Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Jennifer Sung
Nominee to the Court of Appeals for the Ninth Circuit
September 21, 2021

1. **At your hearing, members of the Senate Judiciary Committee asked you questions about a July 2018 letter addressed to Yale Law leadership that you signed onto—in your personal capacity—expressing reservations about then-Judge Brett Kavanaugh's nomination to the U.S. Supreme Court. Some Committee members suggested that simply because you signed onto this letter, you do not have the appropriate temperament to serve on the Ninth Circuit. Yet, your record on the Oregon Employment Relations Board (ERB) for almost five years shows just the opposite. Lawyers who have appeared before you representing employers, unions, and employees have attested to your "impressive intelligence, diligent preparation, respectful courtroom demeanor, and judicial impartiality." Another group of lawyers who represent employers wrote that despite employment and labor matters being "prone to emotionally charged interactions between opposing sides" you have "always maintained a very professional approach."**

   How do you respond to concerns about your temperament?

   Response: It is the prerogative of each member of the Committee to reach their own assessment of my qualifications, including temperament. I respectfully request only that all of the evidence that is relevant to that assessment be given due consideration. In particular, I believe the best evidence of the kind of judge I would be, if confirmed, is my extensive track record as a neutral adjudicator on the Oregon Employment Relations Board. The decisions issued during my nearly five-year tenure on the Board demonstrate my impartiality, faithfulness to the law, and collegiality. In each case, I have impartially applied the law to the facts, as established by the evidence in the record. When the impartial application of the law to the facts has led to the conclusion that the employer should prevail, I have issued a decision accordingly, without reservation. For some examples, I have concluded that an employer acted lawfully when it disciplined a union officer; that an employer acted lawfully when it laid off employees who had engaged in protected activity; that an employer acted reasonably when it declined to provide information to a union; and that an employer acted reasonably when it discharged an employee for unprofessional conduct. I am deeply grateful to have the support of my colleagues on the Oregon Employment Relations Board, Chair Adam Rhynard and Member Lisa Umscheid, and their letters to the Committee describe in detail my conduct as a Board Member. Chair Rhynard attested that I have "the judicial temperament and demeanor that allows all parties to understand that their concerns will be heard and fairly evaluated." Member Umscheid attested that, if confirmed, I would "bring to the court the impartiality, judicial demeanor, and dedication to justice that [I have] demonstrated at [the Board]." As noted in your question, I am also deeply grateful to have the support of many lawyers who have dealt with me in a variety of professional contexts, including attorneys who represent management in labor and employment matters. I am honored that those attorneys attested in their letter to the Committee that my "objectivity,

fairness, and professional demeanor have been exceptional." The Oregon Coalition of Police & Sheriffs also attested that I have "earned the reputation of a thoughtful, neutral decision-maker." Additionally, I am grateful to have been rated "well qualified" by the American Bar Association's Standing Committee on the Federal Judiciary.

2. **At your hearing, you did not have an opportunity to discuss any cases you have presided over as a member of the ERB. During your tenure, you have presided over 200 cases and been overturned only three times. One of your fellow ERB members, Lisa Umscheid, who has a background representing employers, described your discussions as "collegial, thoughtful, and grounded in the facts in the record and the applicable law." Your other fellow ERB member, Adam Rhynard, wrote that you have "the judicial temperament and demeanor that allows all parties to understand that their concerns will be heard and fairly evaluated" and that you embody the qualities of neutrality, evenhandedness, and being a consensus builder.**

   Can you speak to your approach presiding over cases at the ERB and how you think it will be instructive when you will be confirmed to the Ninth Circuit?

   Response: Before addressing the question, I would like to clarify that, during my tenure on the Board, we have issued over 200 orders, but in some instances, more than one order was issued in a single case.

   In each case, it is my duty to faithfully and impartially apply the law, as set forth in constitutions, statutes, regulations, and precedent, to the facts as established by the evidence in the record. To fulfill that duty, I carefully review all of the evidence in the record, consider all of the parties' contentions, and independently research the applicable law. Because I sit on a three-member panel, I also carefully consider the views of my colleagues before reaching any final decisions regarding the factual and legal issues presented, and I work hard to reach consensus whenever possible. Throughout my service as an adjudicator, I have also demonstrated restraint and respect for precedent. For example, the Board has the authority to overturn its own precedent, however, we have never done so during my nearly five-year tenure. I also strive to write opinions that are clear and accessible to both lawyers and lay readers, and to issue decisions in a timely fashion. In sum, as an adjudicator, I have adhered to the principles of open-mindedness, impartiality, faithfulness to the law, restraint, diligence, and collegiality, and I believe that experience will serve me well as an appellate judge, should I be confirmed.

3. **Virtually all judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a host of legal issues they have not personally confronted beforehand.**

   What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your legal career?

   Response: If confirmed, I would take full advantage of the judicial education opportunities offered by the Federal Judicial Center, as well as any additional programs offered by the

Ninth Circuit. Additionally, in my nearly two decades of professional experience as a neutral adjudicator, a civil litigator, and a Ninth Circuit judicial law clerk, I have frequently been required to analyze legal issues in subject areas that I had not personally confronted beforehand. Based on that experience, I am confident in my ability to thoroughly research and quickly get up to speed on any legal issue that may be presented to the court.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Jennifer Sung
Judicial Nominee to the United States Circuit Court of Appeals for the Ninth Circuit

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

   Response: To my knowledge, neither the Supreme Court nor the Ninth Circuit has used or defined the term "super precedent." It is not a term that I have used as a litigator or adjudicator. If confirmed, I will faithfully adhere to all Supreme Court and Ninth Circuit precedent.

2. **You can answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Planned Parenthood v. Casey* correctly decided?**
   f. **Was *Gonzales v. Carhart* correctly decided?**
   g. **Was *District of Columbia v. Heller* correctly decided?**
   h. **Was *McDonald v. City of Chicago* correctly decided?**
   i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
   j. **Was *Sturgeon v. Frost* correctly decided?**
   k. **Was *Juliana v. United States* (9th Cir.) correctly decided?**
   l. **Was *Rust v. Sullivan* correctly decided?**
   m. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**
   n. **Was *Harris v. Quinn* correctly decided?**
   o. **Was *Janus v. American Federation of State, County, and Municipal Employees, Council 31* correctly decided?**

   Response: As a lower court judge, if confirmed, I would be duty bound to follow all Supreme Court precedents, except those expressly overruled by the Court itself. As a Ninth Circuit judge, if confirmed, I would also be duty bound to follow all Ninth Circuit precedents, except those reversed or overruled by the Supreme Court, or by the Ninth Circuit sitting *en banc.* If confirmed, I would fulfill the duty to adhere to binding precedent without reservation and without regard to my personal views, if any. I have fulfilled that duty as an adjudicator on the Oregon Employment Relations Board, including by applying *Janus v. American Federation of State, County, and Municipal Employees, Council 31.* Further, because it is the duty of a lower court judge to follow precedent without regard to personal views, and because judges are ethically prohibited

from commenting on legal issues that could become the subject of litigation, it is generally inappropriate for judicial nominees to comment on the merits of any particular precedent. Prior judicial nominees have made exceptions to that general rule for *Brown v. Board of Education* and *Loving v. Virginia*, because litigation regarding *de jure* racial segregation is highly unlikely to reoccur. Consistent with the judgment of prior judicial nominees, I believe it is appropriate to comment on the merits of those cases, and I agree that they were correctly decided.

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

   Response: I am not familiar with that statement by Judge Ketanji Brown Jackson, and my understanding is that the term "living constitution" has been attributed many different meanings. If the term "living constitution" is used to refer to the idea that the Constitution has no fixed meaning, then I can attest that I do not believe in that concept.

4. **Should paying clients be able to influence which pro bono clients engage a law firm?**

   Response: A law firm must meet its ethical and professional obligations to each client, including by avoiding representation of other clients (whether pro bono or paying) that would create actual or potential conflicts of interest.

5. **Do you agree with the propositions that some clients don't deserve representation on account of their:**

   a. **Heinous crimes?**
   b. **Political beliefs?**
   c. **Religious beliefs?**

   Response: Regarding criminal defendants, the Sixth Amendment and Supreme Court precedent, including *Gideon v. Wainwright*, 372 U.S. 335 (1963), establish the right to counsel in felony cases, which would likely include crimes considered to be heinous. There is no equivalent federal right to counsel in civil matters. However, I believe it would generally be consistent with an attorney's ethical and professional duties to represent a client without regard to their political or religious beliefs, so long as the attorney believes in good faith that the client has a colorable claim or defense.

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

   Response: The role of a judge is limited to deciding individual cases by faithfully and impartially applying the law to the facts of the case, as established by the evidence in the record.

7. **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: To resolve a constitutional issue, a lower court judge must apply the correct legal standard, as set forth in Supreme Court or circuit precedent, to the facts, as established by the evidence in the record. Having served as a neutral adjudicator on the Oregon Employment Relations Board for nearly five years, I can assure the Committee that each decision I have reached has been based solely on the impartial application of the law to the facts in the record before me. That is, my approach to decision-making has not been, "reach the answer that essentially your values tell you to reach," but rather, "reach the conclusion that the impartial application of the law to the facts requires in this case."

8. **Is climate change real?**

   Response: Questions regarding climate change are important ones for policy makers to consider. As a judge, if confirmed, my role would be limited to deciding individual cases, solely by impartially applying the law to the facts as established by the evidence in the record.

9. **Is gun violence a public-health crisis?**

   Response: Questions regarding gun violence and public health are important ones for policy makers to consider. As a judge, if confirmed, my role would be limited to deciding individual cases, solely by impartially applying the law to the facts as established by the evidence in the record.

10. **Is racism a public-health crisis?**

    Response: Questions regarding racism and public health are important ones for policy makers to consider. As a judge, if confirmed, my role would be limited to deciding individual cases, solely by impartially applying the law to the facts as established by the evidence in the record.

11. **Is second-degree murder a crime of violence under 18 U.S.C. § 924(c)(1)(A)?**

    Response: 18 U.S.C. § 924(c)(3) defines the term "crime of violence" as "an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Supreme Court declared 18 U.S.C. § 924 (c)(3)(B), commonly referred to as the "residual clause," unconstitutionally vague in

United States v. Davis, 139 S.Ct. 2319 (2019). In *United States v. Begay*, the Ninth Circuit held that "[s]econd-degree murder does not constitute a crime of violence under the elements clause — 18 U.S.C. § 924(c)(3)(A) — because it can be committed recklessly." 934 F.3d 1033, 1038 (9th Cir. 2019). If confirmed, I would be bound by the Supreme Court's decision in *Davis*, and the Ninth Circuit's decision in *Begay*, unless an intervening decision by the Supreme Court or the Ninth Circuit sitting *en banc* meant that *Begay* was no longer good law.

12. **Does 8 C.F.R. § 1003.14(a), the regulation concerning an immigration court's jurisdiction, set out a limit on the immigration court's subject matter jurisdiction, a claim-processing rule, or something else?**

    Response: 8 C.F.R. § 1003.14(a) provides: "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter." In *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), the Ninth Circuit held that this regulation defines when the jurisdiction of immigration courts vests.

13. **Can you identify a statute setting out the subject matter jurisdiction of immigration courts?**

    Response: Pursuant to 8 U.S.C. § 1103, the Attorney General has "such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002." *See also* 8 CFR Ch. V, Subch. A, Pt. 1003 (identifying statutory authority for regulations related to the Executive Office for Immigration Review). Under authority delegated by the Attorney General, the EOIR generally has the jurisdiction, or authority, to determine removability, excludability, or deportability and to adjudicate certain applications for relief or protection from removal under the INA.

14. **Does a court need to identify a statute that grants it personal jurisdiction over each defendant, or can a court assert personal jurisdiction based on its inherent authority?**

    Response: The methods for establishing personal jurisdiction over a defendant are set forth in the Federal Rules of Civil Procedure Rule 4(k).

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

Response: Federal courts have considered testimony by scientific experts as relevant to the question of whether a specific substance causes cancer in humans. *See, e.g.*, *GE v. Joiner*, 522 U.S. 136 (1997).

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

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

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

Response: In *Planned Parenthood v. Casey*, the Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992).

18. **Can someone change his or her biological sex?**

Response: It is my understanding, as a factual matter, that sex-reassignment surgery is a medical procedure that exists.

19. **Is threatening Supreme Court Justices right or wrong?**

Response: Under 18 U.S.C. § 875, the transmission in interstate or foreign commerce of "any communication containing any threat to kidnap any person or any threat to injure the person of another" is a crime punishable by a fine, imprisonment "not more than five years," or both.

20. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: If I were confirmed to the Ninth Circuit and a case came before me presenting this issue, I would carefully research the law, impartially apply the law to the facts in the record, and determine if the legal standard had been met.

21. **Do you think the Supreme Court should be expanded?**

Response: The question of whether the Supreme Court should be expanded is one for policy makers to consider. Federal appellate judges are bound to follow all Supreme Court precedent regardless of the size of the Court.

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

Response: To determine whether the president has the power to remove a senior official at his pleasure, I would consider any statutory provisions governing removal of the position at issue, and the standards set forth in precedent regarding executive authority and the separation of powers, including, for example, *Morrison v. Olson*, 487 U.S. 654 (1988).

23. **Is it possible that removing someone—as is the President's power—can be for wholly apolitical reasons?**

Response: I believe that it is possible, as a factual matter, for a president's reasons for removing someone to be wholly apolitical.

24. **Is a social worker qualified to respond to a domestic violence call where there is an allegation that the aggressor is armed?**

Response: The question of how to respond to such public safety situations is an important one for policy makers to consider.

25. **Is it appropriate for protestors to ignore social distancing mandates and gathering limitations to protest racial injustice?**

Response: As a judicial nominee, it is not appropriate for me to comment on whether an individual's conduct is or is not socially appropriate. If I were confirmed to the Ninth Circuit and a case came before me presenting issues related to this question, I would resolve them by carefully researching the applicable law (as set forth in statutes, regulations, constitutional provisions, or precedents) and impartially applying the law to the facts in the record.

26. **Is it appropriate for protestors to ignore social distancing mandates and gathering limitations to protest gun control?**

Response: As a judicial nominee, it is not appropriate for me to comment on whether an individual's conduct is or is not socially appropriate. If I were confirmed to the Ninth Circuit and a case came before me presenting issues related to this question, I would resolve them by carefully researching the applicable law (as set forth in statutes, regulations, constitutional provisions, or precedents) and impartially applying the law to the facts in the record.

27. **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?

Response: The question of whether, or the circumstances under which, it is appropriate for the government to use law enforcement to enforce any particular mandate is one for policy makers to consider. If I were confirmed to the Ninth Circuit and a case came before me presenting issues related to this question, I would resolve them by carefully researching the applicable law (as set forth in statutes, regulations, constitutional provisions, or precedents) and impartially applying the law to the facts in the record.

28. **Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.**

Response: Questions regarding funding for police departments and law enforcement are important ones for policy makers to consider.

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

Response: Questions regarding funding for police departments and social services are important ones for policy makers to consider.

30. **Do you believe legal gun purchases have caused the violent crime spike?**

Response: The question of what has caused any particular increase in violent crime is an important one for policy makers to consider.

31. **Do rogue gun dealers constitute a substantial factor in the amount of crimes committed with firearms?**

Response: The question of what causes or contributes to the number of crimes committed with firearms is an important one for policy makers to consider.

32. **Is the federal judiciary systemically racist?**

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

33. **Is the federal judiciary affected by implicit bias?**

Response: The question of whether the federal judiciary is affected by implicit bias is an important one for policy makers to consider.

34. **Do you have implicit bias? How do you know if it's implicit?**

Response: My lay understanding of the term "implicit bias" is that it refers to a common cognitive phenomenon identified by scientific researchers.

35. **During your hearing, you repeatedly described the letter you signed opposing the nomination of now-Justice Kavanaugh as "rhetorical advocacy" and that you signed the letter in a "private" or a "personal" capacity. The letter is titled "Open Letter from Yale Law Students, Alumni, and Educators regarding Brett Kavanaugh." An "open letter" is "a published letter of protest or appeal usually addressed to an individual but *intended for the general public*."[1] This open letter was created on a publicly available website that allowed signors to add their names to the letter.**

    a. **At your hearing you stated, "When I signed it I believed that the only intended audience was my law school administration." On what basis did you think an "open letter" about a Supreme Court nominee was only intended for your law school administration?**

    Response: When I signed the letter, my understanding of the term "open letter" was a letter that the authors opened for other individuals to sign, and I did not consult a dictionary to define the term "open letter."

    b. **By saying that you signed the letter in your "personal" capacity, are you arguing that "personal" acts are insulated from professional reprimand if completed outside the workplace?**

    Response: I distinguish between my official and personal capacities to comply with the standards set forth in Oregon law, ORS 260.432, Oregon Administrative Rule No. 165-013-0030, and advice published by the Oregon Attorney General, regarding political activity by employees of the State of Oregon, including members of boards and commissions.

36. **You described the "open letter" that you signed as rhetorical advocacy in your personal capacity. At the time you signed the letter, you were serving as member of the Oregon Employment Relations Board, a position that you describe as a "neutral arbiter." Given that you chose to engage in this rhetorical advocacy while serving as a "neutral arbiter," what assurance will litigants have that you will not continue this rhetorical advocacy if you are confirmed?**

Response: The standards for political activity that apply to my current position as a member of the Oregon Employment Relations Board are set forth in ORS 260.432 and

[1] *Open Letter*, Merriam-Webster, https://www.merriam-webster.com/dictionary/open%20letter (last accessed Sept. 21, 2021) (emphasis added).

Oregon Administrative Rule No. 165-013-0030, and I have strictly adhered to those standards during my tenure. The standards that apply to federal judges are different, and much broader. In particular, the Code of Conduct for United States Judges, Canon 5, generally prohibits federal judges from engaging in political activity. I have strictly adhered to the Code of Conduct, including Canon 5, as a nominee for a federal judicial position, and I would continue to do so if confirmed.

37. **The "open letter" that you signed said that "people will die if [Justice Kavanaugh] is confirmed." Since Justice Kavanaugh's confirmation, can you identify any deaths directly attributable to him?**

Response: As I testified at my hearing, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed. Additionally, as I testified during my hearing, I cannot identify any individuals who have died as a direct result of Justice Kavanaugh being confirmed.

38. **The "open letter" that you signed said that "Judge Kavanaugh is a threat to the most vulnerable." Since Justice Kavanaugh's confirmation, can you identify any direct actions that threaten "the most vulnerable"?**

Response: As I testified at my hearing, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

39. **In support of your belief that Justice Kavanaugh is an "intellectually and morally bankrupt ideologue," your "open letter" refers to the choice to confirm Justice Kavanaugh as "a political choice about the meaning of the constitution." This implies that the letter opposed Justice Kavanaugh because of his views about the law and the Constitution. This view seems to be based on a small number of then-Judge Kavanaugh's opinions that you disagreed with the outcome of. Would it be reasonable for a litigant to believe that you view those who disagree with you as "intellectually and morally bankrupt"? Would it also be reasonable for a litigant to think that you hold the same view of other judges and justices with whom you disagree about judicial philosophy?**

Response: As I testified at my hearing, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following

the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed. I do not believe that those who disagree with me are intellectually and morally bankrupt. As my Board colleagues have attested in letters addressed to the Senate Judiciary Committee, when we have had a difference of opinion, I have "consistently been willing to revisit the record to review testimony, exhibits, and briefing to reassess the evidence and legal arguments in light of" my colleagues' perspectives, and "our professional discussions about how to interpret a record or apply a principle of law are collegial, thoughtful, and grounded in the facts in the record and the applicable law."

40. **Your "open letter" also refers to institutions arguing that they "have a religious right to discriminate against LGBT people." Please explain which institutions you believe argue that they have a religious right to discriminate against LGBT people. In answering, please address whether you were referring to:**
    a. **The Catholic Church?**
    b. **The Church of Jesus Christ of Latter-day Saints?**
    c. **Religiously affiliated colleges and universities?**
    d. **Seminaries?**
    e. **Private businesses that operate in accordance with the owners' religious beliefs?**

    Response: As I testified during my hearing, I did not write the letter, and I understood it to be an informal advocacy piece addressed to the administration of my alma mater. The right to the free exercise of religion is a fundamental right protected by the First Amendment, as well as by statutes, such as the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. If I were confirmed to the Ninth Circuit and a case came before me presenting an issue related to the First Amendment right to free exercise of religion or any statutory rights, I would carefully research the law, impartially apply the law to the facts in the record, and determine if the legal standard had been met.

41. **Given the animus displayed towards these religious groups in this letter, would it be reasonable for a litigant to believe that your bias would lead you to rule against litigants who seek protection of religious liberty, religious conscience, or free exercise?**

    Response: I do not harbor animus or bias that would lead me to rule against litigants who seek protection of religious liberty, religious conscience, or free exercise. As a judge, if confirmed, it would be my solemn duty to impartially apply the law, including but not limited to the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and Supreme Court precedent regarding religious liberty, religious conscience, and free exercise of religion.

42. **In college, you organized two events where "[w]hites were excluded from speaking at the Monday protest and from attending a Tuesday meeting for people of color only."[2]**
    a. **Please explain why this action is not discrimination.**
    b. **Please explain why you believe that when addressing racism, white people should not be included in the conversation.**

Response: Although those events occurred nearly thirty years ago, after reviewing all of the accounts of what occurred, including letters submitted to the Oberlin Review, I do not believe that the quoted statement from my college newspaper is a complete and accurate description of what occurred, and I appreciate the opportunity to provide additional context and information. Some months before those events, the Ku Klux Klan widely leafletted Oberlin, and it was reported that the FBI was aware of several Klan members residing in Oberlin. Then, shortly before those events, crosses were burned on campus; graffiti was spray painted on a campus arch that stated "Death to [racial slur for Asians]" and "Dead [racial slur] = Good [racial slur]"; derogatory statements against African-Americans were posted inside the campus gym; and a derogatory note was posted on the door of the Muslim Students Association. Those incidents echoed earlier ones, where, for example, a banner stating "White Supremacy Rules" was hung from a campus building; signs stating "Kill all the [racial slur for African-Americans]" were posted inside campus bathrooms; and a group of Asian-American students, myself included, were denied service at a local establishment while some individuals made racially derogatory comments and references to "dropping the H-bomb on Japan." In this context, many students of color felt scared and threatened, and many believed it would be helpful to hold an informal, one-time meeting for students who felt threatened. As a college student at the time, I believed that this one-time meeting was akin to a support group meeting for people who experienced a particular trauma, and that inviting only people who experienced that trauma was not a form of invidious discrimination. I did not participate in or condone the decision of a faculty member to remove a student from the meeting, and I do not condone it now.

I do not recall whether, or the extent to which, I was involved in organizing the protest that the college newspaper alleged denied students the opportunity to speak on the basis of race. Based on my review of the various accounts of what occurred, my understanding is that the organizers had a set agenda and list of speakers, and that both white and minority students who were not on the list were denied the opportunity to speak because they were not on the agenda.

I do not believe that, "when addressing racism, white people should be excluded from the conversation," and I did not make a statement to that effect.

[2] SJQ 12(E) at 626.

43. **While you attended Yale Law School, you signed an amicus brief in *Grutter v. Bollinger* that argued in favor of continuing to make admissions decisions based on race. When signing this brief, did you consider that allowing schools to make decisions based on race would allow them to institute unconstitutional quotas under the guise of a purportedly permissible system, as Yale has allegedly done and has admittedly done against Jewish students historically?[3]**

Response: I note that I signed the referenced amicus brief almost 19 years ago, as a law school student. As a judicial nominee, it is not appropriate for me to comment on pending litigation.

44. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

Response: As a judicial nominee, it would not be appropriate for me to comment on this matter, because questions regarding release of incarcerated individuals during the COVID-19 pandemic are pending in federal courts.

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

Response: In *District of Columbia v. Heller*, the Supreme Court declined to establish a level of scrutiny for evaluating Second Amendment restrictions. 554 U.S. 570, 634 (2008). However, the Court expressly rejected the adoption of an "interest-balancing test." *Id.* at 634-35. The Ninth Circuit has adopted a "two-step framework to review Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021). First, the court asks "if the challenged law affects conduct that is protected by the Second Amendment," basing "that determination on the historical understanding of the scope of the right." *Id*. (quotation marks and citations omitted). "Laws 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 court "may uphold a law without further analysis if it falls within the 'presumptively lawful regulatory measures' that *Heller* identified." *Id.* (citing *Heller*, 554 U.S. at 626-27, 627 n.26). "If the challenged restriction burdens conduct protected by the Second Amendment," the court will move to the second step of the analysis and determine the appropriate level of scrutiny." *Young*, 992 at 784. The Ninth Circuit has "understood *Heller* to require one of three levels of scrutiny: If a regulation amounts to a destruction of the Second Amendment right, it is unconstitutional under any level of scrutiny; a law

[3] *See, e.g.*, Complaint, *Students for Fair Admissions, Inc. v. Yale University*, No. 3:21-cv-00241 (D. Conn. Feb. 25, 2021), at *4–5, 30.

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 will "apply intermediate scrutiny." *Id*. (quotation marks and citation omitted). Unless and until the Supreme Court or the Ninth Circuit sitting *en banc* adopts a different standard, I would be obligated (if confirmed) to apply the Ninth Circuit's existing two-step framework.

46. **According to press reports, the Biden administration recently reactivated a "migrant child facility" that was open "for only a month in summer 2019" during the Trump administration.[4] The practice of keeping children in these facilities was routinely criticized as "kids in cages" by Democrats and members of the media. You also referenced the concept of a "cage" in your "open letter" regarding Justice Kavanaugh. What is the difference between a "migrant child facility" and a "cage"?**

Response: As a judicial nominee, it is not appropriate for me to comment on such matters.

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

Response: As a judicial nominee, it is not appropriate for me to comment on such legal issues. If I were confirmed to the Ninth Circuit and a case came before me presenting this issue, I would resolve it by carefully researching the law and impartially applying the law to the facts in the record.

48. **Over the course of your career, how many times have you spoken at events sponsored or hosted by the following liberal, "dark money" groups?**
    a. **American Constitution Society**
    b. **Arabella Advisors**
    c. **Demand Justice**
    d. **Fix the Court**
    e. **Open Society Foundation**

Response: None.

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

[4] Siliva Foster-Frau, *First migrant facility for children opens under Biden*, Washington Post (Feb. 22, 2021), available at https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html.

Response: As a judicial nominee, it is not appropriate for me to comment on such legal issues. If I were confirmed to the Ninth Circuit and a case came before me presenting this issue, I would resolve it by carefully researching the law and impartially applying the law to the facts in the record.

50. **Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."**
    a. **Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**
    b. **How is a burden deemed to be "substantial[]" under current caselaw? Do you agree with this?**

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). In *Burwell v. Hobby Lobby Stores, Inc.*, the Court distinguished between the question of whether a government action "imposes a substantial burden on the ability of the objecting parties" to act "in accord with their religious beliefs," and the question of "whether the religious belief asserted in a RFRA case is reasonable." 573 U.S. 682, 724 (2014). The Court explained that "the federal courts have no business addressing" the latter question. Regarding the former question, the Court has determined whether the government action imposed a substantial burden. *See id.* at 710, 719-21 (and cases cited therein). As a lower court judge, I would follow the Court's precedents regarding how to make that determination.

51. **Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?**

Response: The First Amendment expressly guarantees the right to the free exercise of religion, and the Supreme Court has held that right is a fundamental right. The Court's statement in *Bostock* is consistent with that holding. The Court has a number of precedents that have interpreted the Free Exercise Clause and set forth standards for determining whether state action violates it. If confirmed, as a lower court judge, I would be bound to follow those precedents, and I would faithfully and impartially apply the standards set therein.

52. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

Response: If confirmed, I would give all applicants for a clerkship the same consideration, and I would not consider membership in the Federalist Society or any similar, law-related association to be either a qualification or disqualification.

53. **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: A federal judge is duty-bound to faithfully and impartially apply the law, including binding precedent of the Supreme Court and their respective circuit court, to the facts as established by the record, in all cases.

54. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

Response: There is no constitutional right to counsel in civil cases. However, as a general matter, I believe it would be consistent with legal ethics for an attorney to represent a client without regard to their identity so long as the attorney has determined in good faith that the client has a colorable legal claim or defense.

55. **Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?**

Response: I have never made a statement to that effect, and I do not know what the purported basis for such a statement would be, if any.

56. **Do Blaine Amendments violate the Constitution?**

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that the Free Exercise Clause precluded the Montana Supreme Court from applying the provision of Montana's constitution that bars government aid to sectarian schools (the "no-aid provision") to bar religious schools from a state-funded scholarship program that was open to non-religious private schools.

57. **Please list the cases in which you have appeared in federal court in Oregon, including cases you have argued before the Ninth Circuit in Portland.**

Response: When I worked at the Oregon law firm McKanna Bishop Joffe, LLP, I researched and co-authored the motion for judgment on the pleadings or to dismiss filed by the Service Employees International Union in *DiNicola v. SEIU Local 503*, No. 6:08-cv-6317-TC (D. Or. Sep. 23, 2013), but I was not the attorney of record. As noted in my Senate Judiciary Questionnaire, I have argued one case before the Ninth Circuit; that argument took place in San Francisco. Like many civil litigators, my practice involved

complex litigation in many different federal and state courts across the country. In particular, I engaged in extensive civil litigation in district courts throughout the Ninth Circuit, including Arizona and California. To highlight one case that is noted in my questionnaire, I worked for two years on a matter in the District of Arizona, representing the plaintiff-intervenor SEIU Arizona. *See United Food & Commercial Workers Local 99 v. Bennett*, 817 F. Supp. 2d 1118 (D. Ariz. 2011); 934 F. Supp. 2d 1167 (D. Ariz. 2013) (Snow, J.). I would also note that Oregon has been my home for nearly a decade. At McKanna Bishop Joffe, LLP, I represented clients throughout the State of Oregon, and until this current nomination, the honor of my professional life was being nominated by Oregon Governor Kate Brown, and unanimously confirmed by the Oregon State Legislature, to serve as a neutral adjudicator on the Oregon Employment Relations Board.

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

On March 5, 2021, staff for Senator Ron Wyden contacted me regarding the vacancy on the United States Court of Appeals for the Ninth Circuit. I submitted written materials, and on March 9, 2021, I was interviewed by a panel jointly convened by Senators Wyden and Merkley. On April 27, 2021, I was interviewed by attorneys from the White House Counsel's Office. Since April 28, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 30, 2021, the President announced his intent to nominate me.

59. **Did you communicate with anyone at Altshuler Berzon LLP or anyone directly associated with the firm or someone at the firm as part of the process that led to your application and nomination?**

Response: Steven Berzon, who is a partner emeritus of Altshuler Berzon LLP, encouraged me to apply for the Ninth Circuit position in Oregon. I communicated with the current managing partner of the firm, B.J. Chisholm, and staff of the firm, so that I could review records of my work in order to complete the Senate Judiciary Questionnaire.

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

Response: I have spoken with Chris Kang, who provided information regarding the judicial nomination process generally, based on his experience in the White House Counsel's Office.

61. **During your selection process did you communicate with any officials from or anyone directly associated with the American Constitution Society? If so, what was the nature of those discussions?**
    a. **Did anyone do so on your behalf?**

Response: I have spoken with Erin Roycroft, an attorney who is involved in the Oregon chapter of the American Constitution Society. She provided information about the nomination process in Oregon.

62. **During your selection process, did you communicate with any officials from or anyone directly associated with Arabella Advisors? 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.**
    a. **Did anyone do so on your behalf?**

Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with Arabella Advisors or any of its subsidiaries and no one did so on my behalf.

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

Response: To my knowledge, I did not communicate with any officials from or anyone directly associated with the Open Society Foundation and no one did so on my behalf.

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

Response: On September 21, 2021, I received these questions from the Office of Legal Policy (OLP). I reviewed the questions, conducted legal research, reviewed my records when necessary to refresh my recollection, and drafted my answers. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee.

Senator Blackburn
Questions for the Record to Jennifer Sung
Nominee to be United States Circuit Judge for the Ninth Circuit

1. **You signed a letter dated July 10, 2018 that characterized Justice Kavanaugh as a "threat to many of us." Please clarify who the "us" refers to and explain the precise "threat" that Justice Kavanaugh poses.**

   Response: As I testified at my hearing, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

2. **The July 10, 2018 letter that you signed also stated that Justice Kavanaugh's rulings show that he is an "intellectually and morally bankrupt ideologue." Please identify what aspects of Justice Kavanaugh's jurisprudence you were referring to and explain how that jurisprudence shows that Justice Kavanaugh is intellectually and morally bankrupt.**

   Response: As I testified at my hearing, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

3. **The July 10, 2018 letter that you signed also stated that "people will die" if Justice Kavanaugh were confirmed. Who are the "people" who you predicted would die? Has anyone died as a result of Justice Kavanaugh being confirmed? If so, who?**

   Response: As I testified at my hearing, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed. Additionally, as I testified during my hearing, I cannot identify any individuals who have died as a result of Justice Kavanaugh being confirmed.

4. **Please describe your own judicial philosophy. In answering this question, please include your method of constitutional interpretation and your definition of "judicial activism."**

   Response: The solemn duty of a judge is to faithfully and impartially apply the law, as set forth in constitutions, statutes, regulations, and precedent, to the facts as established by the evidence in the record. That is also my duty as an adjudicator on the Oregon Employment Relations Board. To fulfill that duty, I carefully review all of the evidence in the record, consider all of the parties' contentions, and independently research the

applicable law. I apply statutes as written and follow precedent, without regard to whether I would have decided the case the same way. Because I sit on a three-member panel, I also carefully consider the views of my colleagues before reaching any final decisions regarding the factual and legal issues presented, and I work hard to reach consensus whenever possible. I also strive to write opinions that are clear and accessible to both lawyers and lay readers, and to issue decisions in a timely fashion. In sum, I believe that judges must adhere to the principles of open-mindedness, impartiality, faithfulness to the law, restraint, diligence, and collegiality.

If confirmed as a circuit court judge, I would apply the Constitution's provisions as written and as interpreted by the Supreme Court or the Ninth Circuit in precedent. It is highly unlikely that a lower court judge would have occasion to interpret a constitutional provision for which there is no precedent regarding its interpretation and the standards for its application. If such a case were to arise, I would look to the Court's precedents to discern the appropriate interpretive methodology. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.) The Court considered a variety of historical sources to determine the ordinary meaning of the text at the time of enactment. The Court also considered how similar provisions of the Constitution, and analogous provisions of state constitutions, have been interpreted.

My understanding is that the term "judicial activism" means different things to different people. If the term "judicial activism" refers to the basing of decisions on a judge's personal political or policy views, rather than the applicable law, then judicial activism is inappropriate and violates a judge's duty to be faithful to the law and impartial.

5. During your eleven-year career in private practice, you appeared in state or federal court only seven times. You stated that these cases were "decided without a trial" or "settled before final judgment." Further, you have briefed and argued only one case before the Ninth Circuit. Do you have the necessary experience to be a Ninth Circuit judge?

Response: Yes, I have the necessary experience to be a Ninth Circuit judge. As a litigator in private practice, I frequently handled matters involving complex civil litigation, included several cases where the litigation spanned many years, and I was involved in all aspects of pre-trial litigation, even if trials did not ultimately occur. In addition to my litigation experience in private practice, for nearly five years, I have served as an adjudicator on a three-member panel that typically reviews decisions issued by an administrative law judge, in a manner comparable to appellate review. Finally, I would note that I began my legal career as a Ninth Circuit judicial law clerk, where I was exposed to the full range of cases that the Ninth Circuit considers in a given year. I am deeply grateful to have the support of my colleagues on the Oregon Employment Relations Board, who have attested to my qualifications and record as an impartial adjudicator. I am also deeply grateful to have the support of many lawyers who have

dealt with me in a variety of professional contexts, including those who generally represent management in labor and employment cases. I am likewise grateful to have been was rated "well qualified" by the American Bar Association's Standing Committee on the Federal Judiciary.

6. **Your nomination has been praised by liberal groups such as Demand Justice and Alliance for Justice. These groups have specifically highlighted your past activism representing labor organizations. In light of this, how can parties that come before you—including employers and businesses—feel confident that you will be an impartial arbiter?**

Response: Respectfully, I had no involvement, advance knowledge, or control over what any outside group has said regarding my nomination. The best evidence of the kind of judge I would be, if confirmed, is my extensive track record as a neutral adjudicator on the Oregon Employment Relations Board. The decisions issued during my nearly five-year tenure on the Board demonstrate my impartiality, faithfulness to the law, and collegiality. In each case, I have impartially applied the law to the facts, as established by the evidence in the record. When the impartial application of the law to the facts has led to the conclusion that the employer should prevail, I have issued a decision accordingly, without reservation. For some examples, I have concluded that an employer acted lawfully when it disciplined a union officer; that an employer acted lawfully when it laid off employees who had engaged in protected activity; that an employer acted reasonably when it declined to provide information to a union; and that an employer acted reasonably when it discharged an employee for unprofessional conduct. I am deeply grateful to have the support of my colleagues on the Oregon Employment Relations Board, Chair Adam Rhynard and Member Lisa Umscheid, and their letters to the Committee describe in detail my conduct as a Board Member. Chair Rhynard attested that I have "the judicial temperament and demeanor that allows all parties to understand that their concerns will be heard and fairly evaluated." Member Umscheid attested that, if confirmed, I would "bring to the court the impartiality, judicial demeanor, and dedication to justice that [I have] demonstrated at [the Board]." I am also deeply grateful to have the support of many lawyers who have dealt with me in a variety of professional contexts. A group of attorneys who represent management in labor and employment matters attested that in their dealings with me (as opposing counsel or as a Board Member), my "objectivity, fairness, and professional demeanor have been exceptional." Another group of attorneys who have appeared before me, including several who represent employers, attested to my "impressive intelligence, diligent preparation, respectful courtroom demeanor, and judicial impartiality." The Oregon Coalition of Police & Sheriffs attested that I have "earned the reputation of a thoughtful, neutral decision-maker." Additionally, I am grateful to have been rated "well qualified" by the American Bar Association's Standing Committee on the Federal Judiciary.

Nomination of Jennifer Sung to be United States Circuit Judge for the Ninth Circuit
Questions for the Record
Submitted September 21, 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. **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 September 21, 2021, I received these questions from the Office of Legal Policy (OLP). I reviewed the questions, conducted legal research, reviewed my records when necessary to refresh my recollection, and drafted my answers. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee.

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

   Response: No other individual wrote or drafted my answers to these questions or the written questions of the other members of the Committee.

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

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

   Response: Enforcement of the law generally is the province and obligation of the Executive Branch. With respect to the enforcement of criminal laws, for example, the

Executive Branch generally has broad latitude to decide whether to bring a specific charge or prosecute a specific violation of the law, assuming the legal standards for specific charges are met. To the extent that there are pending questions regarding whether the Executive Branch may decline to enforce a category of cases in certain contexts, I must respectfully decline to answer as a pending judicial nominee.

2. **Describe how you would characterize your judicial philosophy and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Roberts Courts is most analogous with yours.**

Response: The solemn duty of a judge is to faithfully and impartially apply the law, as set forth in constitutions, statutes, regulations, and precedent, to the facts as established by the evidence in the record. That is also my duty as an adjudicator on the Oregon Employment Relations Board. To fulfill that duty, I carefully review all of the evidence in the record, consider all of the parties' contentions, and independently research the applicable law. I apply statutes as written and follow precedent, without regard to whether I would have decided the case the same way. Because I sit on a three-member panel, I also carefully consider the views of my colleagues before reaching any final decisions regarding the factual and legal issues presented, and I work hard to reach consensus whenever possible. I also strive to write opinions that are clear and accessible to both lawyers and lay readers, and to issue decisions in a timely fashion. In sum, I believe that judges must adhere to the principles of open-mindedness, impartiality, faithfulness to the law, restraint, diligence, and collegiality.

In case the question is asking how I would address a question of constitutional interpretation, I add the following: If confirmed as a circuit court judge, I would apply the Constitution's provisions as written and as interpreted by the Supreme Court or the Ninth Circuit in precedent. It is highly unlikely that a lower court judge would have occasion to interpret a constitutional provision for which there is no precedent regarding its interpretation and the standards for its application. If such a case were to arise, I would look to the Court's precedents to discern the appropriate interpretive methodology. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.) The Court considered a variety of historical sources to determine the ordinary meaning of the text at the time of enactment. The Court also considered how similar provisions of the Constitution, and analogous provisions of state constitutions, have been interpreted.

I have not studied the judicial philosophies of Supreme Court Justices, I have not addressed an open question of constitutional interpretation, and if confirmed, my duty as a

lower court judge would be to follow the precedents of the Supreme Court; for all of these reasons, I cannot say which Supreme Court Justice's philosophy is most analogous to my own.

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

Response: No, I do not believe that the meaning of the text in the Constitution changes over time absent changes through the Article V amendment process.

4. **Please briefly describe the interpretative method known as originalism.**

Response: The Bouvier Law Dictionary defines "originalism" as "[i]nterpretation of a text by its understanding at the time of its creation."

5. **Please briefly describe the interpretive method often referred to as living constitutionalism.**

Response: I have not found a definition of "living constitutionalism" in a legal dictionary to which I have access or Supreme Court precedent. I am not aware of an agreed-upon definition among legal scholars, and I do not have a personal definition.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.) The Court considered a variety of historical sources to determine the ordinary meaning of the text at the time of enactment. The Court also considered how similar provisions of the Constitution, and analogous provisions of state constitutions, have been interpreted. The Court also "address[ed] how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *Id.* at 605.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court explained that a textual analysis of the Constitution should be "guided by the principle

that the 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." (Quotation marks and citation omitted.) Similarly, when determining the meaning of the text used in a statute, the Court has explained that courts should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020).

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

Response: The Constitution places numerous limits on state action that imposes requirements or other burdens on private institutions, including but not limited to religious organizations or small businesses operated by observant owners. My understanding is that the Court has specifically identified some of those limits, such as the exception to the application of certain employment laws commonly referred to as the "ministerial exception." However, because courts address only individual cases and controversies, I would not assume that all such limits have been specifically identified in existing precedents. In addition to the constitutional limits identified in Supreme Court precedents, there are statutory limits, such as those imposed by the Religious Freedom Restoration Act.

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

Response: Yes.

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

Response: No. The First Amendment prohibits the government from "bas[ing] laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

11. **In *Oregon AFSCME Council 75, Local 3997 v. Deschutes County Public Library District*, the majority opinion disagreed with your approach to rely on the Americans with Disabilities Act to resolve a dispute, and the parties both agreed that the case did not turn on the ADA.**

    a. **How do you distinguish between your role as an attorney advocate and the role of an impartial judge?**

Response: The role of an attorney advocate is to zealously represent the client, and the attorney advocate is duty bound to make all arguments that are in service of the client's interests, so long as in good faith and consistent with ethical restrictions. The role of an impartial judge is extremely different. A judge owes no duty of loyalty to any client. Rather, the judge's duty is to impartially consider the contentions of all parties and impartially and faithfully apply the law to the facts, as established by the evidence in the record. That is also my duty as a member of the Oregon Employment Relations Board, and throughout my nearly five-year tenure, I have strictly fulfilled that duty, as attested by my Board colleagues and attorneys who have appeared before me. Additionally, I would like to clarify the premise of the question, as the parties in *Oregon AFSCME Council 75, Local 3997 v. Deschutes County Public Library District* did not both agree that the case did not turn on the ADA. As I explained in my dissent, AFSCME argued in its post-hearing brief that the Board did not need to reach the ADA issues *if* the Board agreed with its primary arguments. However, AFSCME still cited and discussed the ADA standards, and identified all of the issues addressed in my dissent. Additionally, at oral argument, the employer requested an opportunity to provide supplemental briefing on the ADA standards, which the Board granted. In AFSCME's supplemental brief, it reiterated its argument that, unless the Board sustained its grievance on a different basis, the Board would need to reach the ADA issues.

b. **Do you think it is appropriate for a federal judge to *sua sponte* raise an argument that a party did not raise in their briefing and arguments?**

Response: Generally, federal judges must address only those issues that were raised by the parties. Subject matter jurisdiction is an exception to this rule; even if not raised by any party, a court should dismiss a case for lack of subject matter jurisdiction *sua sponte*. While a judge should limit consideration to the issues presented by the parties, a judge is not limited to the specific arguments made by the parties regarding the issues presented. For example, it is a judge's duty to independently research the law, and it is not uncommon for a judge to resolve an issue by applying a precedent that had not been identified by the parties in their briefing and arguments. For another example, in a statutory interpretation case, it is the judge's duty to determine the correct interpretation, even if that differs from the interpretations argued by the parties.

c. **Under what circumstances would you make a dispositive argument on behalf of a party in reaching an opinion on the case?**

Response: As a judge, if confirmed, I would not make arguments on behalf of any parties. My duty would be to explain my understanding of the law and facts and my reasoning.

d. **As a judge, would you decide cases on the basis of legal arguments that parties did not raise or affirmatively chose not to argue in order to help you preferred policy outcome prevail?**

Response: No.

12. **Describe in detail your legal experience pertaining to appellate advocacy.**

a. **How many cases have you briefed before federal circuit courts?**

Response: I estimate that I have co-authored briefs in six cases before federal circuit courts. While this question asks about federal appellate advocacy, I would also point to my nearly five years of experience as a neutral adjudicator on the Oregon Employment Relations Board, which is a three-member panel that is professionally diverse by design and typically decides appeals from recommended orders issued by administrative law judges. This adjudicatory experience, along with my experience in complex civil litigation at both the trial and appellate levels, is relevant to my capacity to serve on a federal appellate court.

b. **How many cases have you argued before federal circuit courts?**

Response: I have argued one case before the Ninth Circuit. While this question asks about federal appellate advocacy, I would also point to my nearly five years of experience as a neutral adjudicator on the Oregon Employment Relations Board, which is a three-member panel that is professionally diverse by design and typically decides appeals from recommended orders issued by administrative law judges. This adjudicatory experience, along with my experience in complex civil litigation at both the trial and appellate levels, is relevant to my capacity to serve on a federal appellate court.

13. **In what circumstances would you consider factual statements made during oral argument or in a brief to merely serve as "rhetorical advocacy"?**

Response: When a party makes a factual statement during oral argument or in a brief, I review the evidence in the record to determine whether the statement is supported by substantial evidence. On some occasions, when arguing a case, attorneys make predictions or opinion statements, and I would not consider such statements to be factual statements but rhetorical advocacy.

14. **As an advocate and sworn member of the bar, have you ever made untrue or exaggerated factual assertions to a judge in the service of "rhetorical advocacy"? If not, why?**

Response: No, as an advocate and sworn member of the bar, I have never made untrue or exaggerated factual assertions to a judge. There are many reasons why I have never done so, including because it would violate ethical and professional standards to do so.

15. **Is Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, an emergency for democratic life?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

16. **Is Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, an emergency for our safety and freedom?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

17. **Is Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, an emergency for the future of our country?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

18. **Is Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, a threat to the most vulnerable?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

19. **Is Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, an intellectually bankrupt person?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

20. **Is Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, a morally bankrupt person?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

21. **Has Brett Kavanaugh, Associate Justice of the Supreme Court of the United States, caused anybody to die since he was confirmed to his highest court?**

Response: As I testified during my hearing, I did not write that statement, but I recognize that it was overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed. Additionally, as I testified during my hearing, I cannot identify any individuals who have died as a result of Justice Kavanaugh being confirmed.

22. **At your hearing you at multiple times stated that you respect the authority of "duly confirmed" Supreme Court Justices.**

    a. **Are all of the nine Justices on the Supreme Court "duly confirmed"?**

    Response: Yes.

    b. **Is Brett Kavanaugh a "duly confirmed" Associate Justice of the Supreme Court of the United States?**

    Response: Yes.

23. **When you were a college student, a student vandalized a campus memorial by writing a racial slur as part of a protest to raise public awareness of a pro-Asian**

American issue. Before it became clear that this was not a hate crime, you said that "institutionalized racism" at Oberlin College allowed the perpetrators to feel comfortable committing such acts, and you organized two events that excluded white participants. But even after you learned the intent and that this was not a hate crime, you said that you would not have responded differently.

a. **Do you believe that intent makes no difference between a real hate crime and a hate crime hoax?**

Response: No. Although the events referred to in the question occurred nearly thirty years ago, after refreshing my recollection by reviewing all of the accounts of what occurred, including letters submitted to the Oberlin Review, I do not believe that the question accurately or completely describes what occurred, my role in the events, or my statements, and I appreciate the opportunity to provide additional context and information. Some months before the events at issue, the Ku Klux Klan widely leafletted Oberlin, and it was reported that the FBI was aware of several Klan members residing in Oberlin. Then, shortly before those events, crosses were burned on campus; graffiti was spray painted on a campus arch that stated "Death to [racial slur for Asians]" and "Dead [racial slur] = Good [racial slur]"; derogatory statements against African-Americans were posted inside the campus gym; and a derogatory note was posted on the door of the Muslim Students Association. Those incidents echoed earlier ones, where, for example, a banner stating "White Supremacy Rules" was hung from a campus building; signs stating "Kill all the [racial slur for African-Americans]" were posted inside campus bathrooms; and a group of Asian-American students, myself included, were denied service at a local establishment while some individuals made racially derogatory comments and references to "dropping the H-bomb on Japan." In this context, many students of color felt scared and threatened when the series of incidents described above occurred, and many students, including white students, believed it would be helpful to hold an informal, one-time meeting for students of color who felt threatened. As a college student at the time, I believed that this one-time meeting was akin to a support group meeting for people who experienced a particular trauma, and that inviting only people who experienced that trauma was not a form of invidious discrimination. I did not participate in or condone the decision of a faculty member to remove a student from the meeting, and I do not condone it now.

I do not recall whether, or the extent to which, I was involved in organizing the rally that the college newspaper alleged denied students the opportunity to speak on the basis of race. Based on my review of the various accounts of what occurred, my understanding is that the organizers had a set agenda and list of speakers, and that both white and minority students who were not on the list were denied the opportunity to speak because they were not on the set agenda.

The question recharacterizes excerpts of statements attributed to me by my college newspaper, which I have reason to believe did not completely and accurately reflect my actual statements. In any event, I recall attempting to explain that it was reasonable for students to view the incidents at issue – including cross-burning and graffiti that stated "Death to [racial slur for Asians]" and "Dead [racial slur] = Good [racial slur]" – as threatening, especially when viewed in historical context. However, as a college student, I was not attempting to argue that the incidents at issue were hate crimes under any law, and to the best of my recollection, I never alleged that they were hate crimes, or that any student should be disciplined. I also note that Oberlin College had no hate crime policy, and I had not yet attended law school.

b. **Is it legal for white students to be excluded from educational spaces because of their race?**

Response: There are many laws that prohibit discrimination on the basis of race, including public accommodation laws that apply to private educational institutions. If I were confirmed to the Ninth Circuit and a case came before me presenting this issue, I would carefully research the law, impartially apply the law to the facts in the record, and determine if the legal standard had been met.

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

Response: In *District of Columbia v. Heller*, the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." 554 U.S. 570, 622 (2008).

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

Response: No.

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

Response: No.

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

Response: I am not aware of any such trainings, the content of trainings provided by the Ninth Circuit, or what role, if any, I would have in determining the content of trainings

provided by the court, if confirmed. All trainings provided by federal courts should comply with federal law.

28. **Is the criminal justice system systemically racist?**

Response: The question of whether there are systemic issues in the criminal justice system is one for policy makers to consider.

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

Response: Under the Appointments Clause of the Constitution, 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 judicial nominee, it is not for me to comment on what is or is not appropriate for the President and Senate to consider when making political appointments consistent with the requirements of the Constitution.

30. **In *Henry Schein Inc. v. Archer and White Sales Inc.*, the Supreme Court was asked to decide whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions or arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Explain the Court's holding in that case.**

Response: The Court held that the Federal Arbitration Act "does not contain a 'wholly groundless' exception," and that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

31. **In *Van Buren v. United States*, the Supreme Court was asked to clarify the scope of Section 1030(a)(2) of the Computer Fraud and Abuse Act of 1986. Explain the Court's holding in that case.**

Response: In *Van Buren v. United States*, the defendant was a former police sergeant who "ran a license-plate search in a law enforcement computer database in exchange for money." 141 S. Ct. 1648, 1652 (2021). "Van Buren's conduct plainly flouted his department's policy, which authorized him to obtain database information only for law enforcement purposes." The issue presented to the Court was "whether Van Buren also violated the Computer Fraud and Abuse Act of 1986 (CFAA), which makes it illegal 'to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.'" *Id.* Interpreting that provision of the CFAA, the Court held that it "covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their

computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." *Id.*

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

Response: The Court held that Philadelphia's refusal to contract with Catholic Social Services (CSS) to provide foster care, unless it agreed to certify same-sex couples as foster parents, violated the Free Exercise Clause of the First Amendment. *Fulton v. City of Phila*., 141 S. Ct. 1868 (2021). In so holding, the Court concluded that Philadelphia's contractual non-discrimination requirement imposed a burden on CSS's religious exercise and did not qualify as generally applicable because it permitted discretionary exceptions, and therefore, was subject to strict scrutiny. *Id.* at 1879. 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 CSS while making them available to others." *Id*., 141 S. Ct. at 1882.

33. **In *Rimini Street, Inc. v. Oracle USA, Inc.*, the Supreme Court was asked to clarify whether the Copyright Act's allowance for "full costs" to a prevailing party is limited to taxable costs only or includes non-taxable costs as well. Explain the Court's holding in that case.**

Response: As noted in the question, the Copyright Act gives federal district courts discretion to award "full costs" to a party in copyright litigation. 17 U. S. C. §505. There is also a federal "general statute" that governs awards of costs, and that general statute specifies six categories of litigation expenses that qualify as "costs." 28 U. S. C. §§1821, 1920. The question presented in *Rimini Street* was "whether the Copyright Act's reference to "full costs" authorizes a court to award litigation expenses beyond the six categories of 'costs' specified by Congress in the general costs statute." *Rimini St., Inc. v. Oracle USA*, *Inc*., 139 S. Ct. 873, 875-76 (2019). The Court explained that "the statutory text and [its] precedents establish that the answer is no." *Id.* "The term 'full' is a term of quantity or amount; it does not expand the categories or kinds of expenses that may be awarded as 'costs' under the general costs statute. In copyright cases, §505's authorization for the award of 'full costs' therefore covers only the six categories specified in the general costs statute, codified at §§1821 and 1920." *Id.*

34. **In *Apple v. Pepper*, the question before the Court was whether consumers may sue anyone who delivers goods to them for antitrust damages, even where the damages sought are based on prices set by third parties who would be the immediate victims of the alleged offense. Explain the holding in that case.**

Response: The plaintiffs in *Apple v. Pepper* were consumers who purchased "apps" from Apple's retail "App Store." The consumer-plaintiffs contended that Apple "monopolized the retail market for the sale of apps" and "used its monopolistic power to charge consumers higher-than-competitive prices," in violation of Section 2 of the Sherman Act. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019). Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. §2. Section 4 of the Clayton Act in turn provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a). In prior cases applying §4, the Court had "consistently stated that the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators." *Apple*, 139 S. Ct. at 1520 (quotation marks and citations omitted). In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-746 (1977), the Court also "incorporate[d] principles of proximate cause into §4" and "ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue." *Apple*, 139 S. Ct. at 1520. Apple argued that the consumer-plaintiffs "may not sue Apple because they supposedly were not 'direct purchasers' from Apple" under the Court's decision in *Illinois Brick*. *Apple*, 139 S. Ct. at 1519. Specifically, Apple argued that "*Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party," and "that the app developers, not Apple, set the retail price charged to consumers." *Id.* at 1521. The Court rejected that argument, explaining that it contradicted both the statutory text and precedent, and was also unpersuasive for a number of reasons. *Id.* at 1521-24. Accordingly, the Court concluded that, because the plaintiffs purchased apps directly from Apple, they were direct purchasers under *Illinois Brick*, and "that the *Illinois Brick* direct-purchaser rule d[id] not bar these plaintiffs from suing Apple under the antitrust laws." *Id.* at 1519.

35. **In *Quarles v. United States*, the Supreme Court had to decipher the generic definition of "burglary" in 18 U.S.C. § 924(e) as to it requiring proof that intent was present at the time of unlawful entry or first unlawful remaining, or only that intent was formed while "remaining in" the building in question. Explain the Court's holding in that case.**

Response: Under the Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), the generic statutory term "burglary" in 18 U.S.C. §924(e) means "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id*. at 599. The question presented in *Quarles v. United States*, 139 S. Ct. 1872 (2019), was "whether remaining-in burglary (i) occurs only if a person has the intent to commit a crime at the exact moment when he or she first unlawfully remains in a building or structure, or (ii) more broadly, occurs when a person forms the intent to commit a crime at

any time while unlawfully remaining in a building or structure." *Id.* at 1875. To resolve this issue, the Court considered the same sources that the Court had considered when interpreting the generic term "burglary" in *Taylor*: "the ordinary understanding of burglary as of 1986; the States' laws at that time; Congress' recognition of the dangers of burglary; and Congress' stated objective of imposing increased punishment on armed career criminals who had committed prior burglaries." *Id.* at 1879. The Court concluded that, "[f]or purposes of §924(e), . . . remaining-in burglary occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure." *Id.* at 1875.

36. **In *Americans for Prosperity Foundation v. Bonta,* the Court's 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. Explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?**

Response: Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, would apply the "exacting scrutiny" standard to First Amendment challenges to compelled disclosure requirements, regardless of the type of association. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382-83 (2021). Chief Justice Roberts noted that the Court has applied exacting scrutiny in prior compelled disclosure cases. *Id.* He disagreed with the assertion that the exacting scrutiny standard had been applied only in electoral disclosure cases, citing several examples. *Id.* at 2383. He also noted that the Court had explained in *NAACP v. Alabama*, "that 'it is immaterial' to the level of scrutiny 'whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.'" *Ams. For Prosperity Found.,* 141 S. Ct. at 2383 (quoting *NAACP*, 357 U. S. at 460-461).

Justice Thomas would apply strict scrutiny, for several reasons. *Ams. For Prosperity Found.,* 141 S. Ct. at 2390 (Thomas, J., dissenting). First, he noted that "the bulk of [the Court's] precedents require application of strict scrutiny to laws that compel disclosure of protected First Amendment association," and that the California law at issue "fit that description." *Id.* (quotation marks and citation omitted). Second, he wrote that "invoking exacting scrutiny is at odds with our repeated recognition that privacy of association is protected under the First Amendment." *Id.* (quotation marks and citation omitted). Third, he noted that "[t]he text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously." Fourth, "the right to associate anonymously often operates as a vehicle to protect other First Amendment rights, such as the freedom of the press." *Id.* Fifth, he contended that "[l]aws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights." *Id.*

Justice Alito, joined by Justice Gorsuch, saw no need to decide which level of scrutiny would apply, because the choice "has no effect on the decision in these cases." *Id.* at 2392. He also indicated that he was "not prepared to hold that a single standard applies to all disclosure requirements." *Id.* at 2391.

As a judicial nominee, it is not appropriate for me to address the last part of the question for several reasons, including because the majority was split on the question of which level of scrutiny should apply, the issue of what level of scrutiny should apply could be the subject of future litigation, and there may be differences in circuit precedents that could affect the answer. As a Ninth Circuit judge, if confirmed, I would be bound by both Supreme Court and Ninth Circuit precedents.

37. **In the Supreme Court's decision in *Carpenter v. United States,* what criteria did the Supreme Court use to distinguish between phenomena that are covered by the 4th Amendment 3rd Party Doctrine and those that are not?**

Response: The Court held that the government conducted "a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018). In concluding that the "third-party doctrine" did not apply to historical cell-site location information (CSLI) records, the Court explained that there were several material differences between the historical CSLI information at issue and the types of information that were covered by the doctrine, namely, telephone numbers and bank records.

The Court noted that, in prior third-party doctrine cases, the Court "considered the nature of the particular documents sought to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *Id*. at 2219 (quotation marks and citation deleted). The Court then considered the comprehensiveness of the information collected, how long the records were stored, how easy it was for the government to access the information, the extent to which identifying information could be revealed, and the extent to which the "sharing" of the information with the third-party was truly voluntary. *See id*. at 2219-20. As summarized by the Court, "In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." *Id.* at 2223.

Senator Josh Hawley
Questions for the Record

Jennifer Sung
Nominee, U.S. Circuit Judge for the Ninth Circuit

1. **The First Amendment of the United States Constitution protects the free exercise of religion.**

    a. **Under the precedents of the Supreme Court, and the U.S. Court of Appeals 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: I understand this question to be asking about precedents interpreting and applying the Free Exercise Clause of the First Amendment, not cases interpreting and applying statutes such as the Religious Freedom Restoration Act.

    In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. 494 U.S. 872, 878-82 (1990).

    However, the Court has identified at least several ways in which a purportedly neutral and generally applicable law may fail to meet that threshold requirement for the application of *Smith*. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876-77 (2021) (and cases cited therein). The "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* Additionally, a "law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* at 1877 (quotation marks and citations omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

    Additionally, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Court reiterated 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." The Court explained, "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* And, "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.*

Additionally, as noted by the Court in *Smith*, "the First Amendment bars the application of a neutral, generally applicable law to religiously motivated action" when the free exercise claim also involves other constitutional protections, such as freedom of speech or the right of parents to direct the education of their children. *Smith*, 494 U.S. at 881.

There are numerous other Supreme Court and Ninth Circuit cases that involve Free Exercise Clause claims, including, for example, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, where the Court explained that, "[a]mong other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion," and that "[t]he independence of religious institutions in matters of 'faith and doctrine' is closely linked to independence in . . . 'matters of church government.'" 140 S. Ct. 2049, 2060 (2020) (quotation marks and citations omitted). I would, if confirmed, be bound to follow all Supreme Court and Ninth Circuit precedents.

b. Under the precedents of the Supreme Court, and the U.S. Court of Appeals 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: My answer to Part (a) of this question discusses a number of ways in which a purportedly neutral state action may not actually be neutral. Additionally, in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, the Court found that the state discriminated on the basis of religion based on evidence of statements reflecting "a clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips'] objection" and evidence of "a difference in treatment between Phillips' case and the other cases of bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission." 138 S. Ct. 1719, 1730 (2018). This is not

an exhaustive list, because courts consider a variety of evidence to determine whether a particular action discriminates on an impermissible basis.

c. Under the precedents of the Supreme Court, and the U.S. Court of Appeals to which you have been nominated, what is the standard for evaluating whether a person's religious belief is held sincerely? Please cite any cases you believe would be binding precedent.

Response: In *Burwell v. Hobby Lobby Stores, Inc*., the Court rejected the argument that the "practical" difficulty of ascertaining the "sincere" beliefs of a corporation was indicative of congressional intent to limit the scope of RFRA. 573 U.S. 682, 717 (2014). The Court also noted, "To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." 573 U.S. at 717 n.28. The Ninth Circuit has treated the question of whether a religious belief is "sincere" as a factual issue. *See, e.g.*, *Abate v. Walton*, No. 94-15942, 1996 U.S. App. LEXIS 624, at *14 (9th Cir. Jan. 5, 1996). The Court, in *Hobby Lobby*, cited *Abate* as an example of a case in which a federal court has determined whether a religious belief was sincerely held. 573 U.S. at 717 n.29.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," regardless of the individual's participation in a "well regulated Militia." *Id*. at 592.

3. Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."

Response: As a judge, if confirmed, I would follow the method of statutory interpretation prescribed by the Supreme Court. *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (stating that the Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment"). The statement quoted in the question appears consistent with that methodology.

4. Are there circumstances when you believe judges should consider expected policy results when deciding a case? When might those circumstances arise?

Response: Judges should not consider expected policy results when deciding a case. A possible, narrow exception to that rule is reflected in cases where a court has resolved a statutory ambiguity by considering whether an interpretation would avoid or produce "anomalies" or "absurd" results. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124, 131 n.3 & 132 (2008).

5. **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 than others?**

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

Response: If confirmed, I would follow the Supreme Court's guidance regarding the use of legislative history in statutory interpretation. The Court has instructed, "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

The Court has also made clear that some types of legislative history are more probative of congressional intent than others. *See, e.g.*, *id.*; *NLRB v. SW Gen., Inc*., 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

As a general rule, the laws of foreign nations are not relevant to the interpretation of the Constitution. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." (Quotation marks and citation omitted.)). There are narrow, limited exceptions to this general rule. For example, in *District of Columbia v. Heller*, the Court considered English law when determining the meaning of the terms used in the Second Amendment. 554 U.S. 570, 582 (2008).

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

Response: In *Bucklew v. Precythe*, the Court described the applicable legal standard as follows: 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. . . . [T]his standard governs all Eighth Amendment

method-of-execution claims." 139 S. Ct. 1112, 1125 (2019) (quotation marks and citations omitted).

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

   Response: Generally, damages are awarded to remedy harm that has occurred, and injunctive relief is awarded to prevent future harm.

8. **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?**

   b. **Do you agree or disagree with this statement? Why?**

   Response: I understand this quote to mean that judges should impartially and faithfully apply the law to the facts, without regard to their personal views about the result. If that is the meaning of the statement, then I agree that it describes the duty of a judge.

9. **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? Why?**

   Response: I understand this quote to mean that, consistent with the separation of powers mandated by the Constitution, judges do not have legislative or policy making authority, and judges must impartially and faithfully apply laws, as written. If that is the meaning of the statement, then I agree that it describes the appropriate role of judges.

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

    Response: I do not regularly or frequently read any particular law professor's works. When I conduct legal research, I generally look to primary sources (state and federal constitutions, statutes, regulations, and case law). I only occasionally reference treatises or law review articles to identify potentially relevant primary sources.

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

    Response: My understanding of our constitutional democracy is most informed by the concepts of checks and balances and separation of powers discussed in Federalist No. 51.

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

Response: In the course of my legal career, I have read many judicial opinions that I consider to be persuasively written.

13. You signed a 2018 letter ridiculing then-Judge Brett Kavanaugh as "intellectually and morally bankrupt."

a. Do you stand by this characterization?

b. Have you issued an apology to Justice Kavanaugh?

c. How do you reconcile this statement with the requirement that persons nominated to the U.S. Courts of Appeals possess "judicial temperament"?

Response: As I testified at my hearing, I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, I recognize the importance of faithfully following the law and precedent, and if confirmed, I would respect the authority of every Supreme Court justice, including Justice Kavanaugh, and follow all of the Court's precedents without reservation – as I have done throughout my legal career as a litigator and neutral adjudicator. Ultimately, it is the prerogative of each member of the Committee to reach their own assessment of my qualifications, including temperament. I respectfully request only that all of the evidence that is relevant to that assessment be given due consideration. In particular, I believe the best evidence of the kind of judge I would be, if confirmed, is my extensive track record as a neutral adjudicator on the Oregon Employment Relations Board. The decisions issued during my nearly five-year tenure on the Board demonstrate my impartiality, faithfulness to the law, and collegiality. In each case, I have impartially applied the law to the facts, as established by the evidence in the record. When the impartial application of the law to the facts has led to the conclusion that the employer should prevail, I have issued a decision accordingly, without reservation. For some examples, I have concluded that an employer acted lawfully when it disciplined a union officer; that an employer acted lawfully when it laid off employees who had engaged in protected activity; that an employer acted reasonably when it declined to provide information to a union; and that an employer acted reasonably when it discharged an employee for unprofessional conduct. I am deeply grateful to have the support of my colleagues on the Oregon Employment Relations Board, Chair Adam Rhynard and Member Lisa Umscheid, and their letters to the Committee describe in detail my conduct as a Board Member. Chair Rhynard attested that I have "the judicial temperament and demeanor that allows all parties to understand that their concerns will be heard and fairly evaluated." Member Umscheid attested that, if confirmed, I would "bring to the court the impartiality, judicial demeanor, and dedication to justice that [I have] demonstrated at [the Board]." I am also deeply grateful to have the support of many lawyers who have dealt with me in a variety

of professional contexts. A group of attorneys who represent management in labor and employment matters attested that in their dealings with me (as opposing counsel or as a Board Member), my "objectivity, fairness, and professional demeanor have been exceptional." Another group of attorneys who have appeared before me, including several who represent employers, attested to my "impressive intelligence, diligent preparation, respectful courtroom demeanor, and judicial impartiality." The Oregon Coalition of Police & Sheriffs attested that I have "earned the reputation of a thoughtful, neutral decision-maker." Additionally, I am grateful to have been rated "well qualified" by the American Bar Association's Standing Committee on the Federal Judiciary.

Senator Mike Lee
Questions for the Record
Jennifer Sung, Ninth Circuit Court of Appeals

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

Response: When interpreting a statute, I would begin with the statutory text, and determine whether there was Supreme Court or Ninth Circuit precedent construing the text at issue. If there were no binding precedent, I would determine the meaning of the statutory text, reading it in the context of the statute as a whole. As the Supreme Court has explained, courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). To determine the ordinary public meaning of text, courts typically consult sources such as contemporaneous dictionaries. If, after conducting this textual analysis, the meaning of the text were "plain," the analysis would end. If the text had more than one reasonably plausible meaning, I would try to resolve the ambiguity by applying permissible tools of interpretation. I would look to Supreme Court and Ninth Circuit precedents to identify the appropriate tools for resolving textual ambiguity. Generally, under existing precedents, the permissible tools include application of canons of construction, consideration of how other courts have interpreted the text at issue, consideration of certain types of legislative history, and consideration of how the terms have been defined or interpreted in other statutory contexts. Regarding the use of legislative history in statutory interpretation, the Court has instructed, "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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

Response: If confirmed as a circuit court judge, I would apply the Constitution's provisions as written and as interpreted by the Supreme Court or the Ninth Circuit in binding precedent. It is highly unlikely that a lower court judge would have occasion to interpret a constitutional provision for which there is no precedent regarding its interpretation and the standards for its application. If such a case were to arise, I would look to the Court's precedents to discern the appropriate interpretive methodology. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.) The Court considered a variety of historical

sources to determine the ordinary meaning of the text at the time of enactment. The Court also considered how similar provisions of the Constitution, and analogous provisions of state constitutions, have been interpreted.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.)

4. **If a constitutional provision is ambiguous, and there is no controlling precedent, would it be appropriate to consult—as Justice Stephen Breyer contends—"the values" underlying the provision's language?**

Response: I am not familiar with the quote or its context, and the term "values" is broad and ambiguous. In some constitutional interpretation cases, the Court has held that factors that could be described as the "values" underlying the provision's language should be considered; for example, in *Washington v. Glucksberg*, the Court held that to determine whether an asserted fundamental right is within the scope of the substantive due process clause of the Fourteenth Amendment, the Court must determine whether the right is "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). As a lower court judge, if confirmed, I would be bound to apply the standard set forth in *Glucksberg.*

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

Response: When interpreting a statute, I would begin with the statutory text and determine whether there was Supreme Court or Ninth Circuit precedent construing the text at issue. If there were no binding precedent, I would determine the meaning of the statutory text, reading it in the context of the statute as a whole. As the Supreme Court has explained, courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). If, after conducting this textual analysis, the meaning of the text were "plain," the analysis would end. Regarding the use of legislative history in statutory interpretation, the Court has instructed, "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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

Response: As the Supreme Court has explained, courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.)

7. **If confirmed, would you consult legislative history when interpreting ambiguous statutory terms?**

Response: Under Supreme Court precedent, legislative history is one of the "traditional tools" of statutory interpretation that courts are expected to use. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). However, the Court has also made clear that some types of legislative history are more probative of congressional intent than others. *See, e.g.*, *id.*; *NLRB v. SW Gen., Inc*., 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

8. **If confirmed, would you look to the underlying purpose of a Congressional statute to construe ambiguous provisions?**

Response: In some cases, the Court has considered the legislative purpose of a statute to resolve an ambiguity, but consideration of purpose cannot override the statute's plain text. *See, e.g.*, *Florence Cty. Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7, 13-14 (1993).

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

Response: The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. In *McCullough v. Maryland*, the Court held that the power of Congress to incorporate a federal Bank of the United States was "implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect." 17 U.S. 316, 400 (1819).

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

Response: Under Supreme Court precedent, a court must consider whether a law is within the scope of Congress's enumerated powers, regardless of whether Congress specifically referred to any power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) ("The 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' *Woods v. Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948).").

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

Response: Yes. *See, e.g.*, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (right to freedom of association); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (right to abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy, right to contraception); *United States v. Guest*, 383 U.S. 745 (1966) (right of interstate travel); *Rochin v. California*, 342 U.S. 165 (1952) (right to bodily integrity); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to have children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct the education and upbringing of one's children); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (right to the presumption of innocence).

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

Response: The Supreme Court's substantive due process jurisprudence recognizes a number of rights, as summarized in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997):

> "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'") (*quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Casey*, 505 U.S., at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the 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, *ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278– 279."

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

Response: As a judge, if confirmed, my duty would be to follow Supreme Court precedents regarding substantive due process rights, regardless of my personal beliefs, if any. Further, how I personally might distinguish between such rights would also be irrelevant, as what matters is that the Court has distinguished between those types of rights, and that precedent is binding on all lower court judges. In *Washington v. Glucksberg*, the Court held that to determine whether an asserted fundamental right is within the scope of the substantive due process clause of the Fourteenth Amendment, the Court must determine whether the right is "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted).

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

Response:

"The Framers knew that '[the] accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' The Federalist No. 46, p. 334 (H. Dawson ed. 1876) (J. Madison). In order to prevent such tyranny, the Framers devised a governmental structure composed of three distinct branches – 'a vigorous Legislative Branch,' 'a separate and wholly independent Executive Branch,' and 'a Judicial Branch equally independent.' *Bowsher v. Synar*, *ante*, at 722. The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)."

Commodity Futures Trading Com v. Schor, 478 U.S. 833, 859-60 (1986) (Brennan, J., dissenting).

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

Response: I would need to carefully and impartially consider the law and facts to determine a variety of issues, including, for example, whether the branch was acting within the scope of implied authority, or whether the branch was acting within the scope of authority properly delegated to it by another branch.

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

Response: Empathy should play no role in the determination of the legal or factual issues in a case, such as the interpretation of law or the application of law to facts. However, to be impartial, a judge should consider the perspectives of all parties.

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

Response: Both are equally unacceptable.

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

Response: The term "judicial supremacy" appears to have multiple definitions, and it is not a term I have ever used. In some Supreme Court cases, it appears that justices have used the term "judicial review" to refer to the concept of judicial authority to determine whether a law is constitutional, and the term "judicial supremacy" to refer to the concept of the judiciary exceeding its constitutional authority. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 708 (2015) (Roberts, C.J., dissenting).

19. **Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?**

Response: As a judicial nominee, it would be inappropriate for me to comment on how elected officials should balance their independent obligation to follow the Constitution and the need to respect duly rendered judicial decisions.

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

Response: My understanding of that statement is that it refers to the limited role of judges in our constitutional democracy's system of checks and balances and the separation of powers. It is important for judges to keep that in mind when judging, because it is necessary to preserve the rule of law and our democracy.

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

Response: As a circuit court judge, if confirmed, it would be my duty to follow precedent without regard to any personal view regarding its correctness. However, if precedent does not actually address the issue presented in a given case, or the facts are materially different, then the precedent may not be controlling in that instance.

22. **Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?**

Response: No.

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

Response: A sentencing decision should not discriminate on the basis of the defendant's group identity(ies). A defendant's group identity(ies) could affect factors that a judge is required to consider, such as "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1).

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and**

queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: As a judicial nominee, it would not be appropriate for me to comment on statements made by the President or other elected official, or on policy matters.

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

Response: A primary dictionary definition of "equity" is fairness or justice in the way people are treated. Merriam-Webster, https://www.merriam-webster.com/dictionary/equity. A primary dictionary definition of "equality" is "the quality or state of being equal." *Id.*, https://www.merriam-webster.com/dictionary/equality.

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

Response: As a judge, if confirmed, I would determine issues arising under the 14th Amendment's equal protection clause by applying the interpretation and standards set forth in Supreme Court and Ninth Circuit precedents.

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

Response: I do not have a personal definition of "systemic racism," but I believe that term is commonly used to refer to policies, practices, or other systemic conditions that objectively cause or exacerbate racial disparities without subjective intent, as opposed to subjectively intentional racial discrimination.

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

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

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

Response: Please see my responses to questions 27 and 28.

30. **It appears from the four dissents and concurrences you wrote while on the Oregon Employment Relations Board, that you often take a much more aggressive approach against employers than the rest of the Board. At times, you even appear inclined to accept arguments not presented by the parties. Under what circumstances may a Circuit Court panel *sua sponte* propose alternative, non-argued grounds for overturning a sentence other than those briefed and argued before the panel?**

Response: Thank you for the opportunity to discuss my experience as a neutral adjudicator on the Oregon Employment Relations Board. During my nearly five-year tenure on the Board, I have dissented or concurred separately only four times, and I am proud of the collegial relationship that I have with my colleagues on a Board that is professionally diverse by design. I am likewise proud of our collective ability to resolve the vast majority of issues unanimously. As an adjudicator, including in my dissents and concurrences, I have not *sua sponte* addressed claims, defenses, or other issues that were not raised by the parties themselves. When evaluating the issues raised by the parties, I have independently conducted legal research and independently determined what the law is and how it applies to the facts (as established by the evidence in the record), as I understand that doing so is the duty of an adjudicator and does not violate the general rule that the issues in a case are limited to those presented by the parties. A Circuit Court panel, like all federal judges, may *sua sponte* dismiss a case for lack of subject matter jurisdiction. With respect to an appeal of a sentencing decision, the Supreme Court has held that, when a defendant unsuccessfully challenges his sentence as too high, a court of appeals may not, on its own initiative, increase the sentence absent a cross-appeal by the Government. *Greenlaw v. United States*, 554 U.S. 237 (2008).

31. **As a Circuit court judge, you would be bound by both Supreme Court and Second Circuit precedent. What do you see as the duty of a lower court judge when confronted with a case where the precedent in question does not appear to be rooted in the constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand?**

    a. **In other words, in applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and possible?**

Response: Please see my response to Question 21.

32. **During the nominations hearing for then-Judge Kavanaugh, you joined a letter of Yale Law School Alumni. Among the many heinous accusations against Judge Kavanaugh, your letter indicated he lacked a commitment to law and justice.**

    a. **What is justice?**

    b. **In order to achieve "justice" should the law be applied with a blindness towards the immutable characteristics of the parties in question, or do you believe justice cannot be achieved without considering such characteristics?**

Response: In the context of the judiciary, justice constitutes the resolution of a dispute after all parties have been afforded due process and by the faithful and impartial application of the law to the facts. The law should not be applied in a

manner that discriminates on the basis of the immutable characteristics of the parties in question.

33. **The letter also stated that "Judge Kavanaugh's nomination presents an emergency – for democratic life, for our safety and freedom, for the future of our country." Do you believe that statement to be true? (with a "yes" or "no" only)**

    a. **It goes on to say "[Judge Kavanaugh] is a threat to many of us, despite the privilege bestowed by our education, simply because of who we are", and that he is "intent on rolling back our rights and the rights of our clients." Do you believe those statements to be true? (Please answer with a "yes" or "no" only.)**

    b. **Finally, the letter stated that if Judge Kavanaugh were to be confirmed "people will die." Do you believe that statement to be true? (Please answer with a "yes" or "no" only.)**

    Response: As I testified, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed.

34. **If you answered "yes" to any of the statements in question 33, what assurances can you give that you will respect and follow Justice Kavanaugh's past and future Supreme Court rulings?**

    Response: As I attested at my hearing, if confirmed, I would respect and follow Justice Kavanaugh's past and future Supreme Court rulings, as I have respected and followed the rulings of all Supreme Court justices throughout my legal career as a neutral adjudicator, litigator, and judicial law clerk.

35. **The Yale alumni letter also stated that support for "Judge Kavanaugh is not apolitical. It is a political choice about the meaning of the constitution and our vision of democracy, a choice with real consequences for real people." Do you believe that following precedent written or supported by Justice Kavanaugh is a political statement? Will your own political background influence how you interpret that precedent?**

    Response: It is the duty of every attorney and judge to follow Supreme Court precedent without regard to which Supreme Court justices wrote or supported it, and doing so is not a political statement. It is also the duty of every judge to follow and apply precedent without regard to any personal views they may have, political or

otherwise. My background will not influence how I interpret precedent written or supported by Justice Kavanaugh or any other Supreme Court Justice.

36. **If you answered "no" to any of the statements in question 33, how do you justify signing your name to something you knew to be false and misleading?**

a. **Do you regret any of the harm that such defamatory statements have caused Justice Kavanaugh or his family?**

b. **Have you done anything to remedy this harm? Or have you done anything to signal that you no longer believe these statements?**

Response: As I testified, I did not write the letter, but I recognize that such statements were overheated rhetoric. I have immense respect for the authority of all members of the Supreme Court, and I recognize the importance of faithfully following the law and precedent, as I have done throughout my legal career and would continue to do as a judge, if confirmed. To the extent that your question asks about the legal standard for defamation, I would note that the legal standard is generally set out in the Supreme Court's decision, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 14, 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.

Questions for all judicial nominees:

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

   Response: The solemn duty of a judge is to faithfully and impartially apply the law, as set forth in constitutions, statutes, regulations, and precedent, to the facts as established by the evidence in the record. That is also my duty as an adjudicator on the Oregon Employment Relations Board. To fulfill that duty, I carefully review all of the evidence in the record, consider all of the parties' contentions, and independently research the applicable law. I apply statutes as written and follow precedent, without regard to whether I would have decided the case the same way. Because I sit on a three-member panel, I also carefully consider the views of my colleagues before reaching any final decisions regarding the factual and legal issues presented, and I work hard to reach consensus whenever possible. I also strive to write opinions that are clear and accessible to both lawyers and lay readers, and to issue decisions in a timely fashion. In sum, I believe that judges must adhere to the principles of open-mindedness, impartiality, faithfulness to the law, restraint, diligence, and collegiality.

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

   Response: I do not describe myself according to any particular label, and for that reason, I would not adopt that label (or any other label). As a lower court judge, if confirmed, it would be my obligation to follow all of the Court's precedents interpreting the Constitution or a statute, regardless of whether the Court's interpretation could be described as "originalist" or something else. If confirmed as a circuit court judge, I would apply the Constitution's provisions as written and as interpreted by the Supreme Court or

the Ninth Circuit in precedent. It is highly unlikely that a lower court judge would have occasion to interpret a constitutional provision for which there is no precedent regarding its interpretation and the standards for its application. If such a case were to arise, I would look to the Court's precedents to discern the appropriate interpretive methodology. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Court began with a detailed textual analysis, "guided by the principle that the 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." (Quotation marks and citation omitted.) The Court considered a variety of historical sources to determine the ordinary meaning of the text at the time of enactment. The Court also considered how similar provisions of the Constitution, and analogous provisions of state constitutions, have been interpreted.

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

   Response: I do not describe myself according to any particular label, and for that reason, I would not adopt that label (or any other label). As a lower court judge, if confirmed, it would be my obligation to follow all of the Court's precedents interpreting the Constitution or a statute, regardless of whether the Court's interpretation could be described as "textualist" or something else.

   When interpreting a statute, I would begin with the statutory text, and determine whether there was Supreme Court or Ninth Circuit precedent construing the text at issue. If there were no binding precedent, I would determine the meaning of the statutory text, reading it in the context of the statute as a whole. As the Supreme Court has explained, courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). To determine the ordinary public meaning of text, courts typically consult sources such as contemporaneous dictionaries. If, after conducting this textual analysis, the meaning of the text were "plain," the analysis would end. If the text had more than one reasonably plausible meaning, I would try to resolve the ambiguity by applying permissible tools of interpretation. I would look to Supreme Court and Ninth Circuit precedents to identify the appropriate tools for resolving textual ambiguity. Generally, under existing precedents, the permissible tools include application of canons of construction, consideration of how other courts have interpreted the text at issue, consideration of certain types of legislative history, and consideration of how the terms have been defined or interpreted in other statutory contexts. Regarding the use of legislative history in statutory interpretation, the Court has instructed, "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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

Response: I do not believe that the precise meaning of the Constitution can change over time. I believe that the Constitution is an enduring document.

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

Response: I have not studied the jurisprudence of any individual justice. In my practice as a litigator and adjudicator, I have relied on or followed the Court's precedents without regard to who authored them. I would continue to do so as a judge, if confirmed.

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

Response: As a lower court judge, if confirmed, I would be duty bound to follow all Supreme Court precedents, except those expressly overruled by the Court itself. Because it is the duty of a lower court judge to follow precedent without regard to personal views, and because judges are ethically prohibited from commenting on legal issues that could become the subject of litigation, it is generally inappropriate for judicial nominees to comment on the merits of any particular precedent. Prior judicial nominees have made exceptions to that general rule for *Brown v. Board of Education* and *Loving v. Virginia*, because litigation regarding *de jure* racial segregation is highly unlikely to reoccur. An exception has also been made for *Marbury v. Madison*, as it established the principle of judicial review. Consistent with the judgment of prior judicial nominees, I believe it is

appropriate to comment on the merits of those cases, and I agree that they were correctly decided.

30. 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 Ninth Circuit judge, if confirmed, I would be bound by Ninth Circuit precedent and the doctrine of *stare decisis.* Ninth Circuit precedent could be overruled only by the court sitting *en banc*. Federal Rule of Appellate Procedure 35(a) governs *en banc* review, which "is not favored." The rule states that *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).

31. 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: As a Ninth Circuit judge, if confirmed, I would be bound by Ninth Circuit precedent and the doctrine of *stare decisis.* Ninth Circuit precedent could be overruled only by the court sitting *en banc*. Federal Rule of Appellate Procedure 35(a) governs *en banc* review, which "is not favored." The rule states that *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).

32. 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: When interpreting a statute, I would begin with the statutory text and determine whether there was Supreme Court or Ninth Circuit precedent construing the text at issue. If there were no binding precedent, I would determine the meaning of the statutory text, reading it in the context of the statute as a whole. As the Supreme Court has explained, courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). If, after conducting this textual analysis, the meaning of the text were "plain," the analysis would end. If the text had more than one reasonably plausible meaning, I would try to resolve the ambiguity by applying permissible tools of interpretation. I would look to Supreme Court and Ninth Circuit precedents to identify the appropriate tools for resolving textual ambiguity. Generally, under existing precedents, the permissible tools include application of canons of construction, consideration of how other courts have interpreted the text at issue, consideration of certain types of legislative history, and consideration of how the terms have been interpreted in other statutory contexts. Regarding the use of legislative history in statutory interpretation, the Court has

instructed, “Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language.” *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted). I do not believe that “general principles of justice” may be considered when interpreting a statute.

33. 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: A sentencing court “must make an individualized assessment based on the facts presented and the other statutory factors.” *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (quotation marks and citation omitted). The federal sentencing statute, 18 U.S.C. § 3553(a), sets forth the factors that a sentencing court must consider, which include, but are not limited to, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). As an appellate judge, if confirmed, my role would be limited to reviewing a sentencing court’s decision for compliance with the sentencing statute and the procedural and substantive reasonableness standards set in Supreme Court precedent.

Questions from Senator Thom Tillis
for Jennifer Sung
Nominee to be United States Circuit Judge for the Ninth Circuit Court of Appeals

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

   Response: Yes, it is a judge's duty to put aside any personal views when interpreting and applying the law.

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

   Response: My understanding is that the term "judicial activism" means different things to different people. If the term "judicial activism" refers to the basing of decisions on a judge's personal political or policy views, rather than the applicable law, I agree that it is inappropriate.

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

   Response: Impartiality is an expectation that a judge has a sworn duty to fulfill.

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, if confirmed, my duty would be to faithfully interpret and apply the law, regardless of my personal views about the law or outcome. Adherence to that duty is necessary to preserve the rule of law and the separation of powers mandated by the Constitution.

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 fulfill my duty to faithfully and impartially apply the law, including the Second Amendment and the Supreme Court's decisions in *D.C. v. Heller*, 554 U.S. 570, 595 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: As with any issue, I would faithfully apply the law, as set forth in the Constitution and precedent, to the facts as established by the evidence in the record. Because the question raises issues that are potentially the subject of current or future litigation, it would not be appropriate for me to comment further.

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: If confirmed, I would faithfully and impartially apply the standards for qualified immunity, as established in Supreme Court and Ninth Circuit precedent, to the facts as established by the evidence in the record. As Supreme Court precedent makes clear, "officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks and citations omitted).

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 raises policy issues that are in the province of policy makers. If confirmed, I would faithfully and impartially apply the qualified immunity jurisprudence regardless of personal policy views, if any.

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

Response: If confirmed, I would faithfully and impartially apply the qualified immunity jurisprudence regardless of personal policy views, if any.

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 of practice as a civil litigator and neutral adjudicator, 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 of practice as a civil litigator and neutral adjudicator, 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 of practice as a civil litigator and neutral adjudicator, I have not had significant experience addressing intermediary liability for online service providers that host unlawful content posted by users. I am aware that 47 USC § 230 includes provisions that address liability for online service providers.

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: During my practice as a civil litigator, before I joined the Oregon Employment Relations Board, I occasionally dealt with First Amendment and free speech issues, including in litigation. For example, I represented one of the plaintiff-intervenors in *United Food & Commercial Workers Local 99 v. Bennett*, 817 F. Supp. 2d 1118 (D. Ariz. 2011); 934 F. Supp. 2d 1167 (D. Ariz. 2013) (Snow, J.), which involved a number of different First Amendment issues. I have provided legal analysis and advice to clients on First Amendment issues, and I can recall at least one occasion that involved intellectual property issues in the academic context.

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: If there were Supreme Court or Ninth Circuit precedent construing the legislative text at issue, as a Ninth Circuit judge, if confirmed, I would be bound by any interpretation adopted in that precedent. In the absence of such precedent, I would begin by determining the meaning of the statutory text, reading it in the context of the statute or regulation as a whole. The statutory text is "the most probative evidence" of congressional intent. *Nebraska v. Parker*, 577 U.S. 481 (2016) (quotation marks and citation omitted). Courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). If, after conducting this textual analysis, the meaning of the text were "plain," the analysis would end. If the text had more than one reasonably plausible meaning, the ambiguity may be resolved by applying permissible tools of interpretation. Generally, under existing precedents, the permissible tools include application of canons of construction, consideration of how other courts have interpreted the text at issue, consideration of certain types of legislative history, and consideration of how the terms have been interpreted in other statutory or regulatory contexts. As the Supreme Court has explained, "sound rules of statutory interpretation exist to discover and not to direct the Congressional will." *Huddleston v. United States*, 415 U.S. 814, 831, 94 S. Ct. 1262, 1272 (1974) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943)).

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 legal standards for judicial deference to an administrative agency's statutory interpretation are set forth in *Chevron* and *Skidmore*, and their progeny.

Chevron deference refers to a Supreme Court doctrine that governs whether, or the extent to which, a court should defer to an agency's interpretation of a statute that it administers, when that interpretation has the force of law. The Ninth Circuit will "fully defer to an agency's interpretation of a statute under *Chevron, U.S.A., Inc v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), where Congress has 'delegated authority to the agency generally to make rules carrying the force of law,' and 'the agency interpretation claiming deference was promulgated in the exercise of that authority.' *United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001)." *Larson v. Saul*, 967 F.3d 914, 924 (9th Cir. 2020). As the Ninth Circuit has explained, "Where the agency's action is an interpretation of a statute that the agency administers, we follow the two-step approach set out in *Chevron*. First, we determine if the statute speaks directly to the question or is unambiguous. If Congress has directly spoken to the precise question at issue, then the matter is capable of but one interpretation by which the court and the agency must abide. If the statute is silent or ambiguous with respect to the specific issue, we must ask at *Chevron* step two whether the regulations promulgated by the agency are based on a permissible construction of the statute." *Bahr v. Regan*, No. 20-70092, 2021 U.S. App. LEXIS 22333, at *52-53 (9th Cir. July 28, 2021) (quotation marks and citations omitted). "When deference is

appropriate," the agency rule will be afforded *Chevron* deference so long as it "involves the reasonable resolution of ambiguities in the [statute]." *Is.* (quotation marks and citations omitted). Before concluding that a statute is "genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron*, 467 U.S. at 843 n.9).

Skidmore deference refers to a Supreme Court doctrine that governs whether, or the extent to which, a court should defer to an agency's interpretation of a statute that it administers, when that interpretation does not have the force of law. Such an interpretation is not entitled to *Chevron* deference, but "may still be entitled to *Skidmore* deference as long as it is not plainly erroneous or inconsistent with the governing statute." *Larson v. Saul*, 967 F.3d 914, 925 (9th Cir. 2020) (citing *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)). "Under *Skidmore*, the weight to be accorded the Secretary's interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Scalia v. Alaska*, 985 F.3d 742, 748 (9th Cir. 2021) (quotation marks and citation omitted).

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: To the extent that the question raises issues that are potentially the subject of litigation, as a judicial nominee, it is inappropriate for me to answer. To the extent that the question raises policy issues, those are in the province of policy makers.

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 must interpret and apply statutes as written. Consistent with the separation of powers mandated by the Constitution, judges do not have the authority to amend statutes to address changed 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: If there is binding precedent that interprets a statute, judges must follow that precedent, and apply the statute to the various factual circumstances presented in

individual cases. Judges do not have the authority to amend statutes or depart from precedential statutory interpretations based on changed factual circumstances.