Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Linda Lopez
Nominee to be United States District Judge for the Southern District of California

1. **If you faced a constitutional issue, what is the general procedure you would follow for determining what the law required?**

   Response: I would examine the text of the constitutional provision at issue and consult all applicable Supreme Court precedents, as well as any binding or instructive circuit court precedents, regarding the interpretation of the constitutional provision at issue. I would then faithfully apply any applicable legal test or guideline to the particular facts of the case in a way that is consistent with existing precedents.

2. **One of a federal judge's most important tasks is reading and applying the statutes that Congress enacts and the President signs.**

   a. **Please describe your approach to understanding what statutes mean, including any particular steps you work through in your analysis.**

      Response: My approach to reading statutes is to faithfully apply all binding precedents instructing how the particular statute at issue should be read. The interpretation of statutes must start with the text and the plain meaning of the text. If the text is clear and unambiguous, additional interpretation of the text is not appropriate. If text could reasonably be interpreted in more than one way, I would apply the rules of statutory construction as set forth in Supreme Court precedents and binding Ninth Circuit precedents.

   b. **Prior to your nomination, did you ever study the canons of statutory construction?**

      Response: Yes.

   c. **Prior to your nomination, have you ever used any canon of statutory interpretation?**

      Response: I have consulted and applied Supreme Court and Ninth Circuit precedents regarding the interpretation of particular statutes.

   d. **Would you use the canons of statutory interpretation when reading regulations? Please explain why or why not.**

      Response: I would consult and apply any controlling Supreme Court and Ninth Circuit precedents regarding the interpretation of particular regulations and reading regulations in general.

3. **Federal courts generally examine the law de novo because each court is usually obligated to correctly interpret the law to the best of its own ability. But in some cases, federal courts defer to how others interpret the law. A number of Supreme Court decisions outline this deference.**

   a. **What is *Skidmore* deference? Please summarize the Ninth Circuit's *Skidmore* jurisprudence.**

      Response: The Supreme Court has held that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires[.]" United States v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944)). The Ninth Circuit's Skidmore jurisprudence follows Supreme Court precedent. See Scalia v. Dep't of Transp. & Pub. Facilities, 985 F.3d 742, 748 (9th Cir. 2021) (applying Skidmore deference).

   b. **What is *Chevron* deference? Please summarize the Ninth Circuit's *Chevron* jurisprudence.**

      Response: In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court recognized that in certain circumstances "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Courts determine "whether Congress has directly spoken to the precise question at issue," and "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. If Congress has not "directly addressed the precise question at issue," and "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. If the agency's interpretation is reasonable, the court will defer to the agency's interpretation. Id. at 845. The Ninth Circuit's Chevron jurisprudence follows Supreme Court precedent. See Route v. Garland, 996 F.3d 968, 978-82 (9th Cir. 2021) (applying Chevron deference).

   c. **What is *Auer* deference? Please summarize the Ninth Circuit's *Auer* jurisprudence.**

      Response: In Auer v. Robbins, 519 U.S. 452 (1997), the Supreme Court held that under its jurisprudence an agency interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation. Id. at 461 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

The Ninth Circuit Auer jurisprudence follows Supreme Court precedent. See Goffney v. Becerra, 995 F.3d 737, 744-46 (9th Cir. 2021) (applying Auer deference).

d. **Is there an analytical difference between *Auer* deference and *Seminole Rock* deference? If so, please explain the difference.**

Response: There may be no substantive analytical difference between Auer deference and Seminole Rock deference. See Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (noting that the Supreme Court "has applied Auer or Seminole Rock in dozens of cases, and lower courts have done so thousands of times"); Goffney v. Becerra, 995 F.3d 737, 744 (9th Cir. 2021) ("Although Seminole Rock represents one of the Supreme Court's earliest expositions of that principle, the doctrine has come to be associated with the Court's more recent decision in Auer v. Robbins.").

4. **What is more important for a district judge: (a) reaching what she thinks is the correct conclusion or (b) reaching a conclusion that she knows will not be overturned on appeal? How would you decide whether to go with option (a) or (b)?**

Response: The role of a district judge is to faithfully apply all precedents to the facts in the record in deciding the limited question raised in the case at hand. A judge's views on the outcome should not play a part in the judge's methodical analysis of the facts and application of all binding precedents.

5. **In the 1870s, Rep. James Blaine promoted a federal constitutional amendment that would have prevented federal funds from going to sectarian schools. The Blaine Amendment was supported by anti-Catholic Americans, including white supremacists who were upset that Catholic schools educated African American children. Charleston's Bishop John England, for example, faced local opposition and mob violence as he opened schools for African American students in the 1830s. The Blaine Amendment failed federally, but many states adopted similar language in their state constitutions. The Supreme Court recently addressed state Blaine Amendments in *Espinoza v. Montana Department of Revenue*, 591 U.S. ___ (2020). Please explain your understanding of current Supreme Court jurisprudence on the constitutionality of Blaine Amendments.**

Response: In Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020), the Supreme Court noted that the Blaine Amendment of the 1870s was "born of bigotry" and religious animus and bore a similarity to state no-aid provisions that bar state support for religious schools. Id. at 2258-59. The Supreme Court held in Espinoza that a no-aid provision blocking scholarship funds linked to a state tax credit program from being used

at religious schools discriminated against religious schools and their affected families in violation of the Free Exercise Clause. Id. at 2261-63.

6. **How, if at all, does the Second Amendment personal right to "keep" arms differ from the right to "bear" arms?**

   Response. The Second Amendment confers "an individual right to keep and bear arms." District of Columbia v. Heller, 554 U.S. 570, 595 (2008). In Heller, the Supreme Court found "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" Id. at 582. The Court also found that "bear arms" refers to "carrying [arms] for a particular purpose – confrontation." Id. at 584. The Court stated, "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation." Id. at 592.

7. **In *Brnovich v. Democratic National Committee*, the Supreme Court held that Arizona's ban on out-of-precinct voting does not violate § 2 of the Voting Rights Act. In reaching this conclusion, the Court explained that Arizona's out-of-precinct policy does not exceed the "usual burdens of voting." Further, the Court wrote that the out-of-precinct policy does not have a significant racially disparate impact because, in absolute terms, the racial disparity in burdens caused by the policy is small. The Court also recognized that important state interests, furthered by the policy, must be given appropriate weight.**

   a. **Does requiring an ID exceed the "usual burdens of voting"?**

      Response: The Supreme Court has found that laws requiring voter identification are not *per se* unconstitutional. See Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197-204 (2008). My understanding is that Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021) did not involve voter identification laws and the Supreme Court in Brnovich declined to articulate a test governing challenges to laws specifying the time, place, or manner for casting ballots under Section 2 of the Voting Rights Act. As a nominee, it would be inappropriate for me to comment and give the impression that I have prejudged this issue. If a matter involving voter identification laws came before me, I would faithfully apply all Supreme Court and Ninth Circuit precedents.

   b. **Does requiring an ID have a significant racially disparate impact?**

      Response: Please see my answer to Question 7a.

   c. **Does requiring an ID further a state's interest in protecting its elections?**

Response: Please see my answer to Question 7a.

d. **Will you commit to applying *Brnovich* in cases that challenge laws requiring an ID to vote?**

Response: If a matter involving voter identification laws came before me, I would faithfully apply all Supreme Court and Ninth Circuit precedents.

8. **What legal standard would you use to evaluate a claim that a facially neutral law impermissibly targets religious exercise?**

Response: I would use all applicable Supreme Court precedents. Under the Free Exercise Clause, restrictions on religious exercise that are not "neutral and of general applicability" must survive strict scrutiny. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993). "[T]he minimum requirement of neutrality is that a law not discriminate on its face." Id. at 533. In Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021), the Supreme Court held that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Id. at 1877 (citing Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1730-32 (2018)).

9. **If you are faced with a Free Exercise Clause claim, what are the Supreme Court cases you will consult to analyze the matter?**

Response: I would consult all applicable Supreme Court cases addressing the Free Exercise Clause.

10. **What legal standard and/or Ninth Circuit precedents would you apply in evaluating whether a regulation or proposed legislation infringes on Second Amendment rights?**

Response: I would apply all applicable Supreme Court and Ninth Circuit precedents, including District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 561 U.S. 742 (2010). Additionally, under Young v. Hawaii, 992 F.3d 765, 783 (9th Cir. 2021), courts in the Ninth Circuit are first required to determine whether the regulation or statute affects conduct that is protected by the Second Amendment based on historical understanding of the scope of the right. Second Amendment rights are not implicated if the regulations have been the subject of longstanding, accepted regulation, or if the regulation falls within the presumptively lawful regulatory measures identified in Heller. Young, 992 F.3d at 783. Second, if the regulation or statute burdens conduct protected by the Second Amendment, and if the regulation is one that implicates the core of the Second Amendment right and severely burdens that right, courts in the Ninth Circuit must apply strict scrutiny. Id. at 784. If Second Amendment rights are affected in some lesser way, courts must apply intermediate scrutiny. Id.

11. **What legal standard would you apply in evaluating whether a redistricting map is racially gerrymandered?**

Response: I would apply all applicable Supreme Court precedents. In Miller v. Johnson, 515 U.S. 900, 916 (1995), the Supreme Court held that in racial gerrymandering cases "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." The Court further held that "[t]o make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Id. If race was the predominant factor for drawing the particular district boundaries, strict scrutiny applies. Id. at 920. The Court also stated that redistricting "is primarily the duty and responsibility of the State" and the "good faith of [the] state legislature must be presumed." Id. at 915.

12. **When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?**

Response: I examine the text of the law at issue and consult all applicable Supreme Court precedents, as well as any controlling or instructive circuit court precedents. I then faithfully apply any applicable legal test or guideline to the particular facts of the case in a way that is consistent with existing precedents. Personal preferences should not shape a judge's view on the correct application of the law.

13. **Under existing Supreme Court precedent, what are the legal contours of the president's ability to remove executive-branch employees?**

Response: The legal contours of the President's authority to remove executive-branch employees are defined by the Constitution, Supreme Court precedents, and applicable federal law, as well as the particular facts of the case. In Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2192 (2020), the Supreme Court stated "[o]ur precedents have recognized only two exceptions to the President's unrestricted removal power." First, Congress may "create expert agencies led by a group of principal officers removable by the President only for good cause." Id. (citing Humphrey's Executor v. United States, 295 U.S. 602 (1935). Second, Congress may "provide tenure protections to certain inferior officers with narrowly defined duties." Id. (citing Morrison v. Olson, 487 U.S. 654 (1988). If a case involving the President's removal power came before me, I would faithfully apply the applicable law.

14. **Do you believe that "[t]here is no such thing as a non-racist or race-neutral policy"?**

Response: I am not familiar with that quote. If I am fortunate enough to be confirmed and subsequently face a case involving legal claims of discrimination or race, I will faithfully and impartially apply all Supreme Court and Ninth Circuit precedents.

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

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

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Brown v. Board of Education because the issue of *de jure* racial segregation in public schools is unlikely to come before me and agree that it was correctly decided.

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

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Loving v. Virginia and agree that it was correctly decided.

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

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue.

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

Response: Please see my response to Question 15c.

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

Response: Please see my response to Question 15c.

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

Response: Please see my response to Question 15c.

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

Response: Please see my response to Question 15c.

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

Response: Please see my response to Question 15c.

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

Response: Please see my response to Question 15c.

j. **Was *Juliana v. United States* (9th Cir.) correctly decided?**

Response: As a magistrate judge and a nominee for a federal district judge position in the Ninth Circuit, I generally refrain from opining whether Ninth Circuit cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all controlling precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue.

16. **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.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

18. **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.

19. **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.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

21. **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: My jurisdiction has two selection committees. Senator Dianne Feinstein has one selection committee and Senator Alex Padilla has another selection committee. I applied to both committees, and I was interviewed by both committees. I also interviewed with the Chair for Senator Feinstein's committee. On July 20, 2021, I was contacted by an attorney from the White House Counsel's Office, and I interviewed with that Office the next day. Since July 22, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 30, 2021, the President announced his intent to nominate me.

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

    Response: No.

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

    Response: No.

24. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: On July 20, 2021, I was contacted by an attorney from the White House Counsel's Office, and I interviewed with that Office the next day. Since July 22, 2021, I

have been in contact with officials from the Office of Legal Policy at the Department of Justice, and White House Counsel's Office. On September 30, 2021, the President announced his intent to nominate me.

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

Response: I received and carefully reviewed all the questions. I conducted research and drafted my responses. I sought comments and feedback on my draft responses from persons at the Office of Legal Policy. After receiving comments and feedback, I finalized my responses and authorized them to be submitted to the Senate Judiciary Committee.

Senator Marsha Blackburn
Questions for the Record to Linda Lopez
Nominee for the Southern District of California

1. **When you represented a defendant accused of attempting to re-enter the country illegally after being deported in *United States v. Martinez-Hernandez*, you argued that it was a reversible error for a trial court to instruct grand jurors to follow the law even if they disagree with it. Do you believe that a juror may simply decline to indict an otherwise guilty defendant simply because the juror doesn't think the particular conduct at issue should be criminalized?**

   Response: I represented Mr. Martinez-Hernandez in 2007, while I was a trial attorney with the Federal Defenders of San Diego, Inc. I filed a motion challenging the district judge's instruction to the January 2007 grand jury in the Southern District of California. The arguments raised were in my role as an advocate, alleging that the instructions from the district judge were contrary to Supreme Court and Ninth Circuit precedents.

   The role of the grand jury differs from that of jurors empaneled to hear evidence and reach a verdict. A member of the grand jury is responsible for determining whether there is probable cause to indict a defendant and for "the protection of citizens against unfounded criminal prosecutions," while a juror selected to hear evidence in a criminal trial is charged with determining whether the government has met its burden, that is "beyond a reasonable doubt," in reaching a verdict. See United States v. Calandra, 414 U.S. 338, 343 (1974) (citing Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972)); see also Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.'" (citation omitted)).

2. **Should a judge refuse to accept a guilty plea if he or she believes the criminalization of the underlying conduct is immoral or unjust?**

   Response: No. Any views a judge may or may not have about the criminalization of any type of conduct can never play a part in a judge's duty to faithfully and impartially apply all laws enacted by the legislature.

Nomination of Linda Lopez
to be United States District Judge for the Southern District of California Questions for the Record
Submitted November 10, 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 sitting magistrate judge, and a nominee to the district court bench, it is generally inappropriate for me to comment on the merits of Supreme Court precedents, including District of Columbia v. Heller, 554 U.S. 570 (2008). If confirmed, I will fully and faithfully apply all binding authority.

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. See District of Columbia v. Heller, 554 U.S. 570 (2008).

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 held that a government regulation that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral and generally applicable and thus subject to strict scrutiny. Id. at 1296 (emphasis in original).

6. **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. 836 (2018), the Supreme Court, in a plurality opinion, interpreted provisions of the Immigration and Nationality Act (INA) authorizing the detention of aliens pending removal decisions. The plurality found: (1) aliens "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation" or those "designated by the Attorney General in his discretion" could be "detained for further consideration of the application for asylum;" (2) aliens applying for admission not included in the first group "shall be detained" pending removal proceedings if immigration officers decide the alien is not clearly and beyond a doubt entitled to be admitted into the United States; (3) criminal aliens already in the United States may be released on bond or parole "only if" the Attorney General decides "both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk;" (4) all other present aliens "may be" released by the Attorney General on bond or parole; (5) it is not a plausible statutory construction to "include an implicit 6-month time limit on the length of mandatory detention;" and (6) all other aliens present in the United States were not entitled under the statute to periodic bond hearings and a determination "by clear and convincing evidence" that the alien's continued detention is not necessary.

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

Response: The Supreme Court found in Trump v. Hawaii, 138 S. Ct. 2392 (2018), that President Donald Trump's Presidential Proclamation 9645, 82 Fed. Reg. 45161 (2017), did not violate the Immigration and Nationality Act or the Establishment Clause by suspending the entry of aliens from several nations. The Supreme Court afforded substantial deference to the executive branch to conduct foreign affairs and the exclusion of aliens, including pursuant to 8 U.S.C. § 1182(f). The majority opinion referred to Korematsu v. United States, 323 U.S. 214 (1944), to distinguish it stating that "it is wholly inapt to liken that morally repugnant [executive] order to a facially neutral policy denying certain foreign nationals the privilege of admission." 138 S. Ct. at 2423.

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

Response: As a nominee, it would be inappropriate for me to comment and give the impression that I have prejudged this issue. If this matter came before me, I would faithfully apply all Supreme Court and Ninth Circuit precedents to the case before me.

9. **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 and carefully reviewed all the questions. I conducted research and drafted my responses. I sought comments and feedback on my draft responses from persons at the Office of Legal Policy. After receiving comments and feedback, I finalized my responses and authorized them to be submitted to the Senate Judiciary Committee.

10. **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 Josh Hawley
Questions for the Record

Judge Linda Lopez
Nominee, U.S. District Court for the Southern 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: Judges are duty-bound to faithfully and impartially apply the law, regardless of where it leads them.

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

Response: The Rooker-Feldman doctrine prohibits federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005). The Ninth Circuit has a "two-part test to determine whether the Rooker-Feldman doctrine bars jurisdiction over a complaint filed in federal court:" (1) "the federal complaint must assert that the plaintiff was injured by legal error or errors by the state court" and (2) "the federal complaint must seek relief from the state court judgment as the remedy." Lundstrom v. Young, 857 F. App'x 952, 955 (9th Cir. 2021) (citation omitted).

The Younger abstention doctrine prohibits federal courts from hearing cases involving federal issues already being litigated in state forums. Younger v. Harris, 401 U.S. 37, 54 (1971). In the Ninth Circuit, the Younger abstention doctrine prohibits a federal court from enjoining "three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." Bristol-Myers Squibb Co. v. Connors, 979 F.3d 732, 735 (9th Cir. 2020).

The Pullman abstention doctrine provides that federal courts may choose not to hear a case, even if all the formal jurisdictional requirements are met, until the state law question can be resolved in a state court. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S.

496, 498 (1941). The Ninth Circuit has held that "[p]ursuant to the Pullman abstention doctrine, federal courts have the power to refrain from hearing cases . . . in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." Unites States v. State Water Res. Control Bd., 988 F.3d 1194, 1209 (9th Cir. 2021) (internal citation omitted).
The Burford abstention doctrine prohibits a federal court from exercising diversity jurisdiction over a state law claim that could affect a state's administration of an important policy. Burford v. Sun Oil Co., 379 U.S. 315 (1943). In the Ninth Circuit, the Burford abstention doctrine applies if the party seeking to invoke the doctrine shows "(1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." Tucker v. First Maryland Sav. & Loan, Inc., 942 F.2d 1401, 1405 (9th Cir. 1991).

The Thibodaux abstention doctrine provides that abstention is appropriate where a federal court allows a state court to rule to avoid unnecessary friction between federal and state authorities. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

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: The Supreme Court has considered most of the constitutional provisions in depth, and in doing so, it has already interpreted their meaning, determined the values each provision is designed to promote, and in many instances, formulated a test or framework within which to evaluate new or novel claims under the provision. If fortunate enough to be confirmed, I would look to guidance from Supreme Court precedents if this issue existed in a case that came before me.

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

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

Response: The text governs, and I always start with the text. If the legislative text, viewed in the context of the statute as a whole, is clear and unambiguous, then I do not consider legislative history. If the text is not clear, meaning it is equally susceptible to more than one interpretation, I might consider the following: (1) judicial interpretation of analogous statutory language, (2) the context in which the statute was enacted, (3) grammatical rules and presumptions about usage, (4) Congress's purpose(s) in enacting the statute, and (5) possibly legislative history. If I consider the legislative history, it would be in very limited circumstances, and only to clarify the meaning of the statutory language.

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

Response: Never.

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: I would apply all applicable Supreme Court and Ninth Circuit precedents. The United States Supreme Court has held that a prisoner seeking to prove that an execution violates the Eighth Amendment's prohibition on cruel and unusual punishment must show that there is "a substantial risk of harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for the purposes of the Eighth Amendment." Baze v. Rees, 553 U.S. 35, 50 (2008) (internal quotation marks and citation omitted). The Supreme Court indicated that "prisoners must identify an alternative" to the default method of execution "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" Glossip v. Gross, 576 U.S. 863, 877 (2015) (quoting Baze, 553 U.S. at 52). In Bucklew v. Precythe, 139 S. Ct. 1112 (2019), the Supreme Court further clarified that only those methods of executions that "cruelly superadds pain to the death sentence" are inconsistent with the original meaning of the Eighth Amendment. Id. at 1123-24.

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: Yes.

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: The United States Supreme Court held in District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009), that there was no due process right (procedural or substantive) to access DNA evidence for a habeas petitioner. The Supreme Court found that the task of establishing rules for when DNA testing should be ordered post-conviction belonged primarily to the legislature.

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: In evaluating a constitutional Free Exercise claim, if the state law is neutral and of general applicability, it does not need to "be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (citing Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 878–79 (1990)); see also S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1140 (9th Cir. 2021) ("If the law is neutral and of general applicability. . . then the law need only survive rational basis review, even if it 'has the incidental effect of burdening a particular religious practice." (quoting Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 531)).

    "Facial neutrality is not determinative" because "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 534; see also Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1731–32 (2018) (finding the application of a facially neutral law violated the Free Exercise Clause because government officials adjudicating the baker's religious objection expressed hostility to religion in public comments, which was "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion").

    If a state law is not neutral or not of general application, it must undergo strict scrutiny and show that it advances compelling interests and is "narrowly tailored in pursuit of those interests." Id. at 546. A government regulation that treats "*any* comparable secular activity more favorably than religious exercise" is not neutral and generally applicable and thus subject to strict scrutiny. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (emphasis in original).

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 No. 10.

12. 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: A religious belief is sincerely held if it is a "meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." United States v. Seeger, 380 U.S. 163, 176 (1965). A "pretextual assertion of a religious belief" in order to obtain a beneficial exemption is not a sincere belief. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 n.28 (2014). A religious belief is sincere if it is not "obviously" a "sham" or an "absurdit[y]." Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981). These sincere religious beliefs are not limited to traditional or parochial concepts of religion. Welsh v. United States, 398 U.S. 333, 339-40 (1970). The trier of fact may not inquire into the truth or falsity of the claimant's religious beliefs, although they might seem incredible or preposterous. United States v. Ballard, 322 U.S. 78, 87–88 (1944); Callahan v. Woods, 658 F.2d at 685 ("In applying the free exercise clause of the First Amendment, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."). A sincerely held religious belief need not be one held by all members of a religious sect; "[c]ourts are not arbiters of scriptural interpretation." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 715-16 (1981).

13. 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 believe that Justice Holmes made the above-quoted statement in support of his position that the Fourteenth Amendment did not prescribe any particular economic theory. My understanding is that in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the United States Supreme Court abrogated much of Lochner. If confirmed, I would follow binding United States Supreme Court precedents if this issue came before me.

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

Response: As a sitting magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were

correctly decided. My understanding is that much of Lochner was abrogated by West Coast Hotel Co. v. Parrish. 300 U.S. 379 (1937). If confirmed, I would follow binding United States Supreme Court precedents if this issue came before me.

14. 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: Judges are duty-bound to faithfully and impartially apply the law, regardless of where it leads them. It is not a judge's role to impose his or her views or preferences when dutifully applying the binding law to the facts of the case at hand.

15. 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 understand this to mean that the role of a judge is to interpret and apply the law as written to the facts at hand, and not to make the law.

b. Do you agree or disagree with this statement?

Response: I agree with this statement.

16. 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 would interpret that quote to mean that a judge must faithfully and impartially apply the law, regardless of the outcome.

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

Response: I agree. The role of a judge is to faithfully and impartially apply the law to the facts in the record when deciding all matters that come before him or her.

17. 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: The Supreme Court found in Trump v. Hawaii, 138 S. Ct. 2392, that President Donald Trump's Presidential Proclamation 9645, 82 Fed. Reg. 45161 (2017), did not violate the Immigration and Nationality Act or the Establishment Clause by suspending the entry of aliens from several nations. The Supreme Court afforded substantial deference to the Executive branch to conduct foreign affairs and the exclusion of aliens, including pursuant to 8 U.S.C. § 1182(f). The majority opinion referred to Korematsu v. United States, 323 U.S. 214 (1944), to distinguish it stating that "it is wholly inapt to liken that morally repugnant [executive] order to a facially neutral policy denying certain foreign nationals the privilege of admission." 138 S. Ct. at 2423.

18. 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: I have no personal opinion regarding Judge Learned Hand's statement, but I will follow Supreme Court and Ninth Circuit precedents if this issue was before me. The Supreme Court held in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) that evidence that a defendant holds more than an 80% share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. Id. at 481. Eastman Kodak relied on American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946), to support that "over two-thirds of the market is a monopoly." Eastman Kodak Co., 504 U.S. at 481. The Ninth Circuit has found that "a market share of less than 50 percent is presumptively insufficient to establish market power," but that "a 65% market share" typically "establishes a prima facie case of market power." See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995); see also Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997).

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

Response: Please see my response to Question to 18a.

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 to 18a.

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

Response: Common law (i.e., law derived from judicial decisions instead of statutes) can be referred to as "federal common law." However, there is very little federal common law

because federal judges do not have a role in developing common law. In Rodriguez v. Federal Deposit Insurance Corporation., 140 S. Ct. 713 (2020), the United States Supreme Court stated that "federal common law plays a necessarily modest role," compromised of "only limited areas . . . in which federal judges may appropriately craft the rule of decision" such as "admiralty disputes, and certain controversies between States." Id. at 717.

20. 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: A state constitution may provide greater civil rights and liberties than the United States Constitution. Federal courts must defer to the decisions of the highest court in the state whose constitution the federal court is interpreting. See Erie R.R. Co. v. Tomkins, 304 U.S. 64, 78 (1938). The United States Constitution is "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In other words, the protections granted by the United States Constitution are binding on states.

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

Response: Please see my response to Question 20.

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

Response: A state constitution may provide greater civil rights and liberties than the United States Constitution.

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

Response: My understanding is that some federal courts have issued nationwide injunctions enjoining federal government agencies with respect to their actions towards nonparties, and that the legal basis for such injunctions is a matter of ongoing discussion. See, e.g., Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020); Trump v. Hawaii, 138 S. Ct. 2392 (2018). If confirmed, and if a party before me sought a nationwide injunction, I would closely examine and apply existing precedents.

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

Response: Please see my response to Question 21.

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

Response: Please see my response to Question 21.

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 21.

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

Response: In the United States, federalism is a system of government in which the constitution allocates power between a national (federal) government and regional (state) governments. The United States Constitution gives certain powers to the national government and certain powers to the regional governments, and both have a certain level of autonomy from each other.

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

Response: Please see my response to Question 2.

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

Response: The determination of when to award damages versus injunctive relief is one that I would make on a case-by-case basis after careful consideration of the specific issue before me and application of the applicable law.

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

Response: In Washington v. Glucksberg, 521 U.S. 702 (1997), the Supreme Court explained the following about the due process clauses in the Fifth and Fourteenth Amendments:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government action regardless of the fairness of the procedures used to implement them'") (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. Reno v. Flores, 507 U.S. 292, 301-02 (1993); Casey, 505 U.S. at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of

> Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, ibid.; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Casey, supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. Cruzan, 497 U.S., at 278-279.

Washington, 521 U.S. at 719-20.

27. 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 of religion is a fundamental constitutional right. I follow binding Supreme Court and Ninth Circuit precedents regarding the scope of this right.

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

Response: The Supreme Court distinguishes and protects religious beliefs and actions. The free exercise clause protects the right to choose one's religion, i.e., the freedom to worship, as well as the right to practice one's religion of choice, i.e., freedom of religion. The freedom of religion is generally broader in that it includes the right to participate in public discourse about religion, evangelize, change religions, and operate religious institutions such as schools.

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: To claim a violation of the Religious Freedom Restoration Act (RFRA), religious adherents must show that their free exercise of religion has been substantially burdened. 42 U.S.C. § 2000bb-1. The court or jury will decide

whether a burden exists on the exercise of religion. See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719, 726 (2014) (analyzing and concluding that a government regulation substantially burdened the exercise of religion). If a substantial burden is found, the federal action is valid only if the government demonstrates that the action "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." See 42 U.S.C. § 2000bb-1.

The Ninth Circuit has held that "[u]nder RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit [] or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008). The Supreme Court has considered whether a federal mandate imposed a "substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*" and found that the enormous economic impact of complying with the mandate in accordance with their religious beliefs was a "substantial burden on those beliefs." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724–26 (emphasis in original).

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: The trier of fact may not inquire into the truth or falsity of the claimant's religious beliefs, although they might seem incredible or preposterous. United States v. Ballard, 322 U.S. 78, 87–88 (1944); Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981) ("In applying the free exercise clause of the First Amendment, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."). A religious belief is sincerely held if it is a "meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." United States v. Seeger, 380 U.S. 163, 176 (1965). A "pretextual assertion of a religious belief" in order to obtain a beneficial exemption is not a sincere belief. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 n.28 (2014). These sincere religious beliefs are not limited to traditional or parochial concepts of religion. Welsh v. United States, 398 U.S. 333, 339–40 (1970). A sincerely held religious belief need not be one held by all members of a religious sect; "[c]ourts are not arbiters of scriptural interpretation." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 715–16 (1981).

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

Response: The Religious Freedom Restoration Act (RFRA) provides that the federal government "shall not substantially burden a person's exercise of religion

even if the burden results from a rule of general applicability," except when it is "in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1. The RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). Congress may exclude laws from application of the RFRA. 42 U.S.C. § 2000bb-3(b).

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: No.

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

Response: The "beyond a reasonable doubt" standard has been the burden of proof in criminal cases as early as 1880. Miles v. United States, 103 U.S. 304, 312 (1880). If confirmed as a district court judge, I would abide by that precedent.

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 federal district courts for the Southern District of California. As a sitting judge, and a nominee it would be inappropriate for me to comment and give the impression that I have prejudged this issue.

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 Rules establish the protocol for publication of opinions versus unpublished decisions of the Court. If confirmed, I would follow the Ninth Circuit Rules and the Federal Rules of Appellate Procedure.

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. As a sitting judge, I always follow binding precedents. If there is no binding precedent on any particular issue, then I may consider an unpublished opinion as persuasive authority. I would do the same if confirmed.

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 30a.

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: 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: Please see my response to Question 30a.

31. In your legal career:

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

Response: Eight.

b. How many have you tried as second chair?

Response: Three. All of which I was associate counsel and shared all the responsibilities with the lead lawyer.

c. How many depositions have you taken?

Response: Approximately thirty.

d. How many depositions have you defended?

Response: None that I can recall.

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

Response: One.

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

Response: None.

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

Response: None that I can recall.

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

Response: Dozens, if not more.

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

Response: Dozens, if not more.

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: While at Federal Defenders of San Diego, Inc., we were required to keep track of our hours. My best estimate is around 2,400 hours, maybe more.

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

Response: While at Federal Defenders of San Diego, Inc., 100% of my work was dedicated to representing indigent individuals charged with crimes in federal court.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

35. What were the last three books you read?

Response: Leap Year by Helen Russell, The Year of Living Danishly by Helen Russell, and The Pilgrimage by Paulo Coelho.

36. 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: All Supreme Court cases are binding precedents, and the supreme law of the land. As a sitting magistrate judge, and if confirmed as a district court judge, I would faithfully apply all Supreme Court precedents, regardless of any views I may or may not have.

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

Response: Yes.

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

Response: I have not personally studied systemic racism. The study of racial impacts associated with our laws and legal administration, such as our sentencing guidelines, are matters reserved to policy makers. As a sitting judge, my role is to fully, faithfully, and impartially discharge my duties in the cases or controversies that come before me without regard to race. If faced with a claim of racial disparities, I would evaluate the claim based on the applicable law and the record before me.

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

Response: There is not one case in particular; rather, I am proud of the work I did for many years representing indigent defendants in federal court. I deeply value the relationships I built with colleagues, opposing counsel, and the judges of the Southern District of California.

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

Response: As a sitting magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Brown v. Board of Education because the issue of *de jure* racial segregation in public schools is unlikely to come before me and agree that it was correctly decided.

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

Response: As a former public defender I had a duty to provide representation to indigent defendants without regard to any personal views I may or may not have had, within the bounds of the law**.**

a. How did you handle the situation?

Response: My duty was to provide representation within the bounds of the law, without regard to any views I may or may not have had.

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: As a magistrate judge in the Southern District of California, a very busy district, I focus on reading the law itself. There are no law professors whose work I read regularly.

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 particular Federalist Paper.

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

Response: As a magistrate judge in the Southern District of California, I have reached decisions by applying Supreme Court precedents and Ninth Circuit precedents. I have not had occasion where I changed my mind based on a judicial opinion, law review article, or other legal opinion.

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

Response: As a sitting judge and a district judge nominee, it would be inappropriate for me to comment on this issue which is the subject for debate in our courts. If presented with this issue, I would faithfully apply Supreme Court precedents.

45. 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: Under the Second Amendment, the right to keep and bear arms is an individual right regardless of militia service. District of Columbia v. Heller, 554 U.S. 570, 595 (2008). In Heller, the Supreme Court recognized "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635. The Court also recognized the inherent right of self-defense under the Second Amendment, and that a handgun is a "quintessential self-defense weapon." Id. at 628-29. The Court stated that nothing in its opinion should be read to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. at 626-27.

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.

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: Not that I recall.

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: Yes.

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: Not that I recall.

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

Response: I can think of no such cases.

50. Have you ever confessed error to a court?

Response: Not that I recall.

a. If so, please describe the circumstances.

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 have a duty to testify truthfully.

Questions for the Record for Linda Lopez
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"
November 03, 2021

Judge Linda Lopez
Nominee, U.S. District Court for the Southern District of California

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: My judicial philosophy is to carefully look at the limited question or issue before me, consider the facts and apply those facts to Supreme Court and Ninth Circuit precedents. I do so fairly, without impartiality. If I am fortunate enough to be confirmed as a district court judge, I will faithfully apply the same philosophy and methodology.

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

   Response: I do not identify with any particular judicial approach with respect to constitutional interpretation. Supreme Court precedents would dictate when originalism or original public meaning is appropriate.

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

   Response: In construing a statute I would first look to the text of the statute. If the plain language of the text is unambiguous, the analysis would end there.

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

   Response: I do not identify with any particular judicial approach with respect to constitutional interpretation. I view the Constitution as an enduring document that protects our liberties and has since it was founded. The Constitution provides the principles for which our government is based. If I am fortunate enough to be confirmed

as a district judge, I will faithfully interpret the Constitution as directed by Supreme Court and Ninth Circuit precedents.

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

Response: There is no individual Justice whose jurisprudence I admire most.

8. Was Marbury v. Madison correctly decided?

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Marbury v. Madison and agree that it was correctly decided.

9. Was Lochner v. New York correctly decided?

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. My understanding is that much of Lochner was abrogated by West Coast Hotel Co. v. Parrish. 300 U.S. 379 (1937). If confirmed, I would follow binding United States Supreme Court and Ninth Circuit precedents if this issue came before me.

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

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Brown v. Board of Education because the issue of *de jure* racial segregation in public schools is unlikely to come before me and agree that it was correctly decided.

11. Was Bolling v. Sharpe correctly decided?

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Bolling v. Sharpe because the issue of *de jure* racial segregation in public schools is unlikely to come before me and agree that it was correctly decided.

12. Was Cooper v. Aaron correctly decided?

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue.

13. Was Mapp v. Ohio correctly decided?

Response: Please look to my response for Question 12.

14. Was Gideon v. Wainwright correctly decided?

Response: Please look to my response for Question 12.

15. Was Griswold v. Connecticut correctly decided?

Response: Please look to my response for Question 12.

16. Was South Carolina v. Katzenbach correctly decided?

Response: Please look to my response for Question 12.

17. Was Miranda v. Arizona correctly decided?

Response: Please look to my response for Question 12.

18. Was Katzenbach v. Morgan correctly decided?

Response: Please look to my response for Question 12.

19. Was Loving v. Virginia correctly decided?

Response: As a magistrate judge and a nominee for a federal district judge position, I generally refrain from opining whether Supreme Court cases were correctly decided. I do so out of acknowledgement that I am duty-bound to follow all Supreme Court precedents regardless of any views I may or may not have, and to avoid giving the impression that I am prejudging any issue. I make an exception to my general practice with respect to Loving v. Virginia and agree that it was correctly decided.

20. Was Katz v. United States correctly decided?

Response: Please look to my response for Question 12.

21. Was Roe v. Wade correctly decided?

Response: Please look to my response for Question 12.

22. Was Romer v. Evans correctly decided?

Response: Please look to my response for Question 12.

23. Was United States v. Virginia correctly decided?

Response: Please look to my response for Question 12.

24. Was Bush v. Gore correctly decided?

Response: Please look to my response for Question 12.

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

Response: Please look to my response for Question 12.

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

Response: Please look to my response for Question 12.

27. Was Boumediene v. Bush correctly decided?

Response: Please look to my response for Question 12.

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

Response: Please look to my response for Question 12.

29. Was Shelby County v. Holder correctly decided?

Response: Please look to my response for Question 12.

30. Was United States v. Windsor correctly decided?

Response: Please look to my response for Question 12.

31. Was Obergefell v. Hodges correctly decided?

Response: Please look to my response for Question 12.

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: I have been nominated for the position of a district judge not a circuit judge. If confirmed, the issue of reaffirmation of circuit precedent will not be before me.

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 look to my response for Question No. 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: The text governs, and I always start with the text. If the legislative text, viewed in the context of the statute as a whole, is clear and unambiguous, then I do not consider legislative history. If the text is not clear, meaning it is equally susceptible to more than one interpretation, I might consider the following: (1) judicial interpretation of analogous statutory language, (2) the context in which the statute was enacted, (3) grammatical rules and presumptions about usage, (4) Congress's purpose(s) in enacting the statute, and (5) possibly legislative history. If I consider the legislative history, it would be in very limited circumstances, and only to clarify the meaning of the statutory language.

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: No. United States Sentencing Guideline 5H1.10 states that race, sex, national origin, creed, religion, and socio-economic status are not to be considered when imposing a sentence.

Questions from Senator Thom Tillis
for Linda Lopez
Nominee to be United States District Judge for the Southern 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: My understanding of judicial activism is when a judge allows his or her personal views or beliefs to impact the decision-making process. It is never appropriate for a judge to do so.

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

   Response: Impartiality is an expectation for all judges.

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: A judge's duty is to faithfully and impartially interpret and apply the law, without regard to the outcome.

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 would apply Supreme Court precedents, including but not limited to District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. 742 (2010), as well as all Ninth Circuit precedents, including but not limited to Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021).

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: I would closely and faithfully examine, consider, and apply the facts of the case, the statutes or regulations at issue, and any applicable Supreme Court and Ninth Circuit precedents regarding the duties of sheriffs to process handgun purchase permits, including during crises such as the COVID-19 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: As a sitting judge, I follow the process set forth in the binding precedent on this issue. Under Supreme Court and Ninth Circuit precedents, law enforcement officers are entitled to qualified immunity unless (1) "they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (citation omitted).

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

Response: As a sitting judge, it would be inappropriate for me to comment on any personal beliefs I may or may not have regarding the current state of qualified immunity jurisprudence. If confirmed, I would continue to faithfully apply the binding precedent on this issue. See, e.g., District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018).

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

Response: As a sitting judge, it would be inappropriate for me to comment on any personal beliefs I may or may not have regarding the current state of qualified immunity jurisprudence. If confirmed, I would continue to faithfully apply the binding precedent on this issue. See, e.g., District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018).

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: Any thoughts I may or may not have would play no part in the discharge of my duties to faithfully and impartially apply all Supreme Court and Federal Circuit precedents to every matter related to patents that comes before me.

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 sitting judge, and a nominee to the district court bench it would be inappropriate for me to comment on or analyze factual hypotheticals as it could suggest that I am prejudging an issue. If I were fortunate enough to be confirmed, and a similar matter to the hypothetical came before me, I would faithfully apply all Supreme Court and Ninth Circuit precedents in deciding those matters.

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 13(a).

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 13(a).

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 13(a).

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 13(a).

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 13(a).

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 13(a).

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 13(a).

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 13(a).

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 13(a).

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: As a sitting magistrate judge, I have mediated settlements and ruled on discovery disputes in copyright cases.

    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, I have handled discovery disputes and settlement discussions dealing with First Amendment and free speech issues, as well as intellectual property issues, including copyright. I do not believe any of them dealt directly with both intellectual property and 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: The best evidence of Congressional intent is always the plain text of the statute and that is where I would start. If the plain text of the statute is clear and unambiguous, then the analysis ends there. Legislative history may play a role in statutory interpretation only if it might explain the meaning of statutory text that could reasonably be interpreted in more than one way, but legislative history is not a substitute for the text of the statute enacted by Congress.

    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: Interpretive guidance issued by federal agencies is entitled to respect if it is persuasive, but it is not entitled to deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000); Skidmore v. Swift, 323 U.S. 134, 140 (1944).

    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: If that particular legal question came before me as a district court judge, I would consult Supreme Court and Ninth Circuit cases to determine whether any binding precedent exists regarding that issue. I would rely on the clear and unambiguous text of any applicable statute.

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: The role of a judge is to faithfully and impartially apply all existing laws. If fortunate enough to be confirmed, I commit to doing so.

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

Response: If an issue involving the interpretation of a prior judicial opinion that relied on technology that has since changed came before me as a judge, I would consult Supreme Court and Ninth Circuit cases to determine whether any binding precedent exists regarding that issue.