Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Kymberly Kathryn Evanson
Judicial Nominee to the United States District Court for the Western District of Washington

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

   Response: I am not familiar with this statement or the context in which it was made. If confirmed, I will decide cases based upon the applicable binding Supreme Court and Ninth Circuit precedent and the facts of each individual case.

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I am not familiar with Judge Reinhardt's comment or the context in which it was made. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary defines "living constitutionalism" as the doctrine that "[T]he Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (Black's Law Dictionary 11th ed. 2019).

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

   Response: I am not familiar with Justice Jackson's comment or the context in which it was made. The Supreme Court has observed that while the meaning of the Constitution is "fixed," it sets out enduring principles that "must apply to circumstances beyond those the founders specifically anticipated." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

5. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: If confirmed, my philosophy would be rooted in respect and restraint. I recognize that federal district courts are courts of limited jurisdiction, tasked with

deciding specific cases and controversies. My approach to each case would involve (1) a detailed review of the factual record before the court; (2) thorough legal research and neutral consideration of the applicable law and precedent; (3) thoughtful consideration of the parties' briefs and oral argument; (4) unbiased consideration of the issues in consultation with my law clerks; and (5) a clear and cogent written decision setting forth the bases for my ruling in a manner that is understandable to the parties and the public. Throughout my career, I have read opinions of the Supreme Court to understand their importance and application, but without regard to the author or that justice's particular judicial philosophy, to the extent they espouse one.

6. **Please identify a Ninth Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: If confirmed, my philosophy would be rooted in respect and restraint. I recognize that federal district courts are courts of limited jurisdiction, tasked with deciding specific cases and controversies. My approach to each case would involve (1) a detailed review of the factual record before the court; (2) thorough legal research and neutral consideration of the applicable law and precedent; (3) thoughtful consideration of the parties' briefs and oral argument; (4) unbiased consideration of the issues in consultation with my law clerks; and (5) a clear and cogent written decision setting forth the bases for my ruling in a manner that is understandable to the parties and the public. Throughout my career, I have read opinions of the Ninth Circuit to understand their importance and application, but without regard to the author or that judge's particular judicial philosophy, to the extent they espouse one.

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

   Response: I have spent the majority of my career representing local governments and am familiar with the difficult decisions they make in budgeting in order to meet specific community needs. If an issue concerning funding for state or local services came before me, I would apply binding Supreme Court and Ninth Circuit precedent to the specific facts of the case, without regard to my personal views.

8. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**
   a. **Was *Brown v. Board of Education* correctly decided?**

      Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. However, the issue of *de jure* racial segregation is unlikely to come before me or be relitigated in other courts. As such, consistent with the practice of past nominees, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

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

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. However, the issue of anti-miscegenation laws is unlikely to come before me or be relitigated in other courts. As such, consistent with the practice of past nominees, I am comfortable stating that *Loving v. Virginia* was correctly decided.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court overruled the holding of *Roe v. Wade.*

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court overruled the holding of *Planned Parenthood v. Casey.*

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

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

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

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

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

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about

whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

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

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

i. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

j. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

9. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: My understanding of 18 U.S.C. § 1507 is set forth in the text of the statute, which provides: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both."

10. **Under Supreme Court precedent, is 18 USC § 1507 or a state analog statute constitutional on its face?**

Response: I am not aware of Supreme Court precedent that has determined the facial constitutionality of 18 U.S.C. § 1507 or any state analog statute. If confirmed, I would follow Supreme Court and Ninth Circuit precedent in the interpretation and application of this law or any similar law.

11. **What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?**

Response: The Supreme Court has defined "fighting words" to include those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380, 112 S. Ct. 2538, 2541, 120 L. Ed. 2d 305 (1992) ("conduct that itself inflicts injury or tends to incite immediate violence").

12. **What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?**

Response: The Supreme Court has defined true threats to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003).

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

Response: If confirmed and such an issue came before me, I would look to Supreme Court and Ninth Circuit precedent addressing this issue.

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

Response: Whether or not the Supreme Court should be expanded is a question for policymakers to consider. If I am confirmed, I will evaluate each case that comes before me individually and without regard to my personal views on matters of public policy or otherwise.

15. **Is the federal judicial system systemically racist? Please explain.**

Response: Whether certain policies or practices within the United States federal judicial system are systemically racist is a question for policymakers to consider. If I am confirmed, in any case before me asserting claims of racial discrimination, I will carefully evaluate the specific legal claim asserted and the evidence in the record based on the precedent of the Supreme Court and the Ninth Circuit. In each case that comes before me, I will work hard to treat all litigants fairly and impartially.

a. **If you answered yes, if confirmed how will you feel comfortable working in a systemically racist system?**

See my response to question 15.

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

Response: I have not studied or evaluated this question sufficiently to have an informed opinion on this issue. Whether and how implicit bias impacts the judiciary is an important question for social scientists and policymakers. If I am confirmed, I will work hard to treat all litigants fairly and impartially, without bias.

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

Response: Although my 15 years of legal experience have predominantly involved civil litigation, my recollection from my federal district court clerkship is that sentencing and/or release determinations require an evaluation of whether the particular action is consistent with public safety. If presented with a case involving an individual's release to the community, I would carefully evaluate the facts of the case, the applicable law, and the recommendations from pretrial and/or probation services in rendering my decision. If the question arose in the context of sentencing, I would apply the factors set forth in 18 U.S.C. 3553(a).

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

Response: The Supreme Court recently held in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) that the appropriate legal standard is the Second Amendment's plain text. Specifically, courts should evaluate whether the plain text covers an individual's conduct, and if so, that conduct is presumptively protected by the Constitution. "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal*., 366 U. S. 36, 50, n. 10 (1961)).

19. **What is implicit bias?**

Response: Webster's Dictionary defines "implicit bias" as "a bias or prejudice that is present but not consciously held or recognized." Merriam-Webster.com. 2022. https://www.merriam-webster.com/dictionary/implicit%20bias (November 22, 2022).

20. **Do you have any implicit biases? If so, what are they?**

    Response: Social science suggests that all humans are subject to some level of unconscious bias or assumptions that take place below the level of conscious decision-making. Recognizing this, it is important for judges to guard against biased decision-making by focusing their decisions only on the factual record in the specific case before the Court and applying the relevant law without regard to persons or parties.

21. **During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?**

    Response: To the best of my knowledge, no.

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

    Response: To the best of my knowledge, no.

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

    Response: To the best of my knowledge, no.

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

    Response: To the best of my knowledge, no.

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

    Response: To the best of my knowledge, no.

26. **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: To the best of my knowledge, no.

27. **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: To the best of my knowledge, 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: To the best of my knowledge, no.

28. **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: To the best of my knowledge, no.

29. **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 Foundations 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: To the best of my knowledge, no.

30. **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: To the best of my knowledge, no.

31. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**
    a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary 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 Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

    Response: No.

c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response: To the best of my knowledge, no.

32. **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: Washington State has a bipartisan judicial selection committee engaged by Senators Patty Murray and Maria Cantwell to screen and interview candidates and make recommendations for the federal district court positions. On January 25, 2022, I submitted an application to the committee and on February 17, 2022, I interviewed with the committee. On February 27, 2022, I was notified that the committee had recommended me to the senators. I interviewed with senior staff for Senator Murray on March 1, 2022, and with senior staff for Senator Cantwell on March 9, 2022. Senator Murray interviewed me on March 17, 2022. On April 1, 2022, I was interviewed by an attorney in the White House Counsel's Office. Since April 4, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 13, 2022, the President nominated me.

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

Response: On November 22, 2022, the Department of Justice Office of Legal Policy (OLP) forwarded me the Committee's questions. I shared my draft responses with OLP, which provided limited feedback. I reviewed and considered OLP's feedback, and then submitted my answers to the Committee.

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

Questions for the Record for Kymberly Kathryn Evanson, Nominee for the United States Western 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. **Is racial discrimination wrong?**

Response: Racial discrimination is illegal under multiple federal statutes in a variety of contexts such as housing, employment, and voting. Classifications by race are subject to strict scrutiny.

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." (internal quotation marks and citations omitted). If confirmed, I would apply *Glucksberg* and any binding Supreme Court and Ninth Circuit precedent to analyze any claims concerning as of yet unenumerated Constitutional rights.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: If confirmed, my philosophy would be rooted in respect and restraint. I recognize that federal district courts are courts of limited jurisdiction, tasked with deciding specific cases and controversies. My approach to each case would involve (1) a detailed review of the factual record before the court; (2) thorough legal research and neutral consideration of the applicable law and precedent; (3) thoughtful consideration of the parties' briefs and oral argument; (4) unbiased consideration of the issues in consultation with my law clerks; and (5) a clear and cogent written decision setting forth the bases for my ruling in a manner that is understandable to the parties and the public. Throughout my career, I have read opinions of the Supreme Court to understand their importance and application, but without regard to the author or that justice's particular judicial philosophy, to the extent they espouse one. As such, I lack sufficient knowledge of each philosophy of the justices referenced in the question to respond.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?**

Response: Black's Law Dictionary defines originalism as "[T]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." (Black's Law Dictionary 11th ed. 2019). I would not characterize my approach with any particular label. If confirmed, I would follow binding Ninth Circuit and Supreme Court precedent and reach my decision based on the facts of the particular case and the neutral application of the relevant law.

5. **Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?**

Response: Black's Law Dictionary defines "living constitutionalism" as the doctrine that "[T]he Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." (Black's Law Dictionary 11th ed. 2019). As noted above, if confirmed, I would not characterize myself with any particular label, but will decide cases before me based on the factual record, the applicable law, and binding precedent from the Supreme Court and the Ninth Circuit.

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

Response: If confirmed, as a district court judge I will be bound by Supreme Court and Ninth Circuit precedent, and it is unlikely that a constitutional issue will come before me with no applicable precedent. However, to the extent that happened, I would begin my analysis with the text of the constitutional provision, and would follow its clear and plain meaning.

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

Response: If confirmed, I would follow Supreme Court and Ninth precedent in deciding any case or controversy that may come before me, including precedent on when public understanding may be relevant. For example, the Supreme Court has held that in the Second Amendment context, current understandings of the Constitution that are "inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (emphasis and internal quotation omitted). There have also been instances, however, where the Supreme Court has determined that "contemporary community standards" should be used in evaluating certain constitutional questions such as under the First Amendment. *See Miller v. California,* 413 U.S. 15 (1973).

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

Response: The Article V amendment process is the only way in which the Constitution may be changed.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: Please see response to Question 9 above. If confirmed as a United States

District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: Please see response to Question 10 above. If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. My personal views are not relevant to my judicial decision-making.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: The holding in *Brown v. Board of Education* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: Please see response to Question 11 above. If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. However, the issue of *de jure* racial segregation is unlikely to come before me. As such, consistent with the practice of past nominees, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: 18 U.S.C. §3142 addresses pre-trial detention and 18 U.S.C. §3142 (f)(1) lists the offenses or criterion that create a presumption in favor of pre-trial detention:

A judicial officer shall hold a hearing to determine whether any condition or combination of conditions will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, a violation of section 1591, or an offense listed in section

2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
(B) an offense for which the maximum sentence is life imprisonment or death;
(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or
(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—

(A) a serious risk that such person will flee; or
(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance.

a. **What are the policy rationales underlying such a presumption?**

Response: I am unaware of Supreme Court or Ninth Circuit precedent articulating the policy rationale for the rebuttable presumption discussed above. If confirmed, I will apply the statute as written.

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

Response: Yes. There are many restrictions inherent in the Constitution on government power over private institutions. For example, the Supreme Court has repeatedly outlined the limitations on Congress's Commerce Clause powers as well as the First Amendment rights of private companies. The Supreme Court has also repeatedly held that state laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. Further, the Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA) both apply strict scrutiny to federal and certain state actions alleged to substantially burden the free exercise of religion, even if the laws are neutral and generally applicable. Laws are not neutral and generally applicable if they target religious conduct or demonstrate hostility to religion. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Laws are also not neutral and generally applicable when they treat comparable secular conduct

more favorably than religious conduct. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Laws or policies that discriminate on the basis of religion-which are by definition laws that are not neutral and generally applicable- are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). To survive review, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal quotation marks and citations omitted).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020), the Supreme Court held that the plaintiffs were entitled to a preliminary injunction enjoining the enforcement of certain New York COVID-19 restrictions that imposed capacity limits on religious activities. The Court held that Plaintiffs were likely to succeed on the merits of their claims because the restrictions "singled out houses of worship" for especially harsh treatment, and therefore the regulations were not neutral and generally applicable, and strict scrutiny applied. The Court further held that Plaintiffs had shown irreparable harm, because the loss of First Amendment freedoms even for small amounts of time amounts to irreparable injury. Finally, the Court concluded that the public interest would not be harmed by granting the injunction.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court enjoined certain COVID-19 restrictions on private gatherings. The Court applied strict scrutiny to the regulations because they singled out religious activities for less favorable treatment than comparable secular activities. The Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). The Court held plaintiffs were likely to succeed on the merits of their free exercise claims, and further held that Plaintiffs had shown irreparable harm, because the loss of First Amendment freedoms even for small amounts of time amounts to irreparable injury. Finally, the Court concluded that the public interest would not be harmed by granting the injunction.

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

Response: Yes.

18. **Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.**

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court rejected a Colorado state administrative determination enforcing the state's anti-discrimination act against a baker who refused to make a wedding cake for a same-sex couple. The baker alleged that making the cake would violate his religious beliefs. The Colorado Civil Rights Commission rejected the baker's First Amendment free exercise claims. The Supreme Court held that the Colorado Civil Rights Commission did not comply with the Free Exercise Clause's requirement of religious neutrality, and the record in the case demonstrated "clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." *Id.* at 1729. The Court did not reach the constitutionality of the baker's refusal to serve the couple.

19. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: Yes, if the beliefs are sincerely held. In *Frazee v. Illinois Department of Employment*, 489 U.S. 829, 834 (1989), the Supreme Court held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." The court's inquiry is whether the belief is "sincere" not whether it conforms to a particular faith tradition.

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: Please see my response to question 19.

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: Please see my response to question 19.

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: As a judicial nominee, I do not possess the information or authority to state the "official position" of the Catholic Church.

20. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), Catholic school teachers sued their employers alleging employment discrimination. The Supreme Court held that, under the "ministerial exception," churches and other religious

institutions such as Catholic schools are permitted to "decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (*quoting Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 186 (2012)). In determining whether a case falls under the ministerial exception, the Court's inquiry looked to the functions performed by the employee in question. The Court found that even though the teachers were not "ministers" the specific role of the teachers was "educating young people in their faith, inculcating its teachings, and training them to live their faith", which the Court concluded was central to the school's mission. 140 S. Ct. at 2064. As such, the ministerial exemption barred the teachers' employment discrimination suits.

21. **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*, 141 S. Ct. 1868 (2021), the Supreme Court applied strict scrutiny to the City's policy excluding a Catholic organization from its foster care program on account of the organization's refusal to certify same-sex couples as foster parents. The Court found the policy was not neutral and generally applicable in light of certain opportunities for exceptions to the policy, granted at the government's discretion. *Id.* at 1879. The Court held that the city's stated interests of maximizing the number of foster families, of protecting the city from liability, and in the equal treatment of foster parents and foster children were not compelling interests that justified burdening the agency's free exercise rights. *Id.* at 1881–82.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court invalidated Maine's nonsectarian requirement for its tuition assistance program for private secondary schools. Plaintiffs claimed that the exclusion of religious schools from the program that offered tuition assistance to private secular schools burdened their free exercise of religion. The Court applied strict scrutiny because it concluded that the requirement conditioned benefits in a way that "effectively penalizes the free exercise" of religion. *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). The Court held that the program violated the Free Exercise Clause of the First Amendment because the "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit." *Carson*, 142 S. Ct. at 1998. Relying on *Espinoza v. Montana Department of Revenue*, the Court held that "[a] State need not subsidize private education, but once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 1997 (internal citation and quotation omitted).

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District.***

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that neither the Free Exercise Clause nor the Establishment Clause barred a high school football coach from engaging in quiet prayer after a football game at a public

school. For the coach's free exercise claim, the Court explained that there was no dispute that the coach's desire to pray was sincere, and the District's prohibition on prayer targeted his religious conduct, rather than applying a neutral rule. Accordingly, strict scrutiny applied, and the Court concluded that the District's prohibition on the coach's religious conduct was not narrowly tailored to achieve a compelling purpose. The Court further rejected the District's argument that the Establishment Clause compelled the District's policy, and further clarified that courts should determine whether a law or practice violates the Establishment Clause by looking at history and the understanding of the drafters of the Constitution – which the court of appeals had failed to do.

24. **Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.**

Response: Justice Gorsuch's concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), outlines his view that the Religious Land Use and Institutionalized Persons Act (RLUIPA) was misapplied by Fillmore County and the lower courts to the issue of whether an Amish community was subject to the County's septic system mandate. The Amish alleged that the modern septic requirements burden their religious exercise by requiring them to use technology prohibited by their religious. Calling for the "more precise" application of strict scrutiny articulated in *Fulton v. Philadelphia*, Justice Gorsuch reasoned that the County and the lower courts erred by treating the County's general interest in regulating sanitation as compelling without reference to the impact of the County's septic mandate on the specific Amish community at issue. The concurrence also noted that the lower courts failed to consider exemptions granted to other groups but denied to the Amish here. As such, Justice Gorsuch suggests that the framework should focus on whether the County has a compelling interest in denying an exception to the Amish, not whether the County's general interest in sanitation is sufficiently compelling standing alone.

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: If confirmed, I would decide such a case based on the record before the court and binding Supreme Court and Ninth Circuit precedent. As a judicial nominee, and consistent with the Code of Conduct for United States Judges, it would be inappropriate for me to comment further on an issue that is likely to come before the courts.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

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

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

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

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

Response to all subparts: No.

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

Response: I am not aware of any training providing the identified teachings in the United States District Court for the Western District of Washington, or what role, if any, judges have or have had in designing or approving employee trainings. If confirmed, I will commit to following the oath of judges and the Code of Conduct for United States Judges and treating all who come before me fairly and impartially.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

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

Response: Article II, Section 2, Clause 2 of the Constitution gives the President of the United States the power to make political appointments, upon advice and consent of the Senate. If I am confirmed as a United States District Judge and if a case concerning the constitutionality of a specific appointment came before me, I would faithfully apply Supreme Court and Ninth Circuit precedent to resolve the matter.

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

Response: Whether certain policies or practices within the United States criminal justice system are systemically racist is an important question for policymakers. If I am confirmed, in any case before me asserting claims of racial discrimination, I will carefully evaluate the specific legal claim asserted and the evidence in the record based on the precedent of the Supreme Court and the Ninth Circuit. In each case that comes before me, I will work hard to treat all litigants fairly and impartially.

31. **President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the**

number of justices on the U.S. Supreme Court? Please explain.

Response: Whether or not the Supreme Court should be expanded is a question for policymakers to consider. If I am confirmed, I will evaluate each case that comes before me individually and without regard to my personal views on matters of public policy or otherwise.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: My understanding of the original public meaning of the Second Amendment is that articulated by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the original public meaning of the Second Amendment guarantees the right of an individual to keep and bear arms in the home for self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2021), the Court concluded that the original public meaning of the Second Amendment also afforded the right to keep and bear arms for self-defense outside the home.

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: The Supreme Court recently held in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) that the appropriate legal standard is the Second Amendment's plain text. Specifically, courts should evaluate whether the plain text covers an individual's conduct, and if so, that conduct is presumptively protected by the Constitution. "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal*., 366 U. S. 36, 50, n. 10 (1961)).

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the right to own a firearm is a personal civil right under the Second Amendment.

36. **Does the right to own a firearm receive less protection than the other individual**

rights specifically enumerated in the Constitution?

Response: No.

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

Response: Please see my response to question 36.

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

Response: Article II of the Constitution provides that the Executive Branch shall "take care the laws be faithfully executed." The Supreme Court has further observed the "absolute discretion" to make prosecution decisions vested in the Executive Branch. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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

Response: I understand prosecutorial discretion to refer to the authority of a prosecuting agency to make charging decisions, based on the applicable law, facts, and resources available to the agency. Outside of the Administrative Procedure Act ("APA") context, I am not aware of the definition of a "substantive administrative rule change." To the extent the question refers to the APA, an executive branch agency may issue legislative rules through the notice-and-comment ruling making process. Such rules have the force of law.

40. **Does the President have the authority to abolish the death penalty?**

Response: No. 18 U.S.C. § 3591 authorizes the death penalty for certain offenses.

41. **Do so-called "sanctuary cities" frustrate the valid exercise of immigration law by federal authorities?**

Response: The efficacy of federal immigration policy and its interaction with local laws is an issue for policymakers to consider. If any case involving immigration issues were to come before me, I would faithfully and impartially apply binding Supreme Court and Ninth Circuit precedent, based on the facts of the particular case before me, irrespective of any prior litigation positions I have taken on behalf of clients.

42. **Can a county or municipality validly refuse to hold a suspect for violation of federal law solely on the grounds that the county of municipality disagrees with the policy rationale underlying the federal law?**

Response: Generally speaking, state and local laws determine the extent to which local

authorities detain individuals for a variety of reasons. If any case involving immigration issues were to come before me, I would faithfully and impartially apply binding Supreme Court and Ninth Circuit precedent, based on the facts of the particular case before me, irrespective of any prior litigation positions I have taken on behalf of clients.

43. **Do you believe that nationwide injunctions are proper? If so, why? If not, why?**

Response: Federal Rule of Civil Procedure 65 provides the Court's injunction power. In the Ninth Circuit, "[a]lthough there is no bar against . . . nationwide relief in federal district court or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (internal quotation marks and citations omitted).

44. **You signed a letter opposing the decision by then Washington Attorney General Rob McKenna to sue Kathleen Sebelius and the Department of Health and Human Services. The letter argued, "as attorneys, we have doubts about the underlying merit of joining this litigation. Legal scholars have questioned the claims that you are advancing in the lawsuit. We share their skepticism."**

a. **Can you explain the Commerce Clause holding in *NFIB vs. Sebelius*?**

Response: In *NFIB v. Sebelius*, Chief Justice Roberts reasoned that the individual mandate of the Affordable Care Act ("ACA") exceeded Congress's power to regulate commerce under the Commerce Clause. This portion of the opinion concluded that the mandate did not regulate existing commercial activity, but instead compelled individuals to become active in commerce by purchasing health insurance. As such, because the Commerce Clause gives Congress the power to regulate commerce, but not compel it, the Court concluded that the individual mandate was not a valid exercise of the commerce power.

b. **Can you reconcile your letter with Chief Justice Roberts' analysis?**

Response: The letter in question pre-dated the Court's opinion in *NFIB v. Sebelius*, and although I did not draft the letter, I did sign it in my personal capacity based on my understanding of Commerce Clause jurisprudence at the time. If confirmed, I would apply all binding Supreme Court and Ninth Circuit precedent, without regard to my personal views on any particular topic, including *NFIB v. Sebelius*.

45. **You volunteer with the Seattle Clemency Project, where you help "incarcerated individuals secure an early release from life or excessive sentences." What is an excessive sentence?**

Response: Under Washington state law, a prosecutor may petition the Court for resentencing of an individual for a felony offense when the "original sentence no longer advances the interests of justice." RCW 36.27.130(1). Factors the court may consider in making this determination include the inmate's disciplinary record and record of

rehabilitation while incarcerated; evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence; and evidence that reflects changed circumstances since the inmate's' original sentencing. *Id.* § 130(3).

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

Response: In *Ala. Assoc. of Realtors v. Dep't of Health & Human Servs*., 141 S. Ct. 2485 (2021) (per curiam), an association of realtors challenged the nationwide eviction moratorium issued in response to the COVID-19 pandemic by the Centers for Disease Control (CDC). The Court held that the association was "virtually certain to succeed on the merits of their argument that the CDC [had] exceeded its authority" and that the "equities do not justify depriving the applicants of the District Court's judgment in their favor." *Id.* at 2486, 2489. As such, the Court reversed a stay of the district court judgment vacating the moratorium.

Senator Josh Hawley
Questions for the Record

Kymberly Evanson
Nominee, Western District of Washington

1. **Your Judiciary Committee questionnaire indicates that you serve, or have served, on the board of an organization called Legal Voice. In 2020, Legal Voice sued Idaho to block a state law preventing biologically male individuals from playing on women's sports teams in public schools. Legal Voice has claimed that there "is no evidence of dominance by transgender athletes at any level of sport."**

    a. **Do you believe that biological maleness, with its associated hormonal and developmental profile, confers no athletic advantage upon male athletes relative to female ones?**

    Response: I have not studied or evaluated this question sufficiently to provide an informed opinion. I was not involved in the above-cited litigation and am not familiar with the quoted statement. My work with Legal Voice primarily consisted of my role on the Board Affairs committee and my term ended in June of 2022. My most substantive contribution to Legal Voice's litigation work was an amicus brief I authored in 2017 supporting increased protections for crime victims.

    b. **Do you believe that biological sex is a meaningful descriptive category?**

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

2. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    Response: I have not studied Justice Jackson's sentencing practices during her time as a district judge. If confirmed, in any criminal case that came before me, including cases involving child pornography, I would carefully review the record, Supreme Court and Ninth Circuit precedent, and the factors set forth in 18 U.S.C.

§ 3553(a), including whether a given sentencing enhancement is appropriate, before imposing an individualized sentence. While the sentencing guidelines are not mandatory, district judges should first begin by calculating the applicable guidelines range, including any appropriate sentencing enhancements. *See Gall v. United States*, 552 U.S. 38, 49 (2007).

b. The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence

Response: Please see my response to question 2(a).

c. The enhancement for offenses involving the use of a computer

Response: Please see my response to question 2(a).

d. The enhancements for the number of images involved

Response: Please see my response to question 2(a).

3. Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.

a. Do you agree that the penalties should be aligned?

Response: The appropriate penalties for federal criminal offenses are important decisions that rest with Congress. If confirmed, I would faithfully apply the law as written to each case that comes before me.

b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?

Response: Please see my response to question 3(a).

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response: Please see my response to question 2(a).

4. Justice 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: I am not familiar with Justice Marshall's comments or the context in which those comments were made. If confirmed, I would follow Supreme Court and Ninth Circuit precedent and faithfully apply the law to each individual case that came before me, irrespective of my personal views. I do not agree that judges should base their decisions on their personal beliefs.

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

Response: I am not familiar with Justice Marshall's comments nor the context in which those comments were made. A judge should decide individual cases before the court, impartially and without bias, based on the facts and applicable law. Beyond that, it would be inappropriate for me to opine on whether any particular statement violated the judicial oath.

5. Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?

Response: *Dobbs v. Jackson Women's Health Org.* is binding Supreme Court precedent.

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

Response: The Ninth Circuit applies several abstention doctrines, including *Pullman*, *Younger, Burford, Colorado River,* and the *Rooker-Feldman* doctrine.

Where federal court cases raise both federal constitutional claims and state law claims, *Pullman* abstention may apply. *See R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 498 (1941). Under *Pullman*, "federal courts have the power to refrain from hearing cases … in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 716-17 (1996) (citing *Pullman*, 312 U.S. at 496). "Thus, *Pullman* requires that the federal court abstain from deciding the federal question while it awaits the state court's decision on the state law issues." *United States v. State Water Res. Control Bd*., 988 F.3d 1194, 1209 (9th Cir. 2021).

Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must generally abstain from cases seeking to enjoin certain pending state court proceedings. The types of proceedings that raise the possibility of *Younger* abstention are: (1) "ongoing state

criminal prosecutions"; (2) "civil enforcement proceedings" that are "akin to a criminal prosecution"; and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020). The narrow exceptions to *Younger* abstention are for cases of "proven harassment," "prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction," and other "extraordinary circumstances where irreparable injury can be shown." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

The *Burford* abstention doctrine "is concerned with protecting complex state administrative processes from undue federal interference." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 671 (9th Cir. 2004) (internal quotation marks omitted). This doctrine permits a federal court to abstain in order "to avoid federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1404 (9th Cir. 1991) (quoting *Internat'l Broth. of Elec. Workers v. Public Service Comm'n*, 614 F.2d 206, 212 n.1 (9th Cir. 1980)). In the Ninth Circuit, *Burford* abstention requires a showing of three factors: "(1) the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy." *Id.* (internal citations and quotations omitted).

According to the Ninth Circuit, *Colorado River* abstention "is not an abstention doctrine, though it shares the qualities of one." *State Water Resources Control Bd.*, 988 F.3d at 1202. Under *Colorado River*, courts in the Ninth Circuit can stay "a federal suit due to the presence of a concurrent state proceeding." *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976)). The Ninth Circuit directs courts to consider eight factors in determining whether to stay a case under *Colorado River*: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *State Water Resources Control Bd.*, 988 F.3d at 1203.

Finally, under the *Rooker-Feldman* doctrine, lower federal courts are not permitted to sit in review of state court judgments. Rather, appellant jurisdiction over those cases rests only with the United States Supreme Court. *Rooker v. Fidelity Trust Co.*, 263

U.S. 413 (1923). The doctrine is "confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283–84 (2005). In other words, the *Rooker-Feldman* doctrine stands for the proposition that federal courts cannot hear appeals of state court judgments.

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

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

    Response: In *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), the plaintiffs brought religious liberty claims as a component of their challenge to Washington state pharmacy regulations. Though I did not represent a party, I was on a team that filed an amicus brief on behalf of individual clergy and religious groups offering a religious perspective in support of the regulations.

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

Response: The Supreme Court has repeatedly held that when interpreting constitutional provisions, the inquiry must start with the text of the Constitution. The Supreme Court has applied the original public meaning in various contexts, for example, when considering the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: When interpreting a statute, I would first determine whether there was any binding Supreme Court or Ninth Circuit precedent resolving the issue raised. If neither court had addressed the statute, I would look to the statutory text, as the Supreme Court has directed. I would next consult Supreme Court and Ninth Circuit precedent interpreting related or analogous statutory provisions, the canons of statutory construction, and persuasive authority from other courts. Finally, I would consider legislative history if necessary.

    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: I would follow Supreme Court precedent on the use of legislative history as set forth in *Garcia v. United States*, 469 U.S. 70, 76 (1984). In that case, the Court explained that committee reports are the most "authoritative source" of legislative history, and contrasted such reports with "casual statements" of legislators during debate or "passing comments" of one Member. *Id*.

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

Response: It is never appropriate to do so.

10. 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 *Nance v. Ward*, the Supreme Court recently reiterated that a petitioner must: (1) demonstrate that the method of execution presents a "substantial risk of serious harm," including "severe pain over and above death itself"; and (2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)) (alterations in original).

11. 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.

12. 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 such Supreme Court or Ninth Circuit precedent.

13. 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.

14. 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: Facially neutral and generally applicable laws are subject to rational basis review. However, courts apply strict scrutiny to laws that are not neutral and generally applicable. For example, laws are not neutral and generally applicable if they target religious conduct or demonstrate hostility to religion. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Laws are also not neutral and generally applicable when they treat comparable secular conduct more favorably than religious conduct. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Please see my response to question 14.

16. 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: "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). The Ninth Circuit has stated that a religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). Further, "the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id.* (citing *United States v. Seeger*, 380 U.S. 163, 185 (1965)). The court's inquiry in determining the sincerity of a religious belief is to evaluate whether the belief asserted reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citations and quotations omitted).

17. 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 the right of an individual to own a firearm for the purpose of self-defense within the home.

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.

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

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

Response: I read Justice Holmes to be criticizing the majority for basing its decision on an economic theory in order to meet a particular result, as opposed to the Constitution.

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

Response: *Lochner* has since been overruled by the Supreme Court and is no longer controlling law. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

19. 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: I am not aware of any Supreme Court opinions that have not been formally overruled that are no longer good law.

a. If so, what are they?

Response: See my response to question 19(a).

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with Judge Learned Hand's statement or the context in which it was made. If a case came before me concerning monopolies, I would decide the case based on a careful review of the record and the applicable Ninth Circuit and Supreme Court precedent.

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

Response: Please see my response to question 20(a).

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.

d. Response: Please see my response to question 20(a).

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

Response: In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that "no federal general common law" exists. *Id.* at 78. Otherwise, federal common law generally refers to rules of decision federal courts have formulated as part of their Article III authority to adjudicate cases and controversies.

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

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

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

Response to all subparts: A federal court exercising diversity jurisdiction would apply the substantive law of the state in question, and decide questions of state law as the highest court of the state has defined the scope of the relevant right. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about whether a case was correctly decided. However, the issue of *de jure* racial segregation is unlikely to come before me or be religitated in the courts. As such, consistent with the practice of past nominees, I am comfortable stating that *Brown v. Board of Education* was correctly decided.

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

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

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

Response to all subparts: Federal Rule of Civil Procedure 65 provides the Court's injunction power. In the Ninth Circuit, "[a]lthough there is no bar against . . . nationwide relief in federal district court or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (internal quotation marks and citations omitted).

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

Response: Please see my response to Question 24.

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

Response: Federalism is defined in Black's Law Dictionary as "the legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state government." (11th ed. 2019). Under our federal constitutional system, the federal government possesses enumerated powers while other powers are reserved to the states or the people. In this way, liberty is enhanced and a healthy balance of power is achieved. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power

between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.") (internal quotations and citations omitted)).

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

Response: Please see my response to question 6.

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

Response: The appropriate measure of damages is a highly fact-specific inquiry. Different legal standards apply to requests for damages and injunctive relief, making them applicable to different situations. For example, injunctive relief can only be awarded where damages would be inadequate to prevent irreparable harm, and is generally applicable to future conduct. Damages are often sought to remedy past harms.

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

Response: Substantive due process is a concept derived from the Fifth and Fourteenth Amendments that protects certain unenumerated fundamental rights from government interference, notwithstanding procedural protections. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court explained that any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. The Court has since recognized such fundamental rights to include, among others, the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *Id.* at 720; *but see Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (no constitutional right to abortion).

30. 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: Burdens on the First Amendment's right to free exercise of religion generally must satisfy strict scrutiny. See my response to question 14.

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

Response: I am not aware of any Supreme Court or Ninth Circuit precedent distinguishing between freedom of worship and the free exercise of religion.

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: See my response to question 14.

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: See my response to question 16.

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: Where the Religious Freedom Restoration Act (RFRA) applies, it "operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1854 (2020). While RFRA applies to all federal statutes, it allows Congress to exclude statutes from RFRA's protections. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020).

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

Response: No.

31. 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 this statement or the context in which it was made. However, I read this statement to suggest that Justice Scalia believed a judge should set aside his or her personal views when deciding cases, and sometimes that will result in outcomes that may be unpopular.

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

a. If yes, please provide appropriate citations.

Response: To the best of my recollection, I have not taken the position that a federal statute was unconstitutional. I have litigated cases concerning the constitutionality of Washington State initiatives under the Washington Constitution. For example, in *Lee v. State*, 374 P.3d 157 (Wash. 2016), I represented a coalition of plaintiffs challenging the constitutionality of a state initiative relating to the state sales tax. The same initiative was at issue in a pre-enactment posture in *Huff v. Wyman*, 361 P.3d 727 (Wash. 2015), where I also represented the plaintiff. Similarly, in *Washington State Ass'n of Ctys. v. State*, 502 P.3d 825 (Wash. 2022), I represented the Washington State Association of Counties in seeking reimbursement for increased election costs caused by a new statute under the state's unfunded mandate law. The case involved some state constitutional claims, though was decided on statutory grounds. It is possible that I was involved in other initiative-related litigation in a junior capacity earlier in my career, but after a review of my records, I am unable to identify additional cases.

33. 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.

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

Response: As the child of two public school teachers, who has now been nominated to serve in a position of public trust, I am deeply grateful for the countless opportunities I have had as an American. Generally speaking, judges adjudicate specific legal claims and if I am confirmed, in any case before me where a party asserted a racial discrimination claim in violation of federal law, I will carefully evaluate the specific legal claim asserted and the evidence in the record based on the precedent of the Supreme Court and the Ninth Circuit. In each case that comes before me, I will work hard to treat all litigants fairly and impartially.

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

Response: Yes.

36. How did you handle the situation?

Response: As an attorney, I am duty bound to zealously advocate for my client's position, without regard to my personal views, within the bounds of the law. I have taken that obligation seriously throughout my career.

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

Response: Yes.

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

Response: No specific Federalist Paper has most shaped my views of the law. If confirmed, my view of the law would be shaped by binding Supreme Court and Ninth Circuit precedent, which I would apply faithfully and impartially.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court expressly reserved the question of fetal personhood. Because this question is likely to be litigated and could potentially come before me, it would be inappropriate for me to express my personal views on this issue.

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

Response: To the best of my recollection, no.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: No.

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

Response: To the best of my recollection, I have not substantially authored or edited a brief that was filed in court without my name on it. On occasion, in the course of my career in private practice, I have proofread and/or suggested edits to the briefs of my colleagues. I have also served as a mentor to junior attorneys and reviewed their work in that capacity and made suggested edits. I have no recollection of specific cases in which I have taken this role.

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

Response: Please see my response to question 43.

44. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: To the best of my recollection, no.

45. 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: My understanding is that judicial nominees must answer all questions fully and truthfully to the best of their ability, consistent with their professional and ethical obligations.

Questions from Senator Thom Tillis
for Kymberly Kathryn Evanson
Nominee to be United States District Judge for the Western 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.

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

   Response: I interpret that term to refer to a judge that decides a case based on personal views or decides issues that are not properly before the court. Neither scenario is appropriate in my view.

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

   Response: The Code of Conduct for United States Judges requires judges to be impartial. It is both an expectation and a requirement.

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

   Response: No. A judge should decide each case based on the facts and the applicable law, and not try 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: Yes. The faithful interpretation and application of the law may sometimes result in an outcome that the public or the judge herself may view as undesirable. Cases should be decided based on the facts and the law, not any personal views or desires of the judge or the public.

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

   Response: No.

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

   Response: If confirmed, I would follow all Ninth Circuit and Supreme Court binding precedent concerning Second Amendment rights, including *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: The Supreme Court has evaluated the relationship between constitutional rights and public health restrictions in several decisions addressing challenges to government restrictions arising out of the COVID-19 pandemic. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). If confirmed and such a case came before me, I would review the record before the court, the arguments of the parties, and Supreme Court and Ninth Circuit precedent. I would then apply the law to the specific facts of the case, reaching only those narrow issues squarely before the court.

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: Qualified Immunity is a legal doctrine that "[P]rotects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), the Supreme Court held that officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." In any case involving a claim of qualified immunity, depending upon the relevant stage of the proceedings, I would carefully evaluate the factual record and/or the pleadings to determine if this standard has been met.

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

Response: Questions about whether current qualified immunity jurisprudence provides sufficient protection for law enforcement officers are best left to policymakers to consider. If confirmed, I would apply all binding Ninth Circuit and Supreme Court precedent to any case involving a qualified immunity claim, regardless of any personal beliefs I may have.

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

Response: Please see my response to question 9.

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: The Supreme Court has established a two-step framework that applies in patent eligibility cases. *See Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012). If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about Supreme Court decisions or areas of jurisprudence. If a case were to come before me involving patent eligibility, I would take the time to carefully review the record and the applicable law, and apply it so as to reach only the issues squarely before the court.

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?**

    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?**

    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?**

    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?**

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?**

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?**

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?**

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?**

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?**

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 to all subparts: The Supreme Court has established a two-step framework that applies in patent eligibility cases. *See Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208

(2014); *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012). If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view or analyze hypotheticals on matters that may come before me. If a case were to come before me involving patent issues, I would take the time to carefully review the record and the applicable law, and apply it so as to reach only the issues squarely before the court.

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: The extent to which current patent law effectively incentivizes innovation is a question for policymakers to consider. If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about Supreme Court decisions or areas of jurisprudence. If a case were to come before me involving patent issues, I would take the time to carefully review the record and the applicable law, and apply it so as to reach only the issues squarely before the court.

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: In my 15-year career as a civil litigator representing public entities, private companies and occasionally individuals, to the best of my recollection, I have not had occasion to litigate issues involving copyright law.

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

Response: See my response to question 15(a).

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

Response: In 2012, I represented an online book retailer in a defamation case arising out of the sale of a self-published work that was sold by the retailer. *See*

Parisi v. Sinclair, 845 F. Supp. 2d 215 (D.D.C. 2012), appeal dismissed at *Daniel Parisi, et al v. Amazon.com, Inc., et al.*, 11-7077 (D.C. Cir. 2012).

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

Response: I have frequently encountered First Amendment issues in my practice. To the best of my recollection, in addition to the case identified above, I have represented public entities in litigation relating to municipal signage policies and provided counseling to public entities regarding other First Amendment issues. I have also represented individual plaintiffs in a civil rights case alleging censorship and a private petitioning company in disputes with property owners arising from petitioning activity. Finally, I served as local counsel on one patent matter.

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 would first determine whether there was any binding Supreme Court or Ninth Circuit precedent resolving the issue raised. If neither court had addressed the statute, I would look to the statutory text, as the Supreme Court has directed. The text of the statute is the best evidence of congressional intent. I would next consult Supreme Court and Ninth Circuit precedent interpreting related or analogous statutory provisions, the canons of statutory construction, and persuasive authority from other courts. Finally, I would consider legislative history if necessary.

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: If confirmed, I would review and apply binding Ninth Circuit and Supreme Court authority regarding the appropriate level of deference to give to an expert agency's analysis or advice.

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 confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent. However, as a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view on matters pending or impending before any court. If a case were to come before me involving copyright infringement issues, I would take the time to carefully review the record and the applicable law, and apply it so as to reach only the issues squarely before the court.

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

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

Response: Judges are bound to apply the law as written. It is the province of policymakers to consider whether certain laws should be amended to better reflect contemporary conditions. If confirmed as a United States District Judge, I will faithfully and impartially apply all binding Supreme Court and Ninth Circuit precedent.

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

Response: See my response to question 17(a).

18. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed

in the U.S. are assigned to just one of the more than 600 district court judges in the country.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: The local rules for the District Court for the Western District of Washington provide for the random assignment of cases to judges within each of the court's two divisions. The local rules further dictate the process for the assignment of cases to each division, which is generally based on geography. *See* Local Rule 3(e). If confirmed, I would comply with all Supreme Court and Ninth Circuit precedent regarding venue, as well as the court's local rules regarding case assignment.

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: Judges should comply with the local rules regarding case assignment for their particular court, and the Code of Conduct for United States Judges, which is what I commit to doing if I am confirmed.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: See my response to question 18(b).

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

Response: See my response to question 18(b).

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: As a judicial nominee, it would be inappropriate for me to speculate in response to this hypothetical. As a general matter, I can state that issues of this type should be addressed by the relevant court of appeals in the circuit where the issue has taken place.

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: See my response to question 19(a).

20. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

Response: If I am confirmed as a United States District judge, my focus will be on resolving only the cases and controversies that come before me, consistent with applicable law and based upon the record of the particular case. To the extent policymakers have concerns regarding venue or case assignment issues, they can pursue those issues through the legislative process.

a. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: Please see my response to question 20(a).

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to question 20(a).

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?

Response: As a judicial nominee, it would be in appropriate for me to comment on the hypothetical conduct of another judge or court. I can state, however, that judges have a duty to follow the applicable binding precedent of the circuit in which they sit, irrespective of any personal views they may harbor.

b. Would five mandamus reversals be sufficient? Ten? Twenty?

Response: Please see my response to question 21(a).

22. In 2017, you represented Seattle, Portland, and other plaintiffs in a lawsuit over the Trump administration's Executive Order to restrict federal funding for sanctuary cities.

a. Do you believe that cities can lawfully obstruct federal immigration enforcement?

Response: I served as local counsel to the City of Portland in the litigation referenced in question 22. I did not play a substantive role in the case, which I understand was settled after a decision was rendered in similar litigation. If any case involving immigration issues were to come before me, I would faithfully and impartially apply binding Supreme Court and Ninth Circuit precedent, based on the facts of the particular case before me, irrespective of any prior litigation positions I have taken on behalf of clients.

b. Would you be able to impartially judge a case involving similar sanctuary city policies under a future administration?

Response: Please see my response to question 22(a).