Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Mary Katherine Dimke
Judicial Nominee to the U.S. District Court for the Eastern District of Washington

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

   Response: I am not familiar with the term "super precedent." Currently, as a magistrate judge, I am bound by all Supreme Court and Ninth Circuit precedent. If confirmed as a district judge, I would continue to faithfully apply all binding authority.

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: During my time as a prosecutor and as a magistrate judge, I have never observed a law firm undertake the pro bono prosecution of crimes. Enforcement and prosecution of the laws is traditionally delegated to the Executive Branch. I am not aware of any legal authority permitting law firms to prosecute crimes on a pro bono basis.

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

   Response: I am not familiar with Judge Jackson's comments. I have not used the phrase "living" constitution. I believe the United States Constitution is an enduring document that has protected our liberties for the past 230 years and it provides the foundational principles upon which our government is based. If confirmed as a district judge, I will interpret the Constitution in accordance with the established precedent of the Supreme Court and the Ninth Circuit.

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

   Response: No.

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

   Response: No. Judicial rulings should be based on the law as applied to the facts of the specific case before the court. As a magistrate judge for the past six years, I have worked diligently to provide equal justice under law in every case that comes before me.

6. **Is it ever appropriate for a judge to publicly profess political positions on campaigns and/or candidates?**

Response: Federal judges are bound by the Code of Conduct for United States Judges. Canon 5 generally precludes judges from engaging in any political activity.

7. Is threatening Supreme Court Justices right or wrong?

Response: Threatening a Supreme Court Justice or any judicial officer undermines the rule of law and has the potential to interfere with the impartial administration of justice.

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

Response: The distinction between an "attack" and a criticism would depend upon the specific circumstances, including the actual language used and the context in which the words were uttered. Although I am unaware of any case law distinguishing between an "attack" and criticism, there is case law setting forth what constitutes a threat, which can be the subject of a criminal prosecution.

9. Do you think the Supreme Court should be expanded?

Response: As a sitting magistrate judge and a pending judicial nominee, it is not appropriate for me to provide an opinion on proposals to modify the composition of the Supreme Court. If confirmed as a district judge, I will continue to be bound by Supreme Court precedent regardless of the number of Justices on the Court.

10. Should a defendant's personal characteristics influence the punishment he or she receives?

Response: Judges are required to impose sentence in accordance with the factors set forth in 18 U.S.C. § 3553(a), which include "the nature and circumstance of the offense and the history and the characteristics of the defendant." However, the guidelines provide that a defendant's race, sex, national origin, creed, religion, and socio-economic status should not be considered as they "are not relevant in the determination of a sentence." U.S.S.G. Manual § 5H1.10 (police statement).

11. What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?

Response: Federal Rule of Civil Procedure 65 governs injunctions, which are an equitable remedy. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 129 S. Ct. 365, 376 (2008). A plaintiff seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood of suffering

irreparable harm in the absence of injunctive relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id*. at 375-77. I am aware that some judges have expressed skepticism about the role of nationwide injunctions. *See, e.g*., *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-25 n.1 (2018) (Thomas, J., concurring) (expressing skepticism about whether such injunctions are within the authority of a district court but observing that "[a]n injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide."); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (noting that the Supreme Court has not yet taken up "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions."). The Supreme Court has held that, in a class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 99 S. Ct. 2545, 2558 (1979). However, more recently, the Court has observed that only where a constitutional violation has been shown to be "systemwide" should the corresponding injunctive relief be given that scope. *See Lewis v. Casey*, 116 S. Ct. 2174, 2184 (1996).

The Ninth Circuit has stated that "[a]lthough there is no bar against … nationwide relief in federal district court, … such broad relief must be necessary to give the prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (internal quotations omitted). The Ninth Circuit has further stated that "nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *Id*. at 583 (internal quotations omitted). If presented with this question, I would apply Supreme Court and Ninth Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: In *District of Columbia v. Heller*, the Supreme Court declined to articulate the level of scrutiny applicable to a Second Amendment challenge because the regulations at issue would fail to meet any level of scrutiny. 128 S. Ct. 2783, 2817-22 (2008). Subsequent to *Heller*, the Ninth Circuit developed a two-step framework to review Second Amendment challenges. *See Young v. Hawaii*, 992 F.3d 765, 783-84 (9th Cir. 2021). First, the Court asks if the challenged law affects conduct that is protected by the Second Amendment, basing that determination on the "historical understanding of the scope of the right." *Id*. at 783. A regulation does not burden conduct protected by the Second Amendment if the record contains evidence that the subject of the regulation has been the subject of longstanding, accepted regulation. *Id.* Similarly, the Court may uphold a law without further analysis if it falls within the zone of presumptively lawful regulatory measures that *Heller* identified. *Id.* at 783-84. If the challenged restriction

burdens conduct protected by the Second Amendment—either because "the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful," the Court moves to the second step of the analysis and determines the appropriate level of scrutiny. *Id.* at 784. According to the Ninth Circuit, *Heller* requires one of three levels of scrutiny: "If a regulation amounts to a destruction of the Second Amendment right, it is unconstitutional under any level of scrutiny; a law that implicates the core of the Second Amendment right and severely burdens that right receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, [the Court applies] intermediate scrutiny." *Id.* If confirmed, I will faithfully apply all binding Supreme Court and Ninth Circuit authority.

13. Is gun violence a public-health crisis?

Response: Gun violence is a social challenge to be addressed by policymakers.

14. Is racism a public-health crisis?

Response: Racism is a social challenge to be addressed by policymakers. I would also note that racism has no place in any court of law and everyday I strive to ensure that every litigant who comes before me is treated fairly and impartially and to deliver equal justice under law.

15. What is implicit bias?

Response: It is my understanding that implicit bias refers to the concept that all people have subconscious views or attitudes about others of which they may not be aware.

16. Is the federal judiciary affected by implicit bias?

Response: I do not possess sufficient knowledge to determine whether the federal judiciary as a whole is affected by implicit bias. For the last six years as a magistrate judge, I have worked diligently to treat every litigant fairly and impartially and to deliver equal justice under law. If confirmed as a district judge, I would continue to do so.

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

Response: I am not aware of controlling Supreme Court or Ninth Circuit authority addressing this question. As a sitting magistrate judge and a nominee, it would not be appropriate for me to opine on this area of law.

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

Response: The Supreme Court recognized a fundamental right and liberty interest protected by the Due Process Clause against government interference with one's right to direct the education and upbringing of one's child. *See Meyer v. Nebraska*, 43 S. Ct. 625, 626-28 (1923) (finding statute criminalizing the teaching of German to one's child was a violation of liberty protected by due process to direct the education of one's child); *see Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 45 S. Ct. 571, 573-74 (1925) (finding that compulsory education act requiring children to attend public schools violated the liberty protected by due process to direct the type of education of one's child).

19. Do Blaine Amendments violate the Constitution?

Response: The Blaine Amendments are regulations that restrict the use of public funds for religious educational institutions. If confirmed, I will follow all Supreme Court and Ninth Circuit precedent, including those precedents involving the Free Exercise Clause, such as *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

20. 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.

21. 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.

22. **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.

23. 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.

24. 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.

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

Response: On February 1, 2021, the United States Senators for Washington State announced a vacancy for a United States District Judge position. On February 27, 2021, I submitted an application to the Judicial Merit Selection Committee, which was established by Senators Patty Murray and Maria Cantwell. On March 23, 2021, I interviewed with the Judicial Merit Selection Committee. I was advised that my name was forwarded by the Committee to the Senators' Offices. On April 19, I interviewed with representatives of Senator Murray's Office. On April 23, 2021, I interviewed with representatives of Senator Cantwell's Office. On May 20, 2021, I interviewed with Senator Murray. On May 21, 2021, Senator Murray's Office informed me that the Senators were forwarding my name to the White House Counsel's Office. On May 26, 2021, I interviewed with attorneys from the White House Counsel's Office. After that, I was in contact with the officials from the Office of Legal Policy at the Department of Justice. On August 5, 2021, my nomination was forwarded to the Senate.

26. 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.

27. 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: In February of 2021, I was contacted by an individual located in Washington State who indicated he was working with the American Constitution Society. During the conversation, he provided general information about how the judicial nomination process works. He also notified me of a webinar sponsored by the American Constitution Society, Alliance for Justice, and other entities for individuals interested in potentially applying for judicial positions. On February 24, 2021, I attended the webinar virtually, which involved a panel presentation describing the process involved in judicial appointments. I observed the presentation, but I did not interact with or speak with any individuals. At the time, I was preparing an application for the position for which I have been nominated but had not yet submitted it.

28. 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.

29. 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.

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

Response: I was interviewed by White House Counsel's Office on May 26, 2021. Shortly thereafter, I was informed that my application was advanced to the vetting process. On or about August 5, 2021, I was informed of my nomination. I have had additional communications with White House Counsel's Office and the Department of Justice Office of Legal Policy since that time.

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

Response: On October 27, 2021, the Department of Justice Office of Legal Policy forwarded these questions to me. I reviewed the questions, conducted legal research as needed, and drafted my responses. I shared my responses with the Department of Justice Office of Legal Policy, which provided limited feedback that I considered. I then submitted my responses to the Committee. The answers submitted are my own.

Senator Marsha Blackburn
Questions for the Record to Mary Dimke
Nominee for the Eastern District of Washington

1. **How would you describe your judicial philosophy? Would you describe yourself as an originalist?**

   Response: For the last six years as a magistrate judge, my approach has been to listen to the parties' arguments with an open mind, to work diligently to understand the applicable legal landscape, and to apply the law to the facts and record before me in an impartial and unbiased manner. I work hard to be well prepared and I endeavor to issue opinions and rulings promptly in a way that is clear and understandable to the parties and to the public. Because such terminology can have differing meanings, I do not use a specific label to describe my philosophy. I believe that the text of any statute must be construed according to its plain meaning at the time it was enacted. I believe that original public meaning is an important consideration in interpreting the Constitution. If confirmed, I would follow Supreme Court and Ninth Circuit precent and follow the interpretative method dictated by such precedent.

2. **Is it ever proper for judges to indulge their own policy preferences in determining what the law means?**

   Response: No. A judge is duty bound to make decisions based on the relevant law and the facts and record before her in an impartial and unbiased manner. Any policy preference is irrelevant when interpreting and applying the law.

Nomination of Mary Katherine Dimke
to be United States District Judge for the Eastern District of Washington Questions for the Record
Submitted October 27, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

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

   Response: As a sitting magistrate judge and as a nominee, it would generally be inappropriate for me to comment on whether any Supreme Court precedent was correctly decided. If confirmed, I will faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms and that the right is not limited to groups such as a militia. 554 U.S. 570, 574-627 (2008). Subsequently in *McDonald v. City of Chicago*, the Supreme Court held that the right to keep and bear arms is applicable to the states. 561 U.S. 742, 759-80 (2010).

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

   Response: In *Tandon v. Newsom*, the Supreme Court found that religious practitioners were entitled to injunctive relief pending appeal on their claim that California's COVID regulations violated the Free Exercise Clause. 141 S. Ct. 1294, 1296-98 (2021). The Court held that governmental restrictions are not neutral and generally applicable,

triggering strict scrutiny review under the Free Exercise Clause, when the restriction treats any comparable secular activity more favorably than a religious activity. *Id*. at 1296. The Court determined that comparability should be evaluated by the asserted government interest that justifies the regulation, here, the risk various activities pose, not the reasons why people gather. *Id*. Finally, the Court found the government failed to demonstrate that less restrictive measures were available to meet the public health needs because the government permitted other activities to proceed with precautions and it did not show that the religious exercise at issue was more dangerous than those activities even when the same precautions were applied. *Id*. at 1296-97.

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

Response: In *Brnovich v. Democratic National Committee*, the Supreme Court held that two state election regulations which governed how ballots are collected and counted did not violate Section 2 of the Voting Rights Act of 1965 (VRA) and did not have a racially discriminatory purpose. 141 S. Ct. 2321, 2336-50 (2021). The Court declined to announce a test to govern Section 2 challenges to rules that specify the time, place, and manner for casting ballots, instead opting to identify certain guideposts which would be evaluated under the totality of the circumstances presented. *Id*. at 2337-41.

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

In *Jennings v. Rodriguez*, the Supreme Court held that aliens detained pursuant to three provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), are not entitled to periodic bond hearings. 138 S. Ct. 830, 841-52 (2018). The Court concluded that the Ninth Circuit incorrectly used the canon of constitutional avoidance to read a limit into the provisions. *Id*. Specifically, the Court held that the provisions at issue could not plausibly be interpreted as implicitly placing a six-month limit on detention or requiring periodic bond hearings because the statutory language mandated detention for a specified period. *Id*. at 842-48.

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

Response: I am aware that in *Gonzales v. Raich*, the Supreme Court held that congressional power under the Commerce Clause extended to the criminalization of the cultivation and use of marijuana even if state law permitted it. 125 S. Ct. 2195, 2201-15 (2005). In general, the question of whether the Controlled Substances Act preempts any state or local law purporting to legalize any controlled substance is an issue that could

come before me as a sitting magistrate judge. It would not be appropriate for me to opine on this area of law.

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

Response: As a practicing attorney, I did not have the occasion to participate in arbitrations. Where parties agree to arbitration, it is my understanding that it can be a useful tool to allow the parties to achieve a more efficient and less costly resolution of their disputes. As a magistrate judge, I have been called upon to interpret and rule on matters related to arbitration provisions. Accordingly, it would not be appropriate for me to express any opinion on the use of arbitration as a litigation alternative. If confirmed, I would apply all Supreme Court and Ninth Circuit precedent and all relevant law, including the Federal Arbitration Act, to the record before me.

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

Response: On October 27, 2021, the Department of Justice Office of Legal Policy forwarded these questions to me. I reviewed the questions, conducted legal research as needed, and drafted my responses. I shared my responses with the Department of Justice Office of Legal Policy, which provided limited feedback that I considered. I then submitted my responses to the Committee. The answers submitted are my own.

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

Response: No other individual assisted with writing or drafting my answers.

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

Questions for the Record for Mary Katherine Dimke, Nominee for the Eastern District of Washington

I. Directions

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

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

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

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

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

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

II. Questions

1. **In *United States v. Adams*, you released a defendant who was "alleged to have sexually abused her child, permitted her boyfriend to sexually abuse her child and also produced, distributed, and received child pornography, including images of her child being sexually abused." The district court almost immediately reversed your release order, finding that the defendant was a danger to the community, specifically young minor victims. The Ninth Circuit affirmed.**

a. Why did you believe that this defendant, who had allegedly engaged in child abuse and producing child pornography, was not a danger to the community?

Response: The Bail Reform Act requires that a judge make an individualized determination and evaluate the following four factors outlined in 18 U.S.C. § 3142(g) to determine whether there are conditions of release that would reasonably assure a defendant's future appearance in court and the safety of the community: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger the defendant would present to the community if released. In analyzing the factors, I acknowledged the incredible seriousness of the nature and circumstances of the allegations and the weight of the evidence. I found that the defendant's lack of criminal history and stringent release plan, which included GPS monitoring and home confinement to a residence where access to children was precluded, in combination with the fact that her codefendant/boyfriend had been detained and the victim had been removed from her custody, provided sufficient protection to the community pending the trial in the underlying matter. The United States requested a stay of the release order to appeal the decision to the district court, which I granted.

b. Explain your understanding of why your decision to release this dangerous defendant was reversed.

Response: It is my understanding that the District Judge determined that the nature of the allegations warranted detention and that the proposed release plan did not overcome the presumption of detention because it did not eliminate all risk that the defendant would come into contact with children.

c. If confirmed, will you take a more cautious approach to avoid releasing child sex predators, and those who collect child pornography, into the community?

Response: As required by the Bail Reform Act, 18 U.S.C. § 3142, I will make an individualized assessment to determine whether there are conditions of release that would reasonably assure a defendant's appearance at future court hearings and the safety of the community. In my six years as a magistrate judge, I have handled hundreds of detention hearings. I have been reversed for releasing a defendant pending trial on only one occasion.

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

Response: Yes. The Supreme Court has identified limits pursuant to the First Amendment as to what government may impose or require of private organizations or small businesses

operated by observant owners. If confirmed, I will follow Supreme Court and Ninth Circuit precedent in all cases, including those involving religious liberties, such as *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); and *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014). Moreover, Congress has enacted legislation establishing limits as to what burdens federal or state officials can impose on such entities. The Religious Freedom Restoration Act, which applies to the federal government, and the Religious Land Use and Institutionalized Persons Act, which applies to state governments, impose strict scrutiny on any restriction placing a substantial burden on a person's exercise of religion even if the burden is the result of a generally applicable rule.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court enjoined the governor's executive order which restricted occupancy limits on attendance at religious events in certain zones, finding that applicants demonstrated a likelihood of success on the merits of their claim, that they would suffer irreparable harm if the injunction was not granted, and that granting the injunction was not against the public interest. 141 S. Ct. 63, 66-68 (2020). As to the likelihood of success on the merits, the Court observed that the executive order likely violated the Free Exercise Clause because the regulations treated religious entities more harshly than comparable secular entities. *Id*. at 67.

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

Response: In *Tandon v. Newsom*, the Supreme Court found that religious practitioners were entitled to injunctive relief pending appeal on their claim that California's COVID regulations violated the Free Exercise Clause. 141 S. Ct. 1294, 1296-98 (2021). The Court held that governmental restrictions are not neutral and generally applicable, triggering strict scrutiny review under the Free Exercise Clause, when the restriction treats any comparable secular activity more favorably than a religious activity. *Id*. at 1296. The Court determined that comparability should be evaluated by the asserted government interest that justifies the regulation, here, the risk various activities pose, not the reasons why people gather. *Id*. Finally, the Court found the government failed to demonstrate that less restrictive measures were available to meet the public health needs because the government permitted other activities to proceed with precautions and it did not show that

the religious exercise at issue was more dangerous than those activities even when the same precautions were applied. *Id*. at 1296-97.

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

Response: Yes.

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

Response: Article II, Section 3 of the Constitution requires that the President "take Care that the Laws be faithfully executed." Accordingly, the Executive Branch has a duty to faithfully execute and enforce federal laws. However, in our system of government, in fulfilling that duty, the Executive Branch generally is granted broad discretion with respect to enforcement decisions. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) (recognizing that decisions whether to prosecute are ill-suited to judicial review).

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

Response: Prosecutorial discretion generally refers to the decisions of a prosecuting agency as to how to utilize its resources and set its enforcement priorities, including determining whether to pursue charges, which charges to pursue, and how to resolve a particular matter. According to the Supreme Court, "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985).

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

Response: For the last six years as a magistrate judge, my approach has been to listen to the parties' arguments with an open mind, to work diligently to understand the applicable legal landscape, and to apply the law to the facts and record before me in an impartial and unbiased manner. I work hard to be well prepared and I endeavor to issue opinions and rulings promptly in a way that is clear and understandable to the parties and to the public. As to matters of constitutional or statutory interpretation, I do not use a specific label to describe my philosophy. I believe that the text of any statute must be construed according to its plain meaning at the time it was enacted. I believe that original public meaning is an

important consideration in interpreting the Constitution. If confirmed, I would follow Supreme Court and Ninth Circuit precent and follow the interpretative method dictated by such precedent. I have not sufficiently studied the philosophies of the individual Supreme Court Justices to identify with any particular Justice.

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

Response: Although subject to differing views, I understand the interpretative method known as "originalism" to be a legal philosophy in which the words of a legal instrument are to be given the meanings they had when they were adopted.

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

Response: Although subject to differing views, I understand the term "living constitutionalism" to be a legal philosophy in which the Constitution should be interpreted and applied in accordance with changing circumstances and changing social values.

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

Response: If confirmed as a district judge, I will continue to be bound by Supreme Court and Ninth Circuit precedent as to the interpretative method to use when interpreting the Constitution. The Supreme Court has looked to original public meaning in interpreting certain constitutional provisions, such as the Second Amendment, the Establishment Clause, and the Confrontation Clause. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court analyzed the text of the Second Amendment by relying on historical sources to determine the ordinary meaning at the time of enactment and considering how the amendment was interpreted immediately after enactment.

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

Response: As noted in the response to Question No. 11, the Supreme Court indicated in *District of Columbia v. Heller* that "the public understanding of a legal text in the period after its enactment or ratification … is a critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008). However, it is my understanding that in rare occasions, the Supreme Court has recognized that the core principles embodied in the Constitution do not change, however, their application may be impacted by contemporary values. For example, the Supreme Court has noted that "to determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.' " *Graham v. Florida*, 560 U.S. 48,

58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " *Graham*, 560 U.S. at 58 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)).

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

Response: No, I do not believe that the meaning of the text in the Constitution changes over time absent changes through the Article V amendment process. However, I believe the Constitution is an enduring document that has protected our liberties for the past 230 years and it provides the foundational principles upon which our government is based. If confirmed as a district judge, I will interpret the Constitution consistent with the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting magistrate judge and a judicial nominee, it is not appropriate for me to provide an opinion on proposals to modify the composition of the Supreme Court. If confirmed as a district judge, I will continue to be bound by Supreme Court precedent regardless of the number of Justices on the Court.

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

Response: Yes. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms. 554 U.S. 570, 574-627 (2008). Subsequently in *McDonald v. City of Chicago*, the Supreme Court held that the right to keep and bear arms is applicable to the states. 561 U.S. 742, 759-80 (2010).

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

Response: No. In *District of Columbia v. Heller*, the Supreme Court observed that the Second Amendment's right to keep and bear arms is not unlimited akin to how the First Amendment's right to free speech is not unlimited. 554 U.S. 570, 595 (2008). I am not aware of any Supreme Court or Ninth Circuit authority holding that the Second Amendment right to bear arms receives less protection than the other individual rights specifically enumerated in the Constitution.

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

Response: No. I am not aware of any authority indicating that the right to own a firearm receives lesser protection than the right to vote.

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

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

Response: To date, I have not been involved in determining the human resources programs or trainings provided to court employees. In my experience, the training provided by the court has been consistent with federal law, and I expect they will continue to comply with the law.

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

Response: Please see response to Question No. 18a.

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

Response: Please see response to Question No. 18a.

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

Response: Please see response to Question No. 18a.

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

Response: Please see response to Question No. 18a.

20. Is the criminal justice system systemically racist?

Response: I am aware of studies indicating that racial disparities exist within the criminal justice system, particularly with respect to certain sentencing factors, which the Senate Judiciary Committee has worked diligently to address. These are important policy matters for legislators. Unlike legislative bodies that address policy matters, as a magistrate judge, I am focused on the cases that come before me. I impartially apply the law to the legal disputes that arise before me and consider any matters alleging discrimination on an individualized basis consistent with Supreme Court and Ninth Circuit authority.

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

Response: Pursuant to the Appointments Clause of the Constitution, the President is delegated the authority, with the advice and consent of the Senate, to make appointments to political positions. U.S. Constitution, Art. II, §2, cl. 2. As a judicial nominee, it is not appropriate for me to opine or comment on the constitutionality of any particular action relating to political appointments.

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

Response: Under current federal law, Congress has authorized the death penalty as an appropriate punishment for certain crimes. *See* 18 U.S.C. § 3591. The Supreme Court has held the death penalty is constitutional in certain circumstances. I am not aware of any authority which would permit the President to unilaterally abolish the death penalty.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, the Supreme Court vacated the stay of the district court's grant of summary judgment in favor of the Alabama Association of Realtors, in which the district court found that the Center for Disease Control and Prevention (CDC) lacked statutory authority to impose a nationwide eviction moratorium. 141 S. Ct. 2485, 2486-90 (2021). The Supreme Court found that the applicants (plaintiffs) demonstrated a substantial likelihood of success on the merits and that the equities did not justify depriving them of the district court's judgment in their favor. *Id*.

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

Response: Whether an act constitutes a violent crime turns on specific statutory definitions pursuant to various federal criminal laws. As a sitting magistrate judge and nominee, it would be inappropriate for me to opine on whether the factual scenario proposed meets any of those definitions.

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

Response: In *Schwake v. Arizona Board of Regents*, the Ninth Circuit held that pursuant to Title IX, a college student accused of sexual misconduct is entitled to a disciplinary process free from sexual discrimination. 967 F.3d 940, 946-47 (9th Cir. 2020) (discussing various circuit authority reaching same conclusion).

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

Response: In *Carpenter v. United States*, the Supreme Court held that an individual maintains a legitimate expectation of privacy in the records of his physical movements, such as historical cell site data, and obtaining such information from a third-party wireless carrier was the product of a search within the meaning of the Fourth Amendment. 138 S. Ct. 2206, 2212-21 (2018). The Court rejected the government's argument that the historical cell site data was obtainable without a warrant pursuant to the third-party doctrine, under which a person has no legitimate expectation of privacy as to information provided to third parties. *Id*. at 2217-20. The Court identified several differences between the historical cell site data at issue and the types of data that is traditionally covered by the doctrine, such as bank record and telephone toll records. *Id*. The Court summarized that "[i]n light of the deeply revealing nature of [historical cell site data], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." *Id*. at 2223.

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

Response: Individuals have a constitutionally protected privacy interest in financial documents maintained in their homes or other zones of privacy protected by the Fourth Amendment. Pursuant to the third-party doctrine, the Supreme Court has held that a person has no legitimate expectation of privacy, warranting constitutional protection, in information he voluntarily turns over to third parties. *See United States v. Miller*, 96 S. Ct. 1619, 1622-26 (1976); *Smith v. Maryland*, 99 S. Ct. 2577, 2579-83 (1979). Specifically, in *Miller*, the Supreme Court determined that an individual did not have a reasonable expectation of privacy in various banking documents in the possession of a bank, such as copies of checks, deposit slips, financial and monthly statements, maintained pursuant to the Bank Secrecy Act. *Miller,* 96 S. Ct. at 1622-23. The Court reasoned that there was no intrusion into area in which defendant had a protected Fourth Amendment interest. *Id.* Moreover, the Court found the documents were not the defendant's private papers as he could not assert ownership nor possession, as they were business records of the bank. *Id.* at 1623.

In the Right to Privacy of 1978, Congress has legislated protections to make private depositors' bank records. *See* 12 U.S.C. §3401, et. seq. The statute requires that the government seek court process to obtain a depositors' bank records.

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

Response: Please see response to Question No. 27.

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

Response: In *Fulton v. City of Philadelphia*, the Supreme Court held that the city's refusal to contract with Catholic Social Services to provide foster care, unless it agreed to permit same-sex couples to serve as foster parents, violated the Free Exercise Clause. 141 S. Ct. 1868, 1876-78 (2021). The Court concluded the city's non-discrimination requirement was not generally applicable because it permitted discretionary exceptions and was thus subject to strict scrutiny analysis. *Id*. at 1877-80. The policy failed strict scrutiny analysis because the city offered no compelling reason why it denied an exception to Catholic Social Services while making them available to other providers. *Id*. at 1881-82.

Senator Josh Hawley
Questions for the Record

Judge Mary Katherine Dimke
Nominee, U.S. District Court for the Eastern District of Washington

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. It is a judge's duty and responsibility to faithfully adhere to the law regardless of whether he likes the outcome. A judge's personal views should not have a role in his decision making.

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

    Response: Please see response to Question No. 1a.

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

Response: Abstention is a doctrine where courts may or in some cases must refuse to hear a case if hearing the case would potentially intrude upon the power of another court. There are several general kinds of abstention.

Under *Pullman* abstention, the federal courts should not adjudicate the constitutionality of state statutes that are open to interpretation until the state courts have been afforded a reasonable opportunity to consider them. Three grounds must be present: (1) the case presents both state grounds and federal constitutional grounds for relief; (2) the proper resolution of the state ground for the decision is unclear; and (3) the disposition of the state ground could obviate the adjudication of the federal constitutional ground. *See generally Railroad Comm'r of Texas v. Pullman*, *Co*., 61 S. Ct. 643 (1941).

Under *Younger* abstention, federal courts are barred from hearing civil rights tort claims brought by a person who is being prosecuted for a matter arising from that claim in state court, unless the prosecution is brought in bad faith, the prosecution is part of some pattern of harassment against the individual, or the law being enforced is flagrantly unconstitutional. *See generally Younger v. Harris*, 401 U.S. 37 (1971).

The *Burford* abstention doctrine allows a federal court to abstain in a complex administrative process if (1) the case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in

the case then at bar, or (2) the adjudication of the case in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See generally Quackenbush v. Allstate Ins. Co*., 517 U.S. 706 (1996); *Burford v. Sun Oil, Co*., 319 U.S. 315 (1943). There is a strong presumption that federal courts not apply *Burford* abstention.

Thibodaux abstention, which is related to *Burford* abstention, may occur when a federal court sitting in diversity jurisdiction chooses to allow a state to decide issues of state law that are of great public importance to that state, to the extent that a federal determination would infringe on state sovereignty. *See generally Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

Colorado River abstention arises where there is parallel litigation, particularly where federal and state court proceedings are simultaneously being carried out to determine the rights of parties with respect to the same questions of law. It is discretionary and based on avoidance of wasteful duplication of litigation. Generally, courts consider the following factors: the order in which the courts assumed jurisdiction over property; the order in which the courts assumed jurisdiction over the parties; the relative inconvenience of the forum; the relative progress of the two actions; the desire to avoid piecemeal litigation; whether federal law provides the rule of decision; whether the state court will adequately protect the rights of the parties; and whether the federal filing was vexatious or reactive. *See generally Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

Under the *Rooker-Feldman* doctrine, lower federal courts should not sit in direct review of state court decisions unless Congress has specifically authorized such relief, such as that provided by 28 U.S.C. § 2254 (federal review of habeas claims arising from state convictions). *See generally Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

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

Response: No.

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

Response: Not applicable.

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

Response: If confirmed as a district judge, I will continue to be bound by Supreme Court and Ninth Circuit precedent as to the interpretative method to use when interpreting the

Constitution. The Supreme Court has looked to original public meaning in interpreting certain constitutional provisions, such as the Second Amendment, the Establishment Clause, and the Confrontation Clause. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court analyzed the text of the Second Amendment by relying on historical sources to determine the ordinary meaning at the time of enactment and considering how the amendment was interpreted immediately after enactment.

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

Response: When interpreting a statute, I begin with the statutory text. If the text is clear and unambiguous, the inquiry ends. If the text is ambiguous, I would look to Supreme Court and Ninth Circuit authority interpreting the provision. If no binding precedent exists, I would utilize other interpretive tools such as considering related or analogous precedents from the Supreme Court and the Ninth Circuit, persuasive authority from other Circuits, and precedents discussing the canons of statutory construction. Absent those sources, I may consider legislative history, but only in an effort to resolve an ambiguity in the statutory language. According to the Supreme Court, legislative history should be used to interpret only an ambiguous statute, not to create an ambiguity in clear statutory language. *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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 Court has made clear that some types of legislative history are more probative of congressional intent than others. *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011); *NLRB v. SW Gen., Inc*., 137 S. Ct. 929, 942-43 (2017). Generally, the reports of congressional committees that considered the proposed legislation and recommended its enactment are considered the best source for determining the intent behind a law. Other documents generated prior to enactment, such as statements made on the floor of Congress in the legislative debate, statements or testimony at committee hearings, and earlier or alternative version of the bills may be considered but are less reliable. Statements made and reports written after enactment are usually found to be the least persuasive and generally are not considered part of the legislative history.

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

Response: The Constitution is a domestic document and should generally be considered within the bounds of domestic law. There are some limited exceptions, for example, the Supreme Court has looked to English common law for context regarding the meaning of the law at the time of our country's founding. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (considering English law when determining the meaning of the terms used in the Second Amendment).

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

   Response: In *Bucklew v. Precythe*, the Supreme Court noted that the Constitution affords a "measurement of deference to a State's choice of execution procedures," and "the Eighth Amendment does not come into play unless the risk of pain associated with the State's method is 'substantial when compared to a known and available alternative.'" 139 S. Ct. 1112, 1125 (2019) (quoting *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008); *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015)). The Court affirmed that to establish a violation of the Eighth Amendment's prohibition on cruel and unusual punishment, a prisoner must first identify a feasible and readily implemented alternative procedure that would "significantly reduce a substantial risk of severe pain." *Bucklew*, 139 S. Ct. at 1125.

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. The Supreme Court held that to establish that a State's chosen method of execution superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt it without a legitimate penological reason. *See Glossip v. Gross*, 135 S. Ct. 2726, 2732-38 (2015); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

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

   Response: I am not aware of any authority from the Supreme Court or the Ninth Circuit recognizing a constitutional right to DNA analysis for habeas petitioners. In *District Attorney's Office for Third Judicial Dist. v. Osborne*, the Supreme Court held there is no Due Process right to DNA testing. 129 S. Ct. 2308, 2316-23 (2009).

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. If confirmed, I will faithfully follow Supreme Court and Ninth Circuit precedent.

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: As to a First Amendment claim, the Supreme Court has determined that the Free Exercise Clause does not prohibit governments from burdening religious practices through generally applicable laws. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2225-26 (1993); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 110 S. Ct. 1595, 1598-1606 (1990). A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge under the Free Exercise Clause. *See Smith*, 110 S. Ct. at 1598-1606.

The Court has identified ways in which purportedly neutral and generally applicable laws may not qualify under *Smith* for rational basis review. State laws that discriminate against a religious group or religious belief are subject to strict scrutiny review. For example, in *Tandon v. Newsom*, the Court held that governmental restrictions are not neutral and generally applicable, triggering strict scrutiny review, when the restriction treats any comparable secular activity more favorably than a religious activity. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Court determined that comparability should be evaluated by the risk various activities pose, not the reasons why people gather. *Id*. In *Fulton v. City of Philadelphia*, the Supreme Court held that "the [g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." 141 S. Ct. 1868, 1877 (2021). The Court concluded that a law that permits for discretionary exemptions is not generally applicable, particularly when "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, the Supreme Court found that the state discriminated on the basis of religion by showing "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the] objection," and treating individuals differently who objected based on conscience. 138 S. Ct. 1719, 1729 (2018).

As to potential statutory claims, the Religious Freedom Restoration Act, which provides for strict scrutiny review of facially neutral laws that place a substantial burden on free exercise, applies only to federal laws; it does not apply to state laws. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006). It would not be applicable in this instance. However, if the state action was subject to the Religious Land Use and Institutionalized Person Act (RLUIPA), the Act provides a higher level of scrutiny than constitutional claims as it relates to neutral and generally appliable state action that burdens religious exercise. *See* 42 U.S.C. §§ 2000cc, et. seq. Under RLUIPA, a state government may not impose a substantial burden on religious exercise even if the burden results from a regulation of general applicability, unless the government meets strict scrutiny. *See* 42 U.S.C. §§ 2000cc(a); 2000cc-1(a). To do so, the regulation must (1) be in furtherance of a compelling governmental interest, and (2)

be the least restrictive means of furthering that interest. *See* 42 U.S.C. §§ 2000cc(a); 2000cc-1(a).

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 response to Question No. 10.

Additionally, state laws that discriminate against a religious group or religious belief are subject to strict scrutiny review, which requires that the state demonstrate (1) a compelling governmental interest in the regulation, and that (2) the regulation is narrowly tailored to the meet the needs of the compelling interest. There must be no less restrictive alternative available to meet the compelling need identified. The Supreme Court has adjudicated numerous cases involving claims of state action discrimination against religious groups or beliefs. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 113 S. Ct. 2217 (1993). If confirmed, I would continue to faithfully follow Supreme Court and Ninth Circuit precedent, including those related to the Free Exercise Clause.

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: The Supreme Court has rejected arguments related to the practical difficulty in ascertaining the sincerity of one's beliefs. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 717 (2014). In so doing, the Supreme Court noted Congress' confidence in the lower court's ability to weed out insincere claims related to RLUIPA cases. *Id*. at 717-18 n. 29 (citing *Abate v. Walton*, 1996 WL 5320, * 5 (9th Cir. Jan. 5, 1996)). The Supreme Court has drawn a distinction between sincerity and reasonableness, noting that "it is not for us to say that their religious beliefs are mistaken or insubstantial…, our 'narrow function … in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Id*. at 725; *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection.").

In Free Exercise cases brought by prisoners, the Ninth Circuit employs a "sincerity test," under which a prisoner's religious claim implicates his Free Exercise rights if the belief is (1) sincerely held, and (2) rooted in religious belief rather than in secular philosophical concerns. *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994).

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: In *Lochner v. New York*, the Supreme Court held that New York's limitations on bakers' working hours were unconstitutional. 198 U.S. 45, 53-64 (1905). In subsequent cases, the Supreme Court abrogated *Lochner* and now applies a lesser standard of review when evaluating restrictions on economic activity. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-400 (1937); *Williamson v. Lee Optimal of Oklahoma, Inc.*, 348 U.S. 483, 487-91 (1955).

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

Response: Because *Lochner v. New York* was abrogated by subsequent Supreme Court authority, I would not apply it.

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: I am not familiar with Justice Scalia's statement. However, a judge is duty bound to adhere to the law regardless of whether the judge agrees with the outcome.

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 am not familiar with Chief Justice Roberts' statement. However, I understand it to mean that the courts are responsible for interpreting the law and applying it to the record before them and the courts are not responsible for legislating or creating the law.

b. Do you agree or disagree with this statement?

Response: I generally 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 am not familiar with Justice Holmes' statement.

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

Response: A judge is duty bound to adhere to the law. However, while adhering to the law, a judge should also seek to provide equal justice under law to those that come before the court.

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: In *Trump v. Hawaii*, the Supreme Court concluded that the President's Proclamation suspending the entry of aliens from eight nations did not violate the Immigration and Nationality Act or the Establishment Clause. 138 S. Ct. 2392, 2407-23 (2018). The Court observed that the Executive is afforded substantial deference in conducting foreign affairs and the exclusion of aliens, including pursuant to 8 U.S.C. § 1182(f), which provides that the President has authority to restrict entry of aliens in circumstances where he finds that their entry "would be detrimental to the interests of the United States." *Id*. at 2407-21. In so ruling, the Supreme Court clarified that *Korematsu v. United States*, 323 U.S. 214 (1944), had long ago been abrogated by subsequent precedent. *Id*. at 2423.

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

Response: The Supreme Court determines whether its opinions are no longer good law. As a sitting magistrate judge, I follow all precedent until the Supreme Court declares its decisions have been abrogated or are no longer good law.

a. If so, what are they?

Response: None.

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

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and

certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: As a sitting magistrate judge, and a judicial nominee, it is generally not appropriate for me to comment on the correctness of any particular Supreme Court opinion. If confirmed, I will faithfully follow all Supreme Court and Ninth Circuit precedent.

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

Response: Please see response to Question No. 19a.

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: I have not encountered this issue. If confirmed, I will follow all Supreme Court and Ninth Circuit authority, including that related to antitrust law.

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

Response: My understanding of the phrase "federal common law" refers to the body of law that is determined by the federal courts, as opposed to determined by legislation.

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

Response: Because state courts may interpret their state constitutional provisions differently than the federal constitutional provisions, I would begin the analysis by researching the relevant state court precedent interpreting the state constitutional provision at issue.

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

Response: Please see response to Question No. 21a.

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

Response: Yes. The states may provide greater protections through their constitutional provisions.

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

Response: As a sitting magistrate judge bound by the Code of Conduct for United States Judges and as a nominee, it is generally not appropriate to comment on whether any binding Supreme Court precedent was correctly decided. I am bound to apply all such precedent regardless of any personal belief I have about the decisions. However, there are certain Supreme Court decisions that are so widely accepted and unlikely to come before any court that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Brown v. Board of Education*, 347 U.S. 483 (1954), is such an exception and was correctly decided. If confirmed, I would continue to faithfully apply all Supreme Court and Ninth Circuit precedent.

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

Response: Federal Rule of Civil Procedure 65 governs injunctions, which are an equitable remedy. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 129 S. Ct. 365, 376 (2008). A plaintiff seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm in the absence of injunctive relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id*. at 375-77. I am aware that some judges have expressed skepticism about the role of nationwide injunctions. *See, e.g*., *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-25 n.1 (2018) (Thomas, J., concurring) (expressing skepticism about whether such injunctions are within the authority of a district court but observing that "[a]n injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide."); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (noting that the Supreme Court has not yet taken up "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions."). The Supreme Court has held that, in a class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 99 S. Ct. 2545, 2558 (1979). However, more recently, the Court has observed that only where a constitutional violation has been shown to be "systemwide" should the corresponding injunctive relief be given that scope. *See Lewis v. Casey*, 116 S. Ct. 2174, 2184 (1996).

The Ninth Circuit has stated that "[a]lthough there is no bar against … nationwide relief in federal district court, … such broad relief must be necessary to give the prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (internal quotations omitted). The Ninth Circuit has further stated that "nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in

different factual contexts and in multiple decisions by the various courts of appeals." *Id*. at 583 (internal quotations omitted). If presented with this question, I would apply Supreme Court and Ninth Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: Please see response to Question No. 23.

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

Response: Please see response to Question No. 23.

24. 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 response to Question No. 23.

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

Response: Federalism is a system of government in which power is divided by a constitution between a national government and state governments. Such a system diffuses governmental power and creates a protection against tyranny. According to the Tenth Amendment of the U.S. Constitution, any right not specifically granted to the federal government is reserved to the states.

26. 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 response to Question No. 2 regarding abstention doctrines.

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

Response: If a case comes before me which requires an assessment of the issue, I will follow the controlling Supreme Court and Ninth Circuit authority and analyze the relevant factors based on the specific record before the court.

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

Response: The Supreme Court has held that in addition to the rights expressly set forth in the Constitution, the due process clauses of the Fifth and Fourth Amendments also protect those fundamental rights and liberties that are objectively rooted in this Nation's

history and tradition. *Washington v. Glucksburg*, 521 U.S. 702, 719-21 (1997). The Court has stated "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 719-20. The Court's substantive due process analysis has two primary features. First, it deemed that the Due Process Clause specially protects those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Id*. at 720-21. Second, the asserted fundamental liberty interest must be carefully described. *Id*. at 721.

In *Washington v. Glucksburg*, the Supreme Court set forth a list of cases in which the Court found substantive due process rights not expressly enumerated in the Constitution, which included 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 of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); to marital privacy and use of contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). 521 U.S. at 720. The Supreme Court has recognized additional substantive due process rights, including the right to travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015). The Court also "assumed, and strongly suggested" that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Glucksburg*, 521 U.S. at 721 (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990)).

29. 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 Supreme Court has long held that the First Amendment's Free Exercise Clause is a foundational and fundamental constitutional right. For the legal authority related to the Free Exercise Clause, please see response to Question Nos. 10, 11.

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

Response: The Free Exercise Clause protects both the freedom of worship, which includes the right to choose one's religion and attend those services, and the right

to free exercise of religion, which includes the right to practice one's religion. The right to free exercise is generally considered a more expansive concept and includes the right of an individual to guide their lives and make decisions according to their religious beliefs.

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

Response: A governmental action substantially burdens the free exercise of religion when it requires one to "engage in conduct that seriously violates his religious beliefs." *See Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (finding that prison regulation prohibiting growth of a beard required individual to violate his religious beliefs); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). As further examples, a government action substantially burdens the free exercise of religion when individuals are forced to choose between following the tenets of their religion and receiving a government benefit, *Sherbert v. Verner*, 374 U.S. 398 (1963), or are coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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

Response: Please see response to Question No. 12.

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) prohibits the federal government from imposing a substantial burden on the exercise of religion unless the government action meets strict scrutiny analysis. *Burwell v. Hobby Lobby Stores, Inc*. 573 U.S. 682, 691-95 (2014). RFRA has been extended to closely-held corporations in addition to individuals. *Id*. at 704-19.

Regarding employment, the Supreme Court has found that religious institutions are exempt from anti-discrimination laws, such as the Age Discrimination and Employment Act (ADEA) and the Americans with Disabilities Act (ADA) with respect to certain employment decisions. *See, e.g.*, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

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: *Lawson v. Carney et al*., No. 2:15-CV-00184-RMP, 2017 WL 4324830 (E.D. Wash. Aug. 4, 2017), *report and recommendation adopted*, 2017 WL 4322408 (E.D. Wash. Sept. 28, 2017), *aff'd*, 765 F. App'x 308 (9th Cir. Apr. 5, 2019).

30. 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 standard of proof for a criminal conviction is "beyond a reasonable doubt." This has been the required standard or proof for more than 150 years. *See, e.g., Miles v. United States*, 103 U.S. 304, 312 (1880). I am unaware of any legal authority authorizing a numerical percentage. Jurors are instructed in part that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant in guilty. It is not required that the government prove guilty beyond all doubt. A reasonable doubt is a doubt based upon common sense and is not based purely on speculation." Ninth Cir. Model Crim. Jury Instr. 3.5.

31. 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: State habeas petitions are regularly filed in the in the Eastern District of Washington when state prisoners fail to prevail in their collateral attack on their criminal conviction in state court. As a sitting magistrate judge, pursuant to Canon 3 of the Code of Conduct for United States Judges, it would not be appropriate for me to provide an opinion on this area of law.

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 response to Question No. 31a.

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

Response: Please see response to Question No. 31a.

32. 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: I cannot speak to the practice of the Tenth Circuit. The Ninth Circuit also issues unpublished decision. As a sitting magistrate judge, I do not believe it is appropriate for me to comment on the Ninth Circuit's management of its caseload and issuance of authority.

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 No. 32a.

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

Response: Generally, no. Unpublished dispositions or orders are considered not to be precedent, except in certain circumstances. Ninth Circuit Rule 36-3.

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

Response: Not applicable.

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

Response: Please see response to Question No. 32c.

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: Pursuant to Ninth Circuit Rule 32.1(a), a court may not prohibit or restrict parties from citing to opinions, orders, judgments, or other written dispositions that have been designated as unpublished that were issued after January 1, 2007.

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: Pursuant to Ninth Circuit Rule 32.1(a), a court may not prohibit or restrict parties from citing to opinions, orders, judgments, or other written

dispositions that have been designated as unpublished that were issued after January 1, 2007.

33. In your legal career:

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

Response: Four.

b. How many have you tried as second chair?

Response: I was associate counsel in six trials.

c. How many depositions have you taken?

Response: None.

d. How many depositions have you defended?

Response: Approximately five.

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

Response: Two.

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.

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

Response: My practice was exclusively criminal and thus the term dispositive is not particularly applicable. As a Department of Justice Trial Attorney and as an Assistant United States Attorney for 11 years, I argued hundreds of motions on behalf of the United States.

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

Response: As a Department of Justice Trial Attorney and as an Assistant United States Attorney for 11 years, I argued many motions on behalf of the United

States where evidence was taken. I cannot provide a specific calculation, but I would estimate a range from several dozen to over a hundred.

34. 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: Not applicable.

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

Response: Since graduating from law school, I have been employed in government positions that preclude the practice of law outside of my employment.

35. 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.

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

Response: No.

37. What were the last three books you read?

Response: My case load leaves little time for leisure reading. I try to read materials on substance abuse and trauma related to my work on reentry courts. The most recent book was "What Happened to You? Conversations on Trauma, Resilience and Healing" by Bruce D. Perry, M.D. and Oprah Winfrey. I also read about world or current events. A recent example is "Hello, Shadowlands" by Patrick Winn, given to me by a law clerk. I also read modern bestsellers such as "Sold on a Monday" by Kristina McMorris.

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

Response: I am aware of studies indicating that racial disparities exist within the criminal justice system, particularly with respect to certain sentencing factors, which the Senate Judiciary Committee has worked diligently to address. These are important policy matters for legislators. Unlike legislative bodies that address policy matters, as a magistrate judge, I am focused on the cases that come before me. I impartially apply the law to the legal disputes that arise before me and consider any matters alleging discrimination on an

individualized basis consistent with Supreme Court and Ninth Circuit authority. I would also note that racism has no place in any court of law and everyday I strive to ensure that every litigant who comes before me is treated fairly and impartially and to deliver equal justice under law.

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

Response: I am currently proud of the work that I do with our district's reentry courts, where the Teams take a collective approach to address issues related to substance abuse for individuals who are on federal supervised release.

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

Response: My personal view as an advocate, like my personal views as a judge, were irrelevant.

a. How did you handle the situation?

Response: Please see response to Question No. 40.

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

Response: Yes. As a magistrate judge for the last six years, I have faithfully applied to the law to all matters that have come before me regardless of any personal beliefs I may have.

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

Response: I do not regularly read law professors' work unless cited by the parties in their briefs or are somehow implicated by a case-related issue.

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 any particular Federalist Paper.

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

Response: In my judicial decision making, I endeavor to approach cases with an open mind. I review the parties' briefs and cited authority impartially prior to reaching a ruling in a particular matter.

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

Response: The legal issues related to balancing a woman's right to privacy and the state's interest in protecting potential human life are the subject of ongoing litigation. As a sitting magistrate judge and a judicial nominee, it would not be appropriate for me to comment on this issue.

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: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms and that the right is not limited to groups such as a militia. 554 U.S. 570, 574-627 (2008).

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: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: I cannot recall such an instance. It is possible that I edited or proofread briefs for colleagues at the United States Attorney's Offices in which I worked, but I cannot recall a specific instance.

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

Response: Please see response to Question No. 49.

50. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: Pursuant to the oath taken, nominees are obligated to testify truthfully when appearing before the Senate Judiciary Committee, including when asked to state their views on their judicial philosophy.

Questions for the Record for Mary Katherine Dimke
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

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

Questions for all nominees:

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

   Response: No.

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

   Response: No.

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

   Response: For the last six years as a magistrate judge, my approach has been to listen to the parties' arguments with an open mind, to work diligently to understand the applicable legal landscape, and to apply the law to the facts and record before me in an impartial and unbiased manner. I work hard to be well prepared and I endeavor to issue opinions and rulings promptly in a way that is clear and understandable to the parties and to the public.

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

   Response: Because such terminology can have differing meanings, I do not use a specific label to describe my philosophy. I believe that the text of any statute must be construed according to its plain meaning at the time it was enacted. I believe that original public meaning is an important consideration in interpreting the Constitution. If confirmed, I would follow Supreme Court and Ninth Circuit precent and follow the interpretative method dictated by such precedent.

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

   Response: Because such terminology can have differing meanings, I do not use a specific label to describe my philosophy. I believe that interpretation of the Constitution, a statute, or a rule begins with the plain meaning of the text and that the text must generally be construed according to its plain meaning at the time it was enacted. If confirmed, I would follow Supreme Court and Ninth Circuit precent and follow the interpretative method dictated by such precedent.

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

Response: I have not used the phrase "living" document. I believe the United States Constitution is an enduring document that has protected our liberties for the past 230 years and it provides the foundational principles upon which our government is based. If confirmed as a district judge, I will interpret the Constitution in accordance with the established precedent of the Supreme Court and the Ninth Circuit.

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

Response: I have deep admiration for the Supreme Court as an institution and admire all Supreme Court Justices for different reasons. When reviewing Supreme Court precedent, I am generally focused on the holdings and reasoning of the opinions and not on their philosophies. If confirmed, I would continue to apply all Supreme Court precedent regardless of who authored or joined the opinion.

8. Was Marbury v. Madison correctly decided?

Response: As a sitting magistrate judge bound by the Code of Conduct for United States Judges and as a nominee, it is generally not appropriate to comment on whether any binding Supreme Court precedent was correctly decided. I am bound to apply all such precedent regardless of any personal belief I have about the decisions. However, there are certain Supreme Court decisions that are so widely accepted and unlikely to come before any court that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Marbury v. Madison*, *Brown v. Board of Education*, *Bolling v. Sharpe*, and *Loving v. Virginia* were correctly decided. If confirmed, I would continue to faithfully apply all Supreme Court and Ninth Circuit precedent.

9. Was Lochner v. New York correctly decided?

Response: Please see response to Question No. 8.

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

Response: Please see response to Question No. 8.

11. Was Bolling v. Sharpe correctly decided?

Response: Please see response to Question No. 8.

12. Was Cooper v. Aaron correctly decided?

Response: Please see response to Question No. 8.

13. Was Mapp v. Ohio correctly decided?

Response: Please see response to Question No. 8.

14. Was Gideon v. Wainwright correctly decided?

Response: Please see response to Question No. 8.

15. Was Griswold v. Connecticut correctly decided?

Response: Please see response to Question No. 8.

16. Was South Carolina v. Katzenbach correctly decided?

Response: Please see response to Question No. 8.

17. Was Miranda v. Arizona correctly decided?

Response: Please see response to Question No. 8.

18. Was Katzenbach v. Morgan correctly decided?

Response: Please see response to Question No. 8.

19. Was Loving v. Virginia correctly decided?

Response: Please see response to Question No. 8.

20. Was Katz v. United States correctly decided?

Response: Please see response to Question No. 8.

21. Was Roe v. Wade correctly decided?

Response: Please see response to Question No. 8.

22. Was Romer v. Evans correctly decided?

Response: Please see response to Question No. 8.

23. Was United States v. Virginia correctly decided?

Response: Please see response to Question No. 8.

24. Was Bush v. Gore correctly decided?

Response: Please see response to Question No. 8.

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

Response: Please see response to Question No. 8.

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

Response: Please see response to Question No. 8.

27. Was Boumediene v. Bush correctly decided?

Response: Please see response to Question No. 8.

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

Response: Please see response to Question No. 8.

29. Was Shelby County v. Holder correctly decided?

Response: Please see response to Question No. 8.

30. Was United States v. Windsor correctly decided?

Response: Please see response to Question No. 8.

31. Was Obergefell v. Hodges correctly decided?

Response: Please see response to Question No. 8.

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: In the Ninth Circuit, only an en banc court, not a subsequent panel, has the authority to overturn a previous panel's published opinion unless there has been a demonstrable change in the underlying law. *United States v. Walker*, 953 F.3d 577, 579-80 (9th Cir. 2020). Federal Rule of Appellate Procedure 35(a) provides that an "en banc rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2). A panel may find controlling circuit precedent overruled when "the reasoning or theory of [the court's] prior circuit authority is *clearly irreconcilable* with the reasoning or theory of intervening higher authority." *Walker*, 953 F.3d at 580 (emphasis in original) (internal quotations omitted).

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

Response: Please see response to 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: When interpreting a statute, I begin with the statutory text. If the text is clear and unambiguous, the inquiry ends and I would not look to any extrinsic factors. If the text is ambiguous, I would look to Supreme Court and Ninth Circuit authority interpreting the provision. If no binding precedent exists, I would utilize other interpretive tools such as considering related or analogous precedents from the Supreme Court and the Ninth Circuit, persuasive authority from other Circuits, and precedents discussing the canons of statutory construction. Absent those sources, I may consider legislative history, but only in an effort to resolve an ambiguity in the statutory language. According to the Supreme Court, legislative history should be used to interpret only an ambiguous statute, not to create an ambiguity in clear statutory language. *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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. A defendant's race or ethnicity should never be considered as a factor in sentencing. The Sentencing Guidelines state that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S.S.G. Manual § 5H1.10 (policy statement) (2018). Judges must apply the sentencing guidelines individually to each defendant consistent with the factors set forth in 18 U.S.C. § 3553(a).

Questions from Senator Thom Tillis for Mary Katherine Dimke
Nominee to be United States District Judge for the Eastern District of Washington

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

   Response: Yes. A judge is duty bound to make decisions based on the relevant law and the facts and record before her in an impartial and unbiased manner. Any personal view is irrelevant when interpreting and applying the law.

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

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). Judicial activism, as defined, is not appropriate. As a magistrate judge for the past six years, I have issued rulings based on the applicable law and the specific facts of the matters pending before me. If confirmed as a district judge, I will continue to do the same.

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

   Response: Impartiality is an expectation and a requirement of a judge. The Code of Conduct for United States Judges requires that judges perform the duties of the office fairly, impartially, and diligently. *See* Code of Conduct for United States Judges, Canon 3; 28 U.S.C. §§ 144, 453, 455.

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

   Response: No. Congress is responsible for policy making and enacting the law. Judges are responsible for interpreting and applying the law as enacted. Judges should not issue rulings with the intent to reach a desired outcome.

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

   Response: Judges are required to faithfully interpret and apply the law without regard to whether an outcome is desirable.

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

   Response: No. A judge is duty bound to make decisions based on the relevant law and the facts and record before her in an impartial and unbiased manner. Any personal political or policy preference is irrelevant when interpreting and applying the law.

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

Response: If confirmed, I will apply the Constitution and the Supreme Court's precedential decisions interpreting the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). These decisions establish that the Second Amendment protects an individual's right to possess firearms and that the right is fundamental.

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 begin by researching the relevant Supreme Court and Ninth Circuit precedent related to firearms and/or COVID-19 restrictions and applying those precedents to the facts presented to me. The most recent Supreme Court authority related to firearms restrictions includes *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The Supreme Court has offered recent guidance on evaluating the impact of COVID restrictions on constitutionally protected rights in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). As a sitting magistrate judge, I cannot opine on the application of the precedent in hypothetical situations. Moreover, I am precluded by Canon 3 of the Code of Conduct for United States Judges from commenting on matters pending before the courts and there is current litigation related to various COVID restrictions.

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 magistrate judge and if confirmed as a district judge, I am bound by Supreme Court and Ninth Circuit precedent when considering qualified immunity. I would follow the current law which generally provides that law enforcement officers are entitled to qualified immunity unless (1) they violated a federal constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time of the alleged misconduct. The court must determine whether a reasonable official would have known that his conduct violated that right. *See generally Pearson v. Callahan*, 555 U.S. 223 (2009); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

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

Response: The legislative and executive branches of government, not the judiciary, determine issues of policy, such as whether qualified immunity provides sufficient protection for law enforcement officers. As a magistrate judge, I faithfully apply Supreme Court and Ninth Circuit precedent regarding qualified immunity. If confirmed as a district judge, I would continue to do so.

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

Response: Please see response to Question No. 10.

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: If presented with a case involving issues of patent law, I would research the relevant Supreme Court and Ninth Circuit authority and apply it faithfully, including *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Servs. v. Prometheus Lab., Inc*., 566 U.S. 66 (2012).

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 magistrate judge and a nominee, I cannot offer an advisory opinion indicating how I would rule in a hypothetical case.

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 response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and

nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: Please see response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

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

Response: Please see response to Question No. 13a.

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

Response: As a sitting magistrate judge and a judicial nominee, it is not appropriate for me to comment on the Supreme Court's patent jurisprudence. If confirmed, I will adhere to all Supreme Court, Ninth Circuit, and Federal Circuit patent eligibility precedent.

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: None.

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

Response: None.

c. 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 presided over cases and mediated cases involving the First Amendment and the right to free speech. I have not dealt with those cases in the context of copyright law.

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

Response: None.

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: When interpreting a statute, I begin with the statutory text. If the text is clear and unambiguous, the inquiry ends. If the text is ambiguous, I would look to Supreme Court and Ninth Circuit authority interpreting the provision. If no binding precedent exists, I would utilize other interpretive tools such as considering related or analogous precedents from the Supreme Court and the Ninth Circuit, persuasive authority from other Circuits, and precedents discussing the canons of statutory construction. Absent those sources, I may consider legislative history, but only in an effort to resolve an ambiguity in the statutory language. According to the Supreme

Court, legislative history should be used to interpret only an ambiguous statute, not to create an ambiguity in clear statutory language. *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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: An agency's interpretation of a statute that the agency is responsible for enforcing in the form of policy statements, agency manuals, and enforcement guidelines, as opposed to formal adjudications or notice and comment rulemaking, is entitled to "respect" to the extent they have the power to persuade, pursuant to *Skidmore v. Swift*, 323 U.S. 134 (1944). Such interpretations are not entitled to *Chevron* defense. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1660-63 (2000).

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

Response: If presented with such facts in a case, I would apply the relevant statutory authority and precedent interpreting the 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 judge best interpret and apply to today's digital environment law 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: As a sitting magistrate judge and if confirmed as a district judge, I am bound by existing Supreme Court and Ninth Circuit precedent, including precedent related to the interpretation of such statutes. Judges generally do not have the authority to depart from precedential statutory interpretation based on changed factual circumstances. However, the Supreme Court has cited changed factual circumstances or undermining of factual authoritativeness as factors it may consider when evaluating whether to depart from is prior precedent. *See, e.g.*, *Janus v. Am. Fed'n of State, County, & Mun. Employees*, *Council 31*, 138 S. Ct. 2448, 2477-86 (2018); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

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: Please see response to Question No. 17a.