Western District of Texas. While at the United States Department of Justice, I advised trial attorneys in the course of their work before various federal district courts. As Special Counsel to the Solicitor General of New York, I was lead

counsel on an amicus brief filed before the United States District Court for the Middle District of North Carolina.

As a trial court judge, I estimate that I have ruled on well over a thousand motions.

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

Response: Please see my response to Question 38(h).

39. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges are duty-bound to apply the law to the facts in each case, regardless of any personal viewpoints they may hold. If that is the meaning of this statement, then I agree with it entirely.

40. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: I understand this statement to mean that judges are duty-bound to apply the law to the facts in each case, regardless of any personal viewpoints they may hold. If that is the meaning of this statement, then I agree with it entirely.

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

Response: To the best of my recollection, on one occasion.

a. If yes, please provide appropriate citations.

Response: https://www.naacpldf.org/wp-content/uploads/LDF-Amicus-Brief-Strauss-v-Horton.pdf

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

Response: No.

43. What were the last three books you read?

Response: Sulwe, Lupita Nyong'o (read with my son on October 24); Are We Still Friends?, Ruth Horowitz (read with my son on October 25); Captain Underpants and the Perilous Plot of Professor Poopypants, Dav Pilkey (read with my son on October 26). My son and I try to pick a book to read together every day. The last three books I read independently were Say Nothing, Patrick Radden Keefe; The Breaks of the Game, David Halberstam; and Exhalation, Ted Chiang.

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

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

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

Response: There is no single case or representation of which I am most proud. I am proud to have comported myself ethically and with respect for my colleagues, opposing counsel, and litigants, and am particularly proud of the friendships and warm professional relationships I have formed with colleagues throughout my career.

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

Response: To the best of my recollection, yes.

a. How did you handle the situation?

Response: As I mentioned in my response to Question 1(a), I did not view my role as an advocate as entailing advocacy of my personal views, but rather as requiring zealous and ethical presentation of good-faith arguments regarding the client's position for the courts to review.

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

Response: Yes.

47. What three law professors' works do you read most often?

Response: I do not regularly or frequently read the work of any particular law professor. As a trial court judge with a busy docket, I am most focused on reading the caselaw and statutes governing the cases I hear.

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

Response: My views of the law have not been influenced to a special degree by any given Federalist Paper, although I have read them.

49. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: I have read many interesting and persuasively written judicial opinions and legal opinions over the course of my legal career. While I have spent less time reading law review articles, I have also found some of those I have read to be interesting and persuasively written.

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

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

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

Response: To the best of my recollection, no.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: My husband and I own shares in Alphabet Inc. We do not own shares in any of the other companies listed.

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

Response: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

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

Response: While I was Deputy Director of Executive Programs at the California Department of Fair Employment and Housing, I occasionally edited briefs written by others. I did not retain a record of what briefs I edited, and do not recall the particular cases. I have never served as the sole editor of a brief filed by another without my name on the brief.

56. Have you ever confessed error to a court?

Response: To the best of my recollection, once.

a. If so, please describe the circumstances.

Response: In March 2015, I filed a letter brief in *United States v. McRae*, 795 F.3d 471 (5th Cir. 2015), regarding the impact of the Supreme Court's decision in *Yates v. United States*, 574 U.S. 528 (2015), on McRae's conviction under 18 U.S.C. § 1519 for burning a vehicle and a corpse. *Yates* was handed down after the United States filed its brief as appellee in *McRae*. The letter stated that in light of the Supreme Court's ruling in *Yates* that a "tangible object" as described in Section 1519 "must be one used to record or preserve information," 574 U.S. at 532, McRae's conviction and sentence under Section 1519 should be vacated.

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

Response: Nominees take an oath to tell the truth when testifying before the Senate Judiciary Committee, including with respect to their views on their judicial philosophy.

Questions for the Record for Holly A. Thomas
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
October 20, 2021

Questions for all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: I believe my role as a judge is best carried out in the following way: carefully and impartially considering the briefs and the arguments; thoroughly familiarizing myself with the record; reviewing applicable law and applying precedent; engaging in open-minded and collegial discussion with colleagues; and providing decisions that offer litigants a clear statement of why the law commanded me to reach the outcome I reached in their case. In each case, moreover, I strive to communicate respect for the litigants and the attorneys and to convey the dignity of the judicial process.

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

   Response: I have not characterized my own jurisprudence by way of reference to originalism or any other particular doctrine; I follow binding precedent in all cases. As a lower court judge, if confirmed, I would be bound by Supreme Court and Ninth Circuit precedent, and would faithfully follow that precedent, including with respect to interpretive methods.

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

   Response: I have not characterized my own jurisprudence by way of reference to textualism or any other particular doctrine; I follow binding precedent in all cases. As a lower court judge, if confirmed, I would be bound by Supreme Court and Ninth Circuit precedent, and would faithfully follow that precedent, including with respect to interpretive methods.

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

   Response: The Constitution does not change unless it is amended pursuant to Article V. It is an enduring document. If confirmed, I will apply Supreme Court and Ninth Circuit precedent about the meaning of the Constitution in any cases coming before me.

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

   Response: I have great respect for the institution of the Supreme Court, and will follow all binding Supreme Court precedents. I have not studied Supreme Court precedent with an eye on reviewing the jurisprudence of individual Justices, and do not have one particular Justice whose jurisprudence I most admire.

8. **Was Marbury v. Madison correctly decided?**
9. **Was Lochner v. New York correctly decided?**
10. **Was Brown v. Board of Education correctly decided?**
11. **Was Bolling v. Sharpe correctly decided?**
12. **Was Cooper v. Aaron correctly decided?**
13. **Was Mapp v. Ohio correctly decided?**
14. **Was Gideon v. Wainwright correctly decided?**
15. **Was Griswold v. Connecticut correctly decided?**
16. **Was South Carolina v. Katzenbach correctly decided?**
17. **Was Miranda v. Arizona correctly decided?**
18. **Was Katzenbach v. Morgan correctly decided?**
19. **Was Loving v. Virginia correctly decided?**
20. **Was Katz v. United States correctly decided?**
21. **Was Roe v. Wade correctly decided?**
22. **Was Romer v. Evans correctly decided?**
23. **Was United States v. Virginia correctly decided?**
24. **Was Bush v. Gore correctly decided?**
25. **Was District of Columbia v. Heller correctly decided?**
26. **Was Crawford v. Marion County Election Board correctly decided?**
27. **Was Boumediene v. Bush correctly decided?**
28. **Was Citizens United v. Federal Election Commission correctly decided?**
29. **Was Shelby County v. Holder correctly decided?**
30. **Was United States v. Windsor correctly decided?**
31. **Was Obergefell v. Hodges correctly decided?**

   Response to Questions 8-31:

   As a sitting judge and a nominee for a federal judicial position, it would generally be inappropriate for me to comment on the merits of the Supreme Court's binding

precedents, all of which I would faithfully apply as a lower court judge. It would, further, be inappropriate for me to comment on issues that might come before me or that are pending or impending in the courts.

Per the practice of prior judicial nominees, I make an exception for *Marbury v. Madison*, 5 U.S. 137 (1803), *Brown v. Board of Education,* 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967). The principle of judicial review established in *Marbury* is so foundational to our legal system that it is now beyond dispute. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* Federalist No. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts."). As to *Brown* and *Loving*, I believe the issues of de jure segregation of schools and the constitutionality of anti-miscegenation laws are issues unlikely to ever come before me. For these reasons, I can ethically state that I believe these cases were correctly decided.

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

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

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

Response: Please see my answer to Question 32.

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

Response: In examining a statute, I would begin with Supreme Court and Ninth Circuit precedent. If those sources answered the question, I would stop there. If the question had not been answered, I would turn to the text of the statute and evaluate its plain meaning. *See Bostock v. Clayton Cty., Georgia,* 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President."). If the matter was not thereby resolved, I would next turn to a variety of potential interpretive methods to resolve the question. These could include employing canons of statutory construction; looking to Supreme

Court and Ninth Circuit precedent analyzing analogous statutory provisions; having discussions with colleagues; and looking, with caution, to legislative history.

As with all Supreme Court precedent, as a lower court judge I would be bound to follow the Supreme Court's holdings regarding the use of legislative history. The "Court has explained many times over many years that, when the meaning of the statute's terms is plain," a court's "job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020). The Court has been clear that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011). "When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Id*.

Moreover, the Court has held while "[t]hose of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text," the Court will "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner*, 562 U.S. at 572. The Court has cited that principle as "a good example of why floor statements by individual legislators rank among the least illuminating forms of legislative history." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

I am unsure what is meant by "general principles of justice," and do not believe that such principles have any place in statutory interpretation.

35. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: Congress has set forth in 18 U.S.C. § 3553(a) the specific factors that are to be considered by district courts in sentencing defendants. These factors include the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *Id.* § 3553(a)(6). In evaluating the propriety of a trial court's sentence, I would look to case law, the sentencing guidelines, these statutory factors, and pertinent policy statements issued by the Sentencing Commission.

Questions from Senator Thom Tillis for Holly Aiyisha Thomas
Nominee to be United States Circuit Judge for the Ninth Circuit

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

   Response: Yes.

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

   Response: I am aware that there are various conceptions of what constitutes "judicial activism." If the phrase "judicial activism" in this question refers to a judge applying their personal views when interpreting the law, then judicial activism is inappropriate. It undermines the rule of law, and destroys faith in the justice system.

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

   Response: Impartiality is more than an aspiration or an expectation; it is a fundamental duty and obligation of the judicial office.

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: As a judge, I am duty-bound to set aside any personal views about the law or the outcome, and to interpret and apply the law impartially and faithfully. Doing so is a fundamental part of judging, and is necessary to our Constitutional order.

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

   Response: No.

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

   Response: If confirmed, I would impartially and faithfully apply the law in all cases. This includes applying the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

   Response: If a case raising this issue were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

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

   Response: The Supreme Court has held that:

   > "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 580 U. S. ——, ——, 137 S.Ct. 548, 551, 196 L.Ed.2d 463 (2017) (*per curiam*) (internal quotation marks omitted). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (*per curiam*) (internal quotation marks omitted). Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 580 U. S., at ——, 137 S.Ct., at 551 (alterations and internal quotation marks omitted). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*) (internal quotation marks omitted).

   Rivas-Villegas v. Cortesluna, No. 20-1539, 2021 WL 4822662, at *2 (U.S. Oct. 18, 2021). If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent in all cases that came before me.

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

    Response: The question whether qualified immunity provides sufficient protection to law enforcement officers is in the province of policymakers. My role as a federal court

judge, if confirmed, would be to apply Supreme Court and Ninth Circuit precedent impartially and faithfully.

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

Response: Questions about the proper scope of qualified immunity protection are within the province of policymakers. The Supreme Court has repeatedly held that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (*per curiam*) (internal quotation marks and citation omitted). My role as a federal court judge, if confirmed, would be to impartially and faithfully apply Supreme Court and Ninth Circuit precedent.

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

a. What experience do you have with copyright law?

Response: In my nearly two decades as a civil and criminal litigator, trial court judge, and judge pro tem on the California Court of Appeal, I have not had significant experience with copyright law.

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

Response: In my nearly two decades as a civil and criminal litigator, trial court judge, and judge pro tem on the California Court of Appeal, I have not had any particular experiences involving the Digital Millennium Copyright Act.

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

Response: In my nearly two decades as a civil and criminal litigator, trial court judge, and judge pro tem on the California Court of Appeal, I have not had significant experience addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: As a Superior Court judge, I occasionally handle requests for restraining orders that require an analysis of free speech issues. To the best of my recollection, none of these cases have involved intellectual property issues.

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

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

Response: I would first look to whether there was any Supreme Court or Ninth Circuit precedent on the issue. If there was such precedent, I would apply it. In the absence of precedent, I would look to the plain language of the text. As the Supreme Court held in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749 (2020), "when the meaning of the statute's terms is plain," a court's "job is at an end." The Court has made clear that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id*.; *see also id.* at 1738 ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President.").

I would, if the matter was not thereby resolved, next turn to a variety of potential methods to resolve the question. These could include employing canons of statutory construction; looking to Supreme Court and Ninth Circuit precedent analyzing analogous statutory provisions; having discussions with colleagues; and looking, with caution, to legislative history. In doing so, I would be mindful of the Supreme Court's holding that "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." *Huddleston v. United States*, 415 U.S. 814, 831 (1974) (quotation marks and citation omitted).

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

Response: The Supreme Court has held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*[*U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S.

837 (1984)]-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (citation omitted). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under . . . *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those interpretations have the 'power to persuade,' *ibid.*" *Christensen*, 529 U.S. at 587.

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

Response: Because this question appears to raise potential issues of policy or potential or current litigation, it would be inappropriate for me to opine.

14. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: Judges are duty-bound to interpret and apply statutes as they have been written. It is the province of policymakers to change statutes to address changing factual circumstances.

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

Response: As a lower court judge, if confirmed, I would be bound to follow Supreme Court and Ninth Circuit precedent, and to apply such precedent when reviewing cases involving new technological developments.

15. While you were Special Counsel for New York Solicitor General, you signed onto two briefs on behalf of the state of New York related to privacy for women and girls. In a Texas case, you dismissed concerns about safety in school bathrooms by stating that there is "no data or tangible evidence in support of the claim that allowing people to use bathrooms corresponding with their gender identity will lead to increased violence or crime in restrooms." In a North Carolina case, you wrote that concerns about privacy and safety were "unfounded."

I am very sympathetic to members of the transgender community, who face untold challenges every day just for being who they are. We must also be mindful that members of the transgender community are also often victims of assault in bathrooms and prisons as well. It is deeply unfortunate there are those out there who would manipulate LGBT anti-discrimination policies in order to commit violent assaults.

a. In light of the Loudon County case presented to you at your confirmation hearing, do you continue to hold the view that concerns about privacy and safety in school bathrooms are "unfounded"?

Response: At the outset, I would note that serving as an attorney or advocate and serving as a judge are fundamentally different roles. The role of an advocate is to represent the views of their clients zealously and ethically, and within the bounds of the rules of professional conduct. This means, among other things, making good-faith arguments regarding the client's position, based on the facts in the record and the legal precedent at the time of the representation, and presenting those arguments for review by the courts. The role of a judge is to review the individual cases that come before the court, and to apply controlling law and precedent faithfully and impartially to those cases.

Because, based upon the information presented to me during the hearing, the Loudon County case appears to be either pending or impending in court, I cannot comment on any specific information stemming from that matter. If a case raising issues regarding privacy and safety in school bathrooms were to come before me, I would carefully consider the record and the arguments presented by the parties, and would impartially and faithfully research and apply any applicable Supreme Court and Ninth Circuit precedent to the record.

b. If confirmed, will you be able to set aside your strongly stated views on this issue if a case regarding women's privacy and safety comes before the Ninth Circuit? What assurances can you give the Judiciary Committee that you will be able to view the facts and the law independently of your strongly stated views?

Response: I would reiterate that I recognize that serving as an attorney or advocate and serving as a judge are fundamentally different roles. The role of an advocate is to represent the views of their clients zealously and ethically, and within the bounds of the rules of professional conduct. This means, among other things, making good-faith arguments regarding the client's position, based on the facts in the record and the legal precedent at the time of the representation, and presenting those arguments for review by the courts. The role of a judge is to review the individual cases that come before the court, and to apply controlling law and precedent faithfully and impartially to those cases.

It is never appropriate for a judge's personal views to influence the judge's determination of a case. As I noted above when discussing judicial activism, a judge's application of their personal views to a case would undermine the rule of law, and destroy faith in the justice system. It would, in my view, be a profound violation of the judicial oath.

In all cases that come before me as a judge, I apply the law impartially and faithfully. I will continue to do so as a federal judge, if confirmed.

c. How do you believe federal courts should weigh the state interest in privacy and safety for women and girls? How would you evaluate such a claim if it came before you?

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