Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Jennifer L. Thurston
Nominee to be United States District Judge, Eastern District of California

1. **Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker?**

   Response: This is an important decision for emergency response personnel. I lack the expertise to opine.

2. **In what situation does qualified immunity not apply to a law enforcement officer in California?**

   Response: If I am confirmed as a District Judge, I will apply the relevant precedent to any matters involving claims of qualified immunity, as I do now as a Magistrate Judge. Qualified immunity protects government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity "balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). The threshold inquiry is whether the facts alleged, when taken in the light most favorable to the plaintiff, demonstrate that the official's conduct violated a statutory or constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the alleged conduct would not be considered a violation, the inquiry stops, and the defense of qualified immunity applies. *See id.* If a constitutional violation occurred, the court must determine whether the statutory or constitutional right was "clearly established." *Id.* To be clearly established, there must be controlling authority sufficiently similar to the circumstances presented. See, e.g., *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

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

   Response: Judges should decide cases based on the law and the evidence presented. They should not decide cases based upon their own personal view of the equities of a situation.

4. **What is implicit bias?**

   Response: My understanding is that all people hold unconscious assumptions, which assist us in making quick decisions. My understanding is that these assumptions can be harmful or unfair when they influence decision-making. As a judge, my role requires me

to slow down and consider why I am deciding as I am, to ensure my decision is based upon the evidence and the law, rather than based upon an unconscious assumption.

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

   Response: Please see my response to Question 4.

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

   Response: I have no opinion on this topic. I will apply the precedent of the Supreme Court no matter how many Justices sit in that court.

7. **Do you believe that we should defund police departments? Please explain.**

   Response: I am not entirely certain as to the meaning of the concept of "defunding the police." Policymakers are charged with allocating their budgets, and they are best situated to determine how to best serve and protect their constituents.

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

   Response: Please see my response to Question 7.

9. **What is the legal basis for a nationwide injunction?**

   Response: A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22, 129 S.Ct. 365 (2008). "[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).

   Only where there is a systemic practice, where it is necessary to afford the plaintiff complete relief, and where the burden is no greater than necessary to provide complete relief, should a national injunction issue. *Califano v. Yamasaki*, 442 U.S. 682, 702-705 (1979); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). If presented with this question, I would apply Supreme Court and Ninth Circuit precedent to determine the proper scope of any injunction to be issued

10. **Does illegal immigration impose costs on border communities?**

    Response: I lack sufficient knowledge to answer this question.

11. When was the last time that you visited the U.S.-Mexico border?

Response: I have never visited the U.S.-Mexico border.

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

Response: Yes.

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

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

Response: No.

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

Response: No.

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

Response: No, I have not been in contact with anyone from this organization.

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

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

Response: No, I have not been in contact with anyone from this organization.

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

Response: No, I have not been in contact with anyone from this organization.

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

Response: No, I have not been in contact with anyone from this organization.

15. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

16. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No, I have not been in contact with anyone from this organization.

17. Fix the Court is purportedly a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

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

Response: No.

b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: No.

c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: No, I have not been in contact with anyone from this organization.

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

Response: In January 2021, I applied to the Judicial Advisory Committee established by Senator Dianne Feinstein to evaluate candidates for the United States District Court for the Eastern District of California. On January 15, 2021, I interviewed with Senator Feinstein's committee, and on January 28, 2021, I interviewed with the committee chairperson. In February 2021, I applied to a Judicial Advisory Committee established by Senator Alex Padilla to evaluate candidates for the Eastern District of California. On

March 17, 2021, I interviewed with Senator Padilla's committee. On April 26, 2021, I interviewed with the committee co-chairs. On June 9, 2021 and on July 30, 2021, I was interviewed by attorneys from the White House Counsel's Office. Since June 10, 2021, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On September 20, 2021, my nomination was submitted to the Senate.

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

Response: No.

a. **Did anyone do so on your behalf?**

Response: No.

20. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society? If so, what was the nature of those discussions?

Response: No.

a. **Did anyone do so on your behalf?**

Response: No.

21. During your selection process, did you talk 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.

Response: No.

a. **Did anyone do so on your behalf?**

Response: No.

22. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundations. If so, what was the nature of those discussions?

Response: No.

a. **Did anyone do so on your behalf?**
Response: No.

23. During your selection process did you talk with any officials from or anyone directly associated with Fix the Court. If so, what was the nature of those discussions?

Response: No.

a. **Did anyone do so on your behalf?**

Response: No.

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

Response: On June 9, 2021 and on July 30, 2021, I was interviewed by attorneys from the White House Counsel's Office. Since June 10, 2021, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On September 20, 2021, my nomination was submitted to the Senate. I have had several calls since that time, related to submitting the Senate Judicial Questionnaire and the financial disclosure, discussing what to expect at the nomination hearing, and providing me these written questions and those from other Senators.

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

Response: I received these questions on October 27, 2021. I prepared answers based on my own knowledge, and I conducted legal research. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on November 1, 2021.

Senator Marsha Blackburn
Questions for the Record to Jennifer L. Thurston
Nominee for the Eastern District of California

1. **In 2019, you published an article in *Law & Contemporary Problems* discussing the lack of diversity among magistrate judges. You claim that lack of diversity on the bench compromises the court's legitimacy and suggest various methods to increase diversity. If you are confirmed as a U.S. District Judge, you would take part in appointing magistrate judges. Given your recently-expressed opinions on this matter, would you prioritize diversity when selecting magistrate judges? If so, explain how diversity would factor into your decisionmaking and how you would weigh it against other factors.**

   Response: According to the tradition in the Eastern District of California, the current Magistrate Judges actively participate in the selection of new magistrate judges. Since I assumed the bench in 2009, I have voted on each new magistrate judge selected. In every selection, I have voted for the person best qualified out of the pool of candidates provided by the merit selection panels, without regard for any immutable characteristic. I will continue in the same vein in the future.

Nomination of Jennifer L. Thurston
to be United States District Judge for the Eastern District of California Questions for the Record
Submitted October 27, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

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

   Response: As a judge and as a nominee, in general, I cannot comment on the wisdom of any Supreme Court precedent, because I am bound to follow them all.

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

   Response: It is an individual right. *D.C. v. Heller,* 554 U.S. 570, 595 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

   Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted injunctive relief against enforcement of a regulation that limited meetings in homes to no more than three households. At the same time, the law treated more favorably other businesses that brought together more than three households at a time. The Court held that the law was not neutral and generally applicable due to this inconsistent treatment of secular and nonsecular activity. Consequently, the Court found this triggered the Free Exercise Clause. This required the Court to apply strict scrutiny and placed the burden on the government to show it used the least restrictive means to achieve a compelling interest. Finally, the Court held that a case is not mooted by enacting less stringent requirements if harsher regulations remain a possibility.

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

Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court considered whether two of Arizona's election regulations violated § 2 of the Voting Rights Act of 1965 or had a racially discriminatory purpose. One election policy required mail-in ballots to be collect by certain proscribed people and the other required people voting in person to do so in their assigned voting precincts. The Court determined that neither regulation violated § 2 of the Voting Rights Act of 1965. The Court declined to announce a test to govern all Section 2 claims involving time, place, or manner rules for casting ballots, though it identified certain factors that courts may consider when evaluating whether voting is "equally open" to members of the protected group.

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

Response: In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Court held that three provisions of the Immigration and Nationality Act allowed a person to be detained until the completion of the applicable immigration proceeding, without periodic bond hearings.

8. **Do federal drug scheduling actions pursuant to the Controlled Substances Act preempt state or local laws that purport to 'legalize' substances contrary to their federal drug control status?**

Response: As a Magistrate Judge, I apply the precedents of the United States Supreme Court, including *Gonzales v. Raich*, 545 U.S. 1 (2005), and of the Ninth Circuit, and I would continue to do so if confirmed as a District Judge. As a judge and a nominee, it would be inappropriate for me to opine on this topic.

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

Response: Before I was a judge, I was involved in at least one arbitration. It was a speedy and cheaper alternative to a jury trial. Since that time, I have become aware that there have been concerns expressed publicly about arbitration, such as whether arbitrators might consciously or unconsciously tend to favor a party who may be involved in further litigation. This concern, if true, could undermine the confidence placed in this alternative. As a Magistrate Judge, I regularly preside over settlement conferences of cases already proceeding in court. Settlement conferences allow the parties the option of coming to a compromise to minimize the costs and risks associated with a trial.

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

Response: I received these questions on October 27, 2021. I prepared answers based on my own knowledge, and I conducted legal research. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on November 1, 2021.

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

Response: No

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

Questions for the Record for Jennifer Leigh Thurston, Nominee for the Eastern District of California

I. Directions

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

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

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

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

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

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

II. Questions

1. **You wrote a film review in 2012, while you were a magistrate, of a 1989 film called "A Dry White Season." The movie is about apartheid in South Africa. You wrote, "Though not an easy movie to watch, it is very well-done and makes the viewer ashamed not only of the horrors that occurred—and continue to occur—in Africa, but of our own, not-too-dissimilar treatment of people of color in our own country."**

This statement draws a comparison between the brutal, unjust apartheid system of 20th century South Africa and racial injustice in the United States today. Do you believe that racial relationships in the United States today are equivalent to South African apartheid?

Response: No. The statement I wrote in the movie review referred to our country's system of de jure segregation that existed historically. It did not refer to today's circumstances. De jure segregation no longer exists in our country. Consequently, I disagree that apartheid—which was ended in South Africa thirty years ago—is equivalent to the current experience of Americans today.

2. **In an article you published, *Black Robes, White Judges*, you express concern over the lack of diversity on the magistrate judge bench. If confirmed as a U.S. District Judge, you will take part in appointing magistrate judges.**

   a. **Is it constitutional to select judicial candidates based on race?**

      Response: No.

   b. **If appointed, will race serve any role in your decision-making process for who to appoint as a magistrate judge?**

      Response: I will ensure that no qualified candidates are excluded from consideration based upon their race or any other immutable characteristic.

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

   Response: No qualified candidates should not be excluded based upon their race or any other immutable characteristic.

4. **If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:**

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

      Response: In my 12 years on the federal bench and despite being the Chief Magistrate Judge since 2020, I have never had a role in determining the human resources programs or trainings provided to court employees, and I know of none of my judicial colleagues who have done so either. In my experience, the training provided by the court has been consistent with the law, and I expect they will continue to be so.

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

Response: Please see my response to Question 4a.

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

Response: Please see my response to Question 4a.

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

Response: Please see my response to Question 4a.

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

Response: Please see my response to Question 4a.

6. Is the criminal justice system systemically racist?

Response: This is an important policy question. I note that laws—for example, the Anti-Drug Abuse Act of 1986 related to mandatory minimum sentences for crack and powder cocaine—have imposed significant sentencing disparities on people of color. It is my understanding that the Senate Judiciary Committee has made great effort to modify the law to address this disparity. As a trial judge, I do not consider party's races or any other immutable characteristic unless the issues raised require it, and I will continue to do so.

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

Response: Yes. In cases in which the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act apply, the law prohibits the government from placing a substantial burden on a person's exercise of religion even if it results from a rule of general applicability, unless the government demonstrates it has a compelling interest and it is using the least restrictive means of furthering that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Both laws work to guarantee that people and groups may practice their religious beliefs.

A law is not neutral and generally applicable if it targets a particular religious practice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). It is not

neutral and generally applicable either if it treats secular activities more favorably than non-secular activities. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

When the government refuses to grant an exemption on religious liberty grounds, despite the ability to do so, it makes the law suspect. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Likewise, the government must treat impartially the justification for refusing to comply with a facially neutral law, which burdens religion. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018). Also, the government may not interfere in employment decisions of religious organizations between a church and its ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

On the other hand, when a challenged law is neutral and generally applicability but has an "incidental effect" on religious exercise, the government need not show a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993); see also *Emp., Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020), the Supreme Court held that the government violated the Free Exercise Clause because the regulations treated churches less favorably than comparable non-religious activities.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted injunctive relief against enforcement of a regulation that limited meetings in homes to no more than three households. At the same time, the law treated comparable businesses more favorably. The Court held that the law was not neutral and generally applicable due to this inconsistent treatment of secular and nonsecular activity. This triggered the Free Exercise Clause and required it to be subjected to strict scrutiny. The Court held the government failed to prove that it used the least restrictive means of achieving the compelling interest. Finally, the Court held that a case is not mooted by enacting less stringent requirements if enforcement of greater prohibitions remained a possibility.

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

Response: Yes.

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

Response: Please see my response to Question 7.

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

Response: Though the executive branch is responsible for enforcing federal laws, it is within its discretion to make enforcement decisions. See *Wayte v. U.S.*, 470 U.S. 1524, 607 (1985).

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

Response: I am not quite sure to what this question is referring. Prosecutorial discretion, in general, refers to the decision of a prosecuting agency as to how to deploy its prosecutorial resources in determining when, whether and under what circumstances to pursue violations of the law. Federal administrative rule changes may occur according to the authority vested in the agency by Congress and according to the processes set forth by law.

14. Describe how you would characterize your judicial philosophy on the bench in California thus far, and identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: As a trial judge, I address the disputes before me impartially and according to the applicable law. Though I suspect that every Justice ever serving this country has done the same, I have not studied the philosophies of the Justices sufficiently for me to be able to claim a comparison with any Justice.

15. Please briefly describe the interpretative method known as originalism.

Response: My understanding is that originalism considers the meaning that the Constitution would have conveyed at the time of its making.

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

Response: My understanding is that living constitutionalism considers the changed circumstances and societal views at the time the Court interprets the Constitution.

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

Response: In limited circumstances, certain Supreme Court precedents that would be binding on me as a lower court judge, have considered new meanings of constitutional texts. When considering the Eighth Amendment's "cruel and unusual punishment" provision, the Court interpretation has been guided by "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This method was used also in *Riley v. California*, 573 U.S. 373 (2014), related to searches of cell phones under the Fourth Amendment. *See also*, *Brown v. Board of Education of Topeka, Shawnee County, Kan.,* 347 U.S. 483, 492-93(1954).

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

Response: I have no opinion on this idea. Rather, this is a policy question. No matter the numerical makeup of the Court, I will apply its precedent.

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

Response: Yes.

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

Response: No.

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

Response: No.

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

Response: As I understand it, Congress has the authority to repeal or amend the federal death penalty. However, the executive branch is responsible for enforcing federal laws and has discretion as to enforcement decisions (See *Wayte v. U.S.*, 470 U.S. 598, 607 (1985)), including whether to seek the death penalty in prosecutions. The President also has the authority to issue pardons and commutations with respect to federal crimes.

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

Response: In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Supreme Court struck down the eviction moratorium finding that the statute at issue, 42 U.S.C. § 264(a), did not grant the CDC the authority it asserted it had.

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

Response: In general, it is illegal to set fire to a building belonging to another person without lawful authority.

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

Response: Yes. Recently, in *Schwake v. Arizona Board of Regents*, 967 F.3d 940, 947 (9th Cir. 2020), the Ninth Circuit determined that a college student accused of sexual misconduct is entitled to a fair disciplinary process that is not biased based upon gender. The Court noted that numerous other circuits have held similarly. *Id*. at 946-947.

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

Response: In *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018), the Supreme Court held that there is no legitimate expectation of privacy as to information turned over to third parties, even if at that time of the disclosure, the person expected it would be used only for a limited purpose. Due to this "third-party doctrine," in general, the government is free to obtain such information without triggering Fourth Amendment protections. Even still, though there is a legitimate expectation of privacy in location data gathered by cell-sites, it is a lesser privacy interest when it relates to historical location information. Thus, the government can obtain records of non-content information based upon "specific and articulable facts," rather than a showing of probable cause. *Id*. at 2221.

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

Response: Yes, the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 makes private depositors' bank records.

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

Response: Yes, the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, et seq., requires the government to obtain a warrant to obtain bank records for a depositor.

29. In *Americans for Prosperity Foundation v. Bonta,* the Court majority ruled that California's disclosure requirement was facially invalid because it burdens donors'

First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Please explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: In *Americans for Prosperity Foundation v. Bonta,* 141 S. Ct. 2373, 2383-84 (2021), California required charities to disclose information about major donors to prevent fraud and misuse of their donations. The petitioners refused to do so because it burdened their First Amendment right to free association. In the Supreme Court, the petitioners argued that the standard to apply requires that the means used to achieve the governmental interest be the least restrictive. *Id*. at 2383. California argued there must be only a substantial relation between the governmental interest and the means used to achieve it. *Id*. The Court determined that "the answer lies between those two positions." *Id*. The Court held that government action to compel charities to disclose the names of donors, must meet an "exacting scrutiny" standard to be constitutional. This standard requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and the means used must be narrowly tailored to further the governmental interest. *Id*. at 2383.

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

Response: In *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), the Court held that iPhone owners could sue Apple for violations of Section 4 of the Clayton Act for injuries suffered due to Apple's unlawful monopolization of sales of apps for iPhones. The Court rejected Apple's argument that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), required a different result. *Illinois Brick* precluded indirect buyers—those buying from general contractors, who bought from the manufacturer—from suing the manufacturer for damages for violations of §4 of the Clayton Act. In *Apple*, the Court found that, consistent with *Illinois Brick*, the iPhone owners were direct purchasers because, even though many of the apps were sold by third parties, the apps were sold on Apple's App Store, Apple made a commission on each sale and Apple charged the app developer annual fees to sell apps on the App Store.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the City refused to refer children to a religious-based foster care agency when it discovered that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The city concluded that the refusal to certify same-sex couples violated a non-discrimination provision in its contract with the city as well as the non-discrimination requirements of a city ordinance. The Court held that the government action was not neutral because it denigrated the religious beliefs of the foster care agency and had to meet

a strict scrutiny standard. *Id*. at 1877. Though the regulation allowed an exemption to be granted, the decision to grant an exemption was completely within the discretion of the City, which placed it in a position of determining whether the foster car agency's religious beliefs warranted an exemption. *Id*. at 1879. The fact that the City had granted no exemptions at all, was irrelevant to the impact on religious freedom. Thus, the Court concluded that the government's action violated the foster care agency's free exercise of religion.

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

Response: In *Associated Press v. United States*, 326 U.S. 1, 20 (1945), the Court held that the actions of the Associated Press to allow news stories to be published only by its members and to limit those who could become members, were violations of the Sherman Act. The Court held that applying the Sherman Act to the press comported with the First Amendment because "far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." *Id*. The Court held that the government was entitled to enforce the Sherman Act against the Associated Press because "[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Id*.

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

Response: As a Magistrate Judge, I apply Supreme Court precedent and I would continue to do so if confirmed as a District Judge. As a judge and as a nominee, it is inappropriate for me to comment on the wisdom of any Supreme Court precedent, because I am required to apply them all.

Senator Josh Hawley
Questions for the Record

Judge Jennifer Thurston
Nominee, U.S. District Court for the Eastern District of California

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

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

    Response: No.

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

    Response: I believe that judges must apply the law regardless of whether they would prefer a different outcome.

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

    Response: *Younger* abstention is implicated when: (1) there is an ongoing state proceeding; (2) the claim raises important state interests; and (3) the state proceedings provide an adequate opportunity to raise the federal constitutional claims.

    The *Pullman* abstention doctrine allows federal courts to choose not to hear a case until the state law question can be resolved by a state court.

    Under *Burford* abstention, federal courts should abstain from reviewing certain decisions of state administrative agencies or from otherwise assuming the functions of state courts in the development and implementation of a state' public policies.

    Thibodaux abstention occurs when a federal court declines to exercise its jurisdiction in favor of allowing a state court to decide difficult issues of state importance, to avoid unnecessary friction between federal and state authorities.

    Under the *Colorado River* abstention doctrine, where federal and state court proceedings concurrently relate to the same questions of law, the federal court may abstain to avoid the wasteful duplication of judicial effort.

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

    Response: No.

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

Response: Not applicable

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

Response: If I were confronted with a new constitutional question, and the text was ambiguous, I would adopt the approach set forth in any analogous Supreme Court and Ninth Circuit precedent. If those courts considered the original public meaning, that is what I would do.

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

Response: If the text is ambiguous, I adopt the approach set forth in any Supreme Court and Ninth Circuit precedent. I look to the methods of interpretation and the canons of construction used by these higher courts. If needed, I consider legislative history.

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

Response: Legislative history created before enactment of the legislation is weightier than that created after its enactment. *Cose v. Getty Oil Co.*, 4 F.3d 700, 708 (9th Cir. 1993), as amended (Oct. 1, 1993).

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

Response: I do not believe laws of foreign nations are determinative when interpreting the provisions of the U.S. Constitution, though they can be informative.

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: The party challenging an execution protocol must prove a feasible and readily implemented alternative method of execution exists, which would significantly reduce a substantial risk of severe pain and that the state has refused to adopt it without a legitimate penological reason. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

The Ninth Circuit has adopted the standard set forth in *Baze v. Rees*, 553 U.S. 35, 52 (2008), which was clarified in *Bucklew*. *Dickens v. Brewer*, 631 F.3d 1139, 1150 (9th Cir. 2011).

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

   Response: The party challenging an execution protocol must prove a feasible and readily implemented alternative method of execution exists, which would significantly reduce a substantial risk of severe pain and that the state has refused to adopt it without a legitimate penological reason. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

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

   Response: In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that there is no constitutional right under the Due Process Clause to DNA testing and that any right to such testing must be provided by legislative action by the states.

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

   Response: No.

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

    Response: Claims asserting governmental interference on religious liberty may be brought under the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and under the establishment and Free Exercise Clauses of the First Amendment.

    The Religious Freedom Restoration Act of 1993 prohibits the federal government from imposing a substantial burden on the exercise of religion. The governmental action will be overturned, even if the law is generally applicable, unless the government action meets strict scrutiny and the means to achieve the goal is the least restrictive. §§ 2000bb-1(a), (b); *Church of the Lukumi Babalu v Aye*, 508 U.S. 520, 531-532 (1993). The Religious Land Use and Institutionalized Persons Act of 2000 places the same prohibitions on the state government. *Holt v. Hobbs*, 574 U.S. 352, 360 (2015). The Religious Freedom Restoration Act of 1993 extends to closely held corporations as well as to individuals. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014).

In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that the law was not neutral and generally applicable if it treats secular and nonsecular activity differently. If it does, it implicates the Free Exercise Clause, and it must be strictly scrutinized with the government showing it used the least restrictive means of achieving the compelling interest. Finally, the Court held that a case is not moot by enacting less stringent requirements if harsher regulations remain a possibility.

If a law allows discretionary exemptions, but the government refuses to grant exemptions for those invoking religious grounds, it is not generally applicable and it implicates the Free Exercise Clause. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Likewise, the government must treat neutrally the justification for refusing to comply with a facially neutral law, which burdens religion. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018). The government may not interfere in employment decisions of religious organizations between a church and its ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012).

Under the free exercise clause, a neutral law of general applicability, which has only an incidental effect on religious exercise, is constitutional if it does not single out religious behavior and was not motivated by a desire to interfere with religion. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). As to such a challenge, the government need not show a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993).

Under the Establishment Clause, the government is prohibited from promoting or restraining a particular religion or of religion in general. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020). The "Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id*. Moreover, the "ministerial exception," first set forth in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), prohibits the government from interfering with matters of "faith and doctrine," when making employment decisions. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

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

Response: Please see my response to Question 10.

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

a. What do you understand this statement to mean?

Response: I do not know the context of Justice Scalia's comments, but I presume he was referring to the fact that judges must decide cases based upon the application of the law to the facts without regard for personal preferences.

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014), the Supreme Court observed that "federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." Indeed, a sincere religious belief need not be a formal tenet of the religion at issue. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-34 (1989). *See also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018). Instead, the Supreme Court has held that the religious belief must be sincere and not a pretext. *Hobby Lobby* at 717, n.28.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court determined that the Second Amendment provides "an individual right to keep and bear arms."

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

Response: No.

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

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

Response: I do not know what Justice Holmes meant by this statement, and it is open to interpretation. Because I do not know exactly the meaning Justice Holmes intended or if he intended more than one meaning, I cannot respond.

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

Response: As a judge and a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, I am aware that *Lochner* has been effectively overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

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

Response: I interpret the Court's sentence to mean that *Korematsu* was wrong the day it was decided.

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

a. If so, what are they?

Response: As a Magistrate Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a District Judge, I would do the same. As a judge and as a nominee, it is generally inappropriate for me to comment on the correctness of any Supreme Court precedent, because I am obligated to apply them all.

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

Response: As a Magistrate Judge, I apply Supreme Court precedent faithfully without exception or hesitation, and if confirmed as a District Judge, I would do the same.

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

Response: Common law is uncodified law arising from judicial decisions.

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

Response: Because state courts are free to interpret their constitutional provisions independently of provisions in the federal constitution, I would first research any determinations made by those courts and any relevant precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals.

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

Response: Please see my response to Question 19.

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

Response: Yes, state constitutions are free to provide greater protections.

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

Response: As a judge and as a nominee, it is generally inappropriate for me to comment on the correctness of any Supreme Court precedent, because I am obligated to apply them all. However, there are certain Supreme Court decisions that have determined issues with finality, such that there can longer be dispute. As to these few cases, I believe I can state my opinion. In my opinion, *Brown* was corrected decided.

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

Response: Yes

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

Response: A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). "[N]ationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

Only where it is necessary to afford the plaintiff complete relief, and where the burden is no greater than necessary to provide complete relief, should a national injunction issue. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

If presented with this question, I would apply Supreme Court and Ninth Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: Please see my response to Question 21a.

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

Response: Please see my response to Question 21a.

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

Response: Federalism divides authority between the federal government and the states. It helps to further individual liberty in the sense of providing additional protection. State law may provide greater protection of individual liberty for the people of the state. For example, it ensures that the government entities, which have most day-to-day impact on people, can pass laws, which protect them in the way the people want. In doing so, it ensures more direct accountability and responsiveness.

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

Response: The various abstention doctrines determine when federal courts should refuse to determine cases when state claims are at issue.

Younger abstention is implicated when: (1) there is an ongoing state proceeding; (2) the claim raises important state interests; and (3) the state proceedings provide an adequate opportunity to raise the federal constitutional claims.

The *Pullman* abstention doctrine allows federal courts to choose not to hear a case until the state law question can be resolved in a state court.

Under *Burford* abstention, federal courts should abstain from reviewing certain decisions of state administrative agencies or from otherwise assuming the functions of state courts in the development and implementation of a state' public policies.

Thibodaux abstention occurs when a federal court declines to exercise its jurisdiction in favor of allowing a state court to decide difficult issues of state importance to avoid unnecessary friction between federal and state authorities.

Under the *Colorado River* abstention doctrine, where federal and state court proceedings concurrently relate to the same questions of law, the federal court may abstain to avoid the wasteful duplication of judicial effort.

If there are "adequate and independent" non-federal grounds to support the state decision, the United States Supreme Court will refuse to hear a case seeking review from a state court judgment.

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

Response: I am not certain of the meaning of this question. In general, substantive due process rights are expressly set forth in the Constitution. The Supreme Court has held that the Constitution protects unenumerated fundamental rights also. *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court has found "fundamental rights and liberties . . . are . . . deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. at 721.

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

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

Response: The Free Exercise Clause of the First Amendment is a fundamental protection for religious liberty.

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

Response: The free exercise clause protects the right to believe in a religion and to practice religion. The free exercise of religion is considered a more expansive term, and it includes the rights of believers to share their beliefs, to change their beliefs, and to establish and maintain schools and charitable institutions promoting their beliefs, for example.

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

Response: A substantial burden is one that "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). It is found where it requires a person to choose "either abandoning his religious principle or facing criminal prosecution." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). It is more than an "inconvenience." *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir.2000).

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

Response: Please see my response to Question 13.

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

Response: Taken together, the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000 prohibit the government from imposing a substantial burden on the exercise of religion. The governmental action cannot stand, even if the law is generally applicable, unless the government action meets strict scrutiny and the means to achieve the goal is the least restrictive. The Religious Freedom Restoration Act of 1993 extends to federal government actions including those of closely held corporations and to individuals. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 706 (2014).

Under the Establishment Clause, the government is prohibited from promoting or restraining a particular religion or of religion in general. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020). The "Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id*. Moreover, the "ministerial exception," set forth by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), prohibits the government from interfering with matters of "faith and doctrine," when making employment decisions. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

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

Response: Yes. Please see attached Exhibit A.

27. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: I do not understand the question. Juries are required to be "firmly convinced" that the accused is guilty beyond a reasonable doubt. I know of no numerical rating for individual jurors to determine whether they are "firmly convinced."

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

a. Do you agree with Judge Learned Hand?

Response: As I understand it, according to the Sherman Act, a monopoly will be found if the defendant has (1) the power to fix prices and exclude competitors within the relevant market and has demonstrated (2) "the willful acquisition or

maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp*., 384 U.S. 563, 571 (1966). In general, the "existence of such power ordinarily may be inferred from the predominant share of the market. *Id*. citing *In American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

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

Response: Please see my response to Question 28a.

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

Response: Please see my response to Question 28a

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

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

Response: Criminal defendants regularly file habeas corpus petitions in the Eastern District of California after failing to prevail in their collateral attacks on their criminal cases in state court. It would be inappropriate for me to provide an opinion on state of the law in this area.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: Please see my response to Question 29a.

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

Response: Please see my response to Question 29a.

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

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

Response: The Ninth Circuit allows for unpublished decisions. Fed. R. App. P. 32.1; Ninth Circuit Rule 36–3.

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

Response: Please see my response to Question 30a.

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

Response: No. Unpublished opinions are not precedential; however, they may be persuasive.

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

Response: Please see my response to Question 30a.

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

Response: Please see my response to Question 30c.

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

Response: Response: Please see my response to Question 30a.

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

Response: In general, though unpublished opinions are not precedential, they may be persuasive.

31. In your legal career:

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

Response: More than 500, assuming this question asks for the total of bench and jury trials.

b. How many have you tried as second chair?

Response: None

c. How many depositions have you taken?

Response: I estimate I have taken at least 100 depositions.

d. How many depositions have you defended?

Response: I estimate I have defended at least 75 depositions.

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

Response: I estimate I have argued approximately five cases before a federal court of appeals.

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

Response: I estimate I have argued at least 25 cases before a state court of appeals.

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

Response: None

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

Response: I estimate I have argued at least 150 cases dispositive motions in the trial courts.

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

Response: Though I am not entirely certain of the definition of an "evidentiary motion," assuming this is defined to include any motion where evidence is submitted, I estimate I have argued at least 400 evidentiary motions in the trial courts.

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

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

Response: I have not practiced in nearly 12 years, so my memory of this is not fresh. However, I estimate that I billed, on average, at least 35 hours per week while practicing.

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

Response: None. My job prohibited pro bono work.

33. 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?

Response: I do not know what Justice Roberts was thinking when he made this statement. However, I suspect that he was asserting that judges should be "above the fray" and decide issues, rather than advocate them.

b. Do you agree or disagree with this statement?

Response: I do not know what Justice Roberts was thinking when he made this statement. Assuming he meant that judges should be "above the fray" and decide issues, rather than advocate them, I agree with him.

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

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

Response: I do not know what Justice Holmes was thinking when he made this statement. I suspect he meant that the law should determine the outcome of a case regardless of the equities.

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

Response: Because I do not know what Justice Holmes was thinking when he made this statement, I cannot agree or disagree. I believe that a judge should fairly and impartially apply the law to the facts of the case, and, in this way, justice is served.

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

Response: Not that I recall.

a. If yes, please provide appropriate citations.

Response: Not applicable

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

Response: I do not have any social media accounts and never have.

37. What were the last three books you read?

Response: My caseload and family obligations leave very little time for reading for leisure. Often, I listen to audiobooks while exercising, driving, or cooking. Recently, I have revisited classics, and I have listened to "Crime and Punishment," and "The Scarlet Pimpernel," but I have also listened to modern bestsellers such as, "The Martian."

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

Response: This is an important policy question. I note that laws—for example, the Anti-Drug Abuse Act of 1986 related to mandatory minimum sentences for crack and powder cocaine—have imposed significant sentencing disparities on people of color. It is my understanding that the Senate Judiciary Committee has made great effort to modify the law to address this disparity. As a trial judge, I do not consider party's races or any other immutable characteristic unless the issues raised require it, and I will continue to do so.

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

Response: I am most proud of my work handling juvenile dependency matters. The abuse and neglect I have seen inflicted on children by those who were supposed to protect them at all costs, is something I will never forget. These cases were extremely difficult, but they were rewarding especially when these kids could be placed in safe homes because their parents were able to correct the problems in the home or because relatives or other families committed to raising them.

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

Response: My personal views were not relevant to my work as an advocate. I adduced evidence, presented it, and argued why the law required a particular outcome.

a. How did you handle the situation?

Response: Please see my response to Question 40.

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

Response: Yes.

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

Response: In general, I do not read law professors' works unless cited by a party in a case or implicated by an issue raised in a case.

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

Response: My view of the law has not been shaped by a Federalist Paper.

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

Response: I am not sure of the exact meaning of this question. When evaluating the positions of the parties appearing before me, a particular legal authority or set of legal authorities determines the outcome.

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

Response: Damages compensate for harms done, while injunctions prevent or limit future harm. Both remedies have a role in our system of justice.

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

Response: A child is a human being. As a judge and a nominee, it would be inappropriate for me to comment further, because it could suggest I have predetermined issues in litigation which could come before me.

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No.

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

Response: Not applicable.

50. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: Nominees are obligated to tell the truth when testifying under oath before the Senate Judiciary Committee, including when asked to state their views on their judicial philosophy.

EXHIBIT A

1. Carter v. California Correctional Institution
United States District Court, E.D. California. June 29, 2021 Slip Copy 2021 WL 2666069

2. Gann v. Garcia
United States District Court, E.D. California. July 27, 2020 Slip Copy 2020 WL 4287431

3. Solis v. Gonzales
United States District Court, E.D. California. June 29, 2020 Slip Copy 2020 WL 3511225

4. Solis v. Gonzales
United States District Court, E.D. California. December 04, 2019 Slip Copy 2019 WL 6528883

5. Vaughn v. Wegman
United States District Court, E.D. California. February 04, 2019 Not Reported in Fed. Supp. 2019 WL 426142

6. Wolcott v. Board of Rabbis of NO. & SO. California
United States District Court, E.D. California. May 04, 2017 Not Reported in Fed. Supp. 2017 WL 1740127

7. Vaughn, Sr. v. Wegman
United States District Court, E.D. California. May 02, 2017 Not Reported in Fed. Supp. 2017 WL 1650621

8. Wolcott v. Board of Rabbis of No. & So. California
United States District Court, E.D. California. April 28, 2016 Not Reported in Fed. Supp. 2016 WL 1702052

9. Vaughn v. Wegman
United States District Court, E.D. California. April 07, 2016 Not Reported in Fed. Supp. 2016 WL 1382874

10. Wolcott v. Board of Rabbis of No. & So. California
United States District Court, E.D. California. November 09, 2015 Not Reported in Fed. Supp. 2015 WL 6847890

11. Mitchell v. Pina
United States District Court, E.D. California. May 30, 2014 Not Reported in F.Supp.3d 2014 WL 2463037

12. Mitchell v. Pena
United States District Court, E.D. California. July 15, 2013 Not Reported in F.Supp.2d 2013 WL 3733593

13. Medina v. Youngblood
United States District Court, E.D. California. January 14, 2013 Not Reported in F.Supp.2d 2013 WL 146951

14. Williams v. Cate
United States District Court, E.D. California. August 17, 2012 Not Reported in F.Supp.2d 2012 WL 3561791

15. Mitchell v. Cate
United States District Court, E.D. California. April 06, 2012 Not Reported in F.Supp.2d 2012 WL 1158760

16. Williams v. Cate
United States District Court, E.D. California. December 14, 2011 Not Reported in F.Supp.2d 2011 WL 6217378

17. Pierce v. Gonzales
United States District Court, E.D. California. February 18, 2011 Not Reported in F.Supp.2d 2011 WL 703594

18. Newman v. Brandon
United States District Court, E.D. California. February 12, 2011 Not Reported in F.Supp.2d 2011 WL 533580

19. Williams v. Cate
United States District Court, E.D. California. February 08, 2011 Not Reported in F.Supp.2d 2011 WL 444788

20. Rose v. California

United States District Court, E.D. California. October 27, 2010 Not Reported in F.Supp.2d 2010 WL 4366084

Questions for the Record for Jennifer L. Thurston
From Senator Mazie K. Hirono

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

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

   Response: No.

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

   Response: No.

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

Questions for all nominees:

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

   Response: No.

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

   Response: No.

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

   Response: I consider the text first. If it is ambiguous, I adopt the approach set forth in any Supreme Court and Ninth Circuit precedent. I use the interpretative methods and the canons of construction used by these higher courts. I keep an open mind and decide cases by applying the law to the evidence presented and without attempting to answer broader questions.

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

   Response: If I were confronted with a new constitutional question, I would adopt the approach set forth in any direct or analogous Supreme Court and Ninth Circuit precedent. If those courts applied originalism, that is what I would do.

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

   Response: If I were confronted with a new constitutional question, I would adopt the approach set forth in any direct or analogous Supreme Court and Ninth Circuit precedent. If those courts applied textualism, that is what I would do.

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

   Response: I have heard this phrase before, but I am not quite certain what it means. The Constitution is the supreme law of the land. It has guided our country throughout its life, and I cannot fathom that it will not always do so. I believe the reason for this is that we,

the American people, have an abiding and unwavering commitment to its fundamental principles. If I am confirmed as a District Judge, I would interpret the Constitution in accordance with the established precedent of the Supreme Court and the Ninth Circuit.

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

Response: I have not studied the Justices sufficiently for me to be able to state a preference for one over another. However, I continue to admire Justices Ginsburg and Scalia for their collegiality and friendship despite having taken very different positions on many important questions. They are an example that we can talk about hard things in a civil and productive manner.

8. Was Marbury v. Madison correctly decided?

Response: As a judge and as a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, there are certain Supreme Court decisions that have determined issues with finality, such that there can no longer be dispute. As to these few cases, I believe I can state my opinion. In my opinion, *Marbury* was corrected decided.

9. Was Lochner v. New York correctly decided?

Response: As a judge and as a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, I am aware that *Lochner* has been effectively overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

10. Was Brown v. Board of Education correctly decided?

Response: As a judge and as a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, there are certain Supreme Court decisions that have determined issues with finality, such that there can no longer be dispute. As to these few cases, I believe I can state my opinion. In my opinion, *Brown* was corrected decided.

11. Was Bolling v. Sharpe correctly decided?

Response: As a judge and as a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, there are certain Supreme Court decisions that have determined issues with finality, such that there can no longer be dispute. As to these few cases, I believe I can state my opinion. In my opinion, *Bolling* was corrected decided.

12. Was Cooper v. Aaron correctly decided?

Response: Please see my response to Question 9.

13. Was Mapp v. Ohio correctly decided?

Response: Please see my response to Question 9.

14. Was Gideon v. Wainwright correctly decided?

Response: As a judge and as a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, there are certain Supreme Court decisions that have determined issues with finality, such that there can no longer be dispute. As to these few cases, I believe I can state my opinion. In my opinion, *Gideon* was corrected decided.

15. Was Griswold v. Connecticut correctly decided?

Response: Please see my response to Question 9.

16. Was South Carolina v. Katzenbach correctly decided?

Response: Please see my response to Question 9.

17. Was Miranda v. Arizona correctly decided?

Response: Please see my response to Question 9.

18. Was Katzenbach v. Morgan correctly decided?

Response: Please see my response to Question 9.

19. Was Loving v. Virginia correctly decided?

Response: As a judge and as a nominee, in general, I cannot comment on the correctness of any Supreme Court precedent, because I am bound to follow them all. However, there are certain Supreme Court decisions that have determined issues with finality, such that there can no longer be dispute. As to these few cases, I believe I can state my opinion. In my opinion, *Loving* was corrected decided.

20. Was Katz v. United States correctly decided?

Response: Please see my response to Question 9.

21. Was Roe v. Wade correctly decided?

Response: Please see my response to Question 9.

22. Was Romer v. Evans correctly decided?

Response: Please see my response to Question 9.

23. Was United States v. Virginia correctly decided?

Response: Please see my response to Question 9.

24. Was Bush v. Gore correctly decided?

Response: Please see my response to Question 9.

25. Was District of Columbia v. Heller correctly decided?

Response: Please see my response to Question 9.

26. Was Crawford v. Marion County Election Board correctly decided?

Response: Please see my response to Question 9.

27. Was Boumediene v. Bush correctly decided?

Response: Please see my response to Question 9.

28. Was Citizens United v. Federal Election Commission correctly decided?

Response: Please see my response to Question 9.

29. Was Shelby County v. Holder correctly decided?

Response: Please see my response to Question 9.

30. Was United States v. Windsor correctly decided?

Response: Please see my response to Question 9.

31. Was Obergefell v. Hodges correctly decided?

Response: Please see my response to Question 9.

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

Response: The Ninth Circuit may court reconsider its own precedent only when a closely analogous intervening Supreme Court decision undermines the precedent and only through en banc review. *United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990).

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

Response: Please see my response to Question 32.

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

Response: If the text is ambiguous, I adopt the approach set forth in any Supreme Court and Ninth Circuit precedent. I use the interpretive methods, including the canons of construction used, by these higher courts. If the meaning of the statute is still not clear after looking to those sources, I will consider legislative history. Legislative history created before enactment of the legislation is entitled to greater weight than that created after its enactment. *Cose v. Getty Oil Co.*, 4 F.3d 700, 708 (9th Cir. 1993), as amended (Oct. 1, 1993).

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

Response: Only those factors set forth in 18 U.S.C. §3553(a) should be considered in sentencing a person. As the Sentencing Guidelines state, race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sentencing Guidelines Manual §5H1.10.

Questions from Senator Thom Tillis for Jennifer Leigh Thurston
Nominee to be United States District Judge for the Eastern District of California

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

   Response: Yes.

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

   Response: In my view, "judicial activism" describes when a judge decides a case or issue based on personal views, rather than determining the outcome based solely on the existing law and facts presented. This is wrong and unfair. A judge must make decisions based on a faithful application of the law to the facts, rather than an effort to achieve a particular result.

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

   Response: It is expected and required.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes. As a judge, I have no interest in any particular outcome; my interest is limited to applying the law to the facts presented.

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: I will apply the Supreme Court's precedence, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). According to these precedents, the right to possess firearms is a fundamental, individual right protected by the Second Amendment.

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 noted in my response to Question 7, I will apply the Second Amendment precedent set forth by the Supreme Court. Also, I would consider the impacts of a crisis on the constitutional rights and in doing so, would be guided by *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), because both arose due to the impacts of the worldwide pandemic.

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 I am confirmed as a District Judge, I will apply the relevant precedent to any matters involving claims of qualified immunity, as I do now as a Magistrate Judge. Qualified immunity protects government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity "balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). The threshold inquiry is whether the facts alleged, when taken in the light most favorable to the plaintiff, demonstrate that the official's conduct violated a statutory or constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the alleged conduct would not be considered a violation, the inquiry stops, and the defense of qualified immunity applies. *See id.* If a constitutional violation occurred, the court must determine whether the statutory or constitutional right was "clearly established." *Id.* To be clearly established, there must be controlling authority sufficiently similar to the circumstances presented. See, e.g., *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

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: If I am confirmed as a District Judge, I will apply the relevant precedent to any matters involving claims of qualified immunity, as I do now as a Magistrate Judge. I will apply the relevant precedent discussed in Question 9 and any laws enacted by Congress on this topic.

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

Response: I will apply the relevant precedent discussed in Question 9. Whether the law should be changed is a policy question reserved to Congress.

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

    Response: I have no opinion. In nearly 12 years as a Magistrate Judge, I have worked peripherally on several patent cases, such as handling discovery issues and settlement conferences, but I have not been required to rule on eligibility issues. As such, I have no opinion on the Supreme Court's patent eligibility jurisprudence, and as a judge, it would be inappropriate for me to either praise or criticize the Supreme Court's opinions on this or any issue

13. **How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.**

    a. ***ABC Pharmaceutical Company*** **develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

    Response: As a judge and a nominee, I am precluded prejudging issues that may come before me. Canon 3(A)(6). If I am confirmed and I am presented with a case described here, I will apply Supreme Court and Ninth Circuit precedent to the facts established.

    b. ***FinServCo*** **develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should** ***FinServCo's*** **business method standing alone be eligible? What about the business method as practically applied on a computer?**

    Response: Please see my response to question 13a.

    c. ***HumanGenetics*** **Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if** ***HumanGenetics*** **Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?**

Response: Please see my response to question 13a.

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: Please see my response to question 13a.

e. ***Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

Response: Please see my response to question 13a.

f. **A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?**

Response: Please see my response to question 13a.

g. ***BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

Response: Please see my response to question 13a.

h. **Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

Response: Please see my response to question 13a.

i. *Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?

Response: Please see my response to question 13a.

j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

Response: Please see my response to question 13a.

14. **Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: Please see my response to question 12.

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

a. **What experience do you have with copyright law?**

Response: Please see my response to question 12.

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

Response: None.

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

Response: None.

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

Response: As a Magistrate Judge for nearly 12 years, I have handled many cases involving the First Amendment and the right to free speech. I don't recall any that raised intellectual property issues as they relate to free speech.

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

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

Response: If the text is unambiguous, I would apply it as written. If the text is ambiguous, I would consider statutory context, and I would look to precedent and analogous precedent to determine the proper canons of construction to use. Finally, if required, I would look to legislative history.

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

Response: When a court is confronted with an interpretation contained in an agency opinion letter, policy statement, agency manual, or enforcement guideline, it provides *Skidmore* deference as set forth in *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)). Thus, the deference afforded will be determined by the ability of the agency's interpretations "power to persuade." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

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 decide this issue, I would look to the law, including the Digital Millennium Copyright Act of 1998 and relevant precedent.

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

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

Response: Trial courts must apply existing law and precedent.

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: Trial courts must apply existing law and precedent.