Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Tiffany M. Cartwright
Nominee to be United States District Judge for the Western District of Washington

1. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court instructed that courts must "exercise the utmost care" when asked to expand the concept of substantive due process. *Id.* at 720 (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (plurality opinion)). There must be a "careful description" of the "asserted fundamental liberty interest" and analysis of whether that interest is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (citations omitted).

2. **Please explain the difference between the original intent of a law and its original public meaning.**

   Response: The Supreme Court has distinguished between the original public meaning of a law's terms as written and the original subjective intent of the law's drafters. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1750 (2020).

   a. **If there is a conflict between a law's original intent and original public meaning, which should a judge rely on to determine how to interpret and apply the law?**

      Response: The Supreme Court has instructed that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Bostock*, 140 S. Ct. at 1737.

3. **As a judge, what legal framework would you use to evaluate a claim about a violation of the Establishment Clause?**

   Response: The Supreme Court has instructed that the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–649 (2002) (quoting *Agostini v. Felton*, 521 U.S. 203, 222–223 (1997)).

4. **Please describe your understanding of the constitutionality of nationwide or universal injunctions based on current Supreme Court and Ninth Circuit precedent.**

   Response: Under Ninth Circuit precedent, "[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).

"The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives." *Id.* at 583 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) and *United States v. Mendoza*, 464 U.S. 154, 160 (1984)).

5. **You served on the board of directors of Legal Voice, an organization that has claimed that women's rights are too often "cast aside in favor of the purported desire to protect religious freedom." Please explain what the organization means when it characterizes the desire to protect religious freedom as "purported."**

   Response: I am not familiar with this quote or its context, and I do not know what the organization meant by this statement. My work with Legal Voice consisted primarily of serving as board Treasurer and a member of the Audit Finance Committee. In those roles, I oversaw the financial health of the organization. I was not involved in the organization's day-to-day policy or litigation work, apart from an amicus brief I authored in *W.H. v. Olympia School District*, 465 P.3d 322 (Wash. 2020), a case that sought to ensure the Washington Law Against Discrimination's prohibition on sexual harassment in places of public accommodation extended to children in public schools. I would note that in my experience, Legal Voice did not have a litmus test for board membership and its board possessed a wide variety of backgrounds and perspectives and included members of many faiths.

6. **Please explain your understanding of Ninth Circuit and Supreme Court case law on when it is appropriate to question the sincerity of an individual's religious beliefs, including when seeking a religious exemption.**

   Response: A Court may evaluate whether an asserted religious belief is "sincere," in that it is "sincerely based on a religious belief and not some other motivation." *See, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1277–78 (2022). A court's "narrow function" in evaluating the sincerity of a religious belief is whether the asserted belief "reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas v. Review Bd. of Indian Employment Security Div.*, 450 U.S. 707, 716 (1981)). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714.

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

   Response: In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court recognized that substantive due process protects "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534.

8. **Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?**

   Response: In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court explained: "This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference,

after two cases in which we employed it." *Id.* at 2408. I do not understand there to be an analytical difference.

9. **When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?**

   Response: If confirmed, as a district judge I would always begin with any Supreme Court or Ninth Circuit precedent interpreting the relevant text. If those sources did not resolve the ambiguity, and if the text was a statute or regulation that met the requirements for these doctrines as set forth by the Supreme Court, I would apply interpretive doctrines such as *Chevron* or *Auer* deference as appropriate. I would also consider canons of statutory construction, persuasive authority from other courts, and legislative history as a last resort.

10. **When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?**

    Response: The Supreme Court has recognized that not all canons of statutory interpretation are useful in every situation. *See, e.g.*, *Microsoft Corp. v. I4I Ltd. Partnership*, 564 U.S. 91, 106 (2011) ("[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." (Internal quotation marks and citation omitted)). If application of two canons of statutory interpretation produces genuinely contradictory results, it might not be helpful to rely on either when interpreting that statute.

11. **How do you decide when text is ambiguous?**

    Response: In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court explained that text may be "genuinely ambiguous" when, for example, it does "not directly or clearly address every issue" or "when applied to some fact patterns, [it] may prove susceptible to more than one reasonable reading." *Id.* at 2410.

12. **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?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

Response: If I am confirmed, as a district court judge I would be bound by and would faithfully apply all Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to comment on or critique those cases as their application may come before me. However, consistent with the position of previous nominees and because the legality of segregated schools or interracial marriage is so unlikely to be relitigated, I will answer that I agree *Brown* and *Loving* were correctly decided.

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

Response: On January 4, 2021, I submitted an application to the nonpartisan Judicial Merit Selection Committee established by Senators Maria Cantwell and Patty Murray. On February 12, 2021, I interviewed with the Committee. On February 22, 2021, I interviewed with staff from Senator Cantwell's office, and on February 25, 2021, I interviewed with staff for Senator Murray. On March 8, 2021, I interviewed with Senator Murray, and Senator Murray's staff told me later the same day that I was being recommended to the White House for further consideration. On July 2, 2021, I interviewed with attorneys from the White House Counsel's Office. Since July 20, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On January 19, 2022, my nomination was submitted to the Senate.

14. **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.

15. **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: After I had already been recommended by my district's nonpartisan judicial merit selection committee, I was contacted by Chris Kang and Jake Faleschini with Demand Justice. I spoke to each of them on a few occasions about the general nature of the nomination process, and Mr. Kang congratulated me following my nomination.

16. **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: On several occasions during my selection process, I spoke with a Seattle attorney whom I knew previously from my law practice and whom I believe was part of a local American Constitution Society chapter. We spoke about the general nature of the nomination process for my district, particularly the nonpartisan merit selection committee.

17. **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.

18. **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.

19. **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, and/or Jen Dansereau?**

        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, and/or Jen Dansereau?**

        Response: Please see my answer to question 15.

20. **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.

21. **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? 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.**

Response: No.

b. **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, 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.

c. **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, 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.

22. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

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

Response: No.

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

Response: To the best of my knowledge, no.

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

Response: To the best of my knowledge, no.

23. **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: To the best of my knowledge, 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.

24. **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: To the best of my knowledge, 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.

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

Response: I received these questions from the Office of Legal Policy (OLP) on June 1, 2022. I submitted draft answers to OLP for feedback on June 2, 2022. I finalized my answers on June 3, 2022.

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

Questions for the Record for Tiffany M. Cartwright, Nominee for the 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. **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: My judicial philosophy is that federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court, based on a fair and impartial application of the law to the actual evidence in the record, being mindful not to stray into the role of either the legislature or the jury.

   As a litigator, I have focused on understanding the application of Supreme Court precedent to my clients' cases regardless of who authored the opinion, and if I am

confirmed, I will apply all Supreme Court and Ninth Circuit precedent faithfully. I do not have sufficient knowledge of the philosophies of the individual Justices to say which is most analogous to my own.

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

Response: Black's Law Dictionary describes "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I would be guided in my rulings by Supreme Court and Ninth Circuit precedent, rather than by any label or interpretive philosophy. For example, in Fourth Amendment cases, the Supreme Court has instructed that the "common law in place at the Constitution's founding . . . may be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (internal quotation marks and citations omitted).

3. **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 describes "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I would be guided in my rulings by Supreme Court and Ninth Circuit precedent, rather than by any label or interpretive philosophy.

4. **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 I am 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, in such a scenario, I would begin my analysis with the text of the constitutional provision, and if the plain text resolved the issue, my inquiry would end.

5. **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: The Supreme Court has stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). When interpreting the Constitution, the Supreme Court is similarly "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

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

Response: The Constitution is an enduring document with principles that remain the same even as they must be applied to contemporary society and "adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). The Constitution may only be changed through the Article V amendment process.

7. **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 (1997), the Supreme Court instructed that courts must "exercise the utmost care" when asked to expand the concept of substantive due process. *Id.* at 720 (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (plurality opinion)). There must be a "careful description" of the "asserted fundamental liberty interest" and analysis of whether that interest is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (citations omitted).

8. **In your opinion, how should the U.S. Supreme Court rule in *Dobbs v. Jackson Women's Health Organization*?**

Response: As a judicial nominee, it would be improper for me to comment on any matter pending in any court. If I am confirmed, I will follow all Supreme Court precedent, including the ultimate ruling in *Dobbs*.

9. **If the Supreme Court were to issue an opinion similar to the leaked majority opinion in *Dobbs*, would you consider that opinion to be binding precedent?**

Response: Please see my answer to question 8.

10. **From 2018 to present, you have served in leadership positions for Legal Voice, a progressive feminist organization that works to criminalize abortions and challenge religious hospitals. Do the values of the organization align with your personal values?**

Response: It is unclear to me what this question means by "works to criminalize abortions and challenge religious hospitals" and I do not understand that to be an accurate description of Legal Voice's work. My work with Legal Voice consisted primarily of serving as board Treasurer and a member of the Audit Finance Committee. In those roles, I oversaw the financial health of the organization. I was not involved in the organization's day-to-day policy or litigation work, apart from an amicus brief I authored in *W.H. v. Olympia School District*, 465 P.3d 322 (Wash. 2020), a case that sought to ensure the Washington Law Against Discrimination's prohibition on sexual harassment in places of public accommodation extended to children in public schools. I would note that in my experience, Legal Voice did not have a litmus test for board membership and its board members possessed a wide variety of backgrounds and perspectives. If I am confirmed, it is my

commitment to set aside my personal views in every case and rule on the specific issues presented to me based on a fair and impartial application of the law.

11. **In *Roberts v. City of Fairbanks*, you pursued your clients' claims despite strong precedent in *Heck v. Heller*, where the U.S. Supreme Court commanded a narrow interpretation of Section 1983. Your advocacy resulted in Ninth Circuit precedent that contradicts the rule articulated by the U.S. Supreme Court in *Heck*. What steps will you take as a judge to demonstrate respect for the doctrine of stare decisis by avoiding the contradiction of existing precedent?**

Response: Respectfully, I disagree with how this question characterizes my advocacy and the holding in *Roberts*. In *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020), the Ninth Circuit held that my clients' convictions had been vacated and thus invalidated under "the plain language" of *Heck v. Humphrey*, 512 U.S 477 (1994). *Roberts*, 947 F.3d at 1198. The City of Fairbanks filed a petition for rehearing en banc of that decision, which was denied, 962 F.3d 1165, and a petition for certiorari to the U.S. Supreme Court, which was also denied, 141 S. Ct. 1515 (2021). Similarly, in *Thompson v. Clark*, 142 S. Ct. 1332 (2022), the Supreme Court held that "[t]o demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction." *Id.* at 1335. If I am confirmed, I will faithfully apply all binding precedent of the Supreme Court and the Ninth Circuit.

12. **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: The Constitution contains many limits on what government may impose on private institutions. For example, all federal statutes must be rooted in an enumerated Congressional power, and neither state nor federal regulation may violate protections contained in the Bill of Rights, such as the freedom of speech or the free exercise of religion. Congress has also created other limitations on state and federal regulation via statute; for example, the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act both require that federal and certain state actions not substantially burden the free exercise of religion unless doing so furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

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

Response: The Supreme Court's Establishment Clauses cases "have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993). Similarly, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.*

14. **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, 66–67 (2020), the Supreme Court held that the plaintiff church and synagogue were likely to succeed on the merits of their free exercise claim because the challenged COVID-19 restrictions "single[d] out houses of worship for especially harsh treatment" and thus were not neutral or generally applicable and were subject to strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Applying strict scrutiny, the Court concluded that the restrictions were not narrowly tailored. *Id.* at 67. The Court also held that the restrictions caused irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Finally, the Court held that granting the injunction would not harm the public interest because "the State has not shown that public health would be imperiled if less restrictive measures were imposed." *Id.* at 68.

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

Response: The Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), was that the plaintiffs, who wished to gather at home for religious exercise, were entitled to an injunction pending appeal of California's restrictions on private gatherings during the COVID-19 pandemic. The rationale was that California's restrictions treated "some comparable secular activities more favorably than at-home religious exercise," *id.* at 1297, thus triggering strict scrutiny, and California had not shown "that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID," *id.* at 1296.

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

Response: Yes. For example, in *West Virginia State Board of Education v. Barnette*, 406 U.S. 205 (1972), the Supreme Court held that a public school could not require students who were Jehovah's Witnesses to salute the flag when doing so conflicted with their beliefs.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the Free Exercise clause of the First Amendment when it adjudicated a complaint under the Colorado Anti-Discrimination Act without complying with "the State's duty under the First

Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731.

18. **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: A Court may evaluate whether an asserted religious belief is "sincere," in that it is "sincerely based on a religious belief and not some other motivation." *See, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1277–78 (2022). The Religious Freedom Restoration Act and Religious Land Use and Institutionalized Person Act both expressly include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See, e.g.*, *Burwell v. Hobby Lobby*, 573 U.S. 682, 695–696 (2014). And in First Amendment cases, the Supreme Court has instructed that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Review Bd. Of Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981)).

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

Response: As discussed above, courts may evaluate whether an asserted religious belief is sincere, but "[i]n considering the circumstances of any given case, courts must take care to avoid 'resolving underlying controversies over religious doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 n.10 (2020) (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)).

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

Response: Please see answers to the above subparts of question 18.

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

Response: To the best of my personal knowledge, no.

19. **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: The Supreme Court's holding in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), was that pursuant to the "ministerial exception," the First Amendment does not permit "courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith." *Id.* at 2055. The Court's reasoning was that because "[t]he First Amendment

protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *id.* (internal quotation marks and citation omitted), and "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission for a private religious school," *id.* at 2064, the two teachers at issue performed "vital religious duties" and thus fell within the ministerial exception, *id.* at 2066.

20. **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 held that the City of Philadelphia's policy requiring foster care agencies to certify same-sex couples to be foster parents was not generally applicable and was thus subject to strict scrutiny pursuant to *Employment Division v. Smith*, 494 U.S. 872 (1990). *Fulton*, 141 S. Ct. at 1878–1879. Applying strict scrutiny, the Court held that the City's asserted interests were not compelling "once properly narrowed," *id.* at 1881–1882, and therefore the policy violated the Free Exercise clause of the First Amendment.

21. **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: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch wrote to explain his view that the County respondents and lower courts in that case "misapprehended RLUIPA's demands" in a dispute regarding whether certain Amish communities should receive an exemption from County regulations for disposal of gray water at their homes. *Id.* at 2432. More specifically, Justice Gorsuch explained that the County and courts had misapplied strict scrutiny by "treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community" and failing to scrutinize whether the County had a compelling interest in denying an exemption "to the Swartzentruber Amish *specifically*," particularly considering "exemptions other groups enjoy." *Id.*

22. **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: No. I am not aware of any trainings in the Western District of Washington that fit these descriptions.

23. **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 in the Western District of Washington that fits this description, and I do not know the role that judges have in designing or approving employee trainings. Please also see my answer to question 22.

24. **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.

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

Response: If I am confirmed, in any case that came before me involving the issue of race, color, or sex in political appointments, 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. As a judicial nominee, it would be improper for me to comment on whether such practices in political appointments are appropriate or constitutional.

26. **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 making a claim of racism in the criminal justice system, 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 all cases that might come before me, I will take care to treat all litigants fairly and impartially without regard to race or any other personal characteristic.

27. **Throughout your descriptions of cases that you litigated as a civil rights lawyer, you emphasized that many of your clients, when opposing law enforcement, were "unarmed." If confirmed, can we expect your bench to exhibit leniency for defendants who, during their encounters with the police, were "unarmed"—even if they were otherwise belligerent or dangerous?**

Response: First, if I am confirmed, in any case that came before me involving an encounter between a civilian and the police, I would fairly and impartially apply the precedent of the Ninth Circuit and the Supreme Court to the specific evidence in the record of that case, without regard for any of my prior work as an advocate. Second, in my work as a civil rights lawyer I have also represented members of law enforcement, and I have great respect for the important and challenging work that law enforcement officers

do every day to keep communities safe. Finally, in the context of whether an officer's use of force is reasonable under the Fourth Amendment, the law is clear that the "operative question . . . is whether the totality of the circumstances justifies a particular sort of search or seizure," and reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (internal quotation marks and citations omitted). Whether a person is armed is just one of many circumstances that can be relevant to the Fourth Amendment analysis.

28. **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: The size of the Supreme Court is a matter for Congress to determine consistent with its authority under the Constitution. If I am confirmed, I will follow the Supreme Court's precedent regardless of its size or composition.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms, and that the District of Columbia's "prohibition on the possession of usable handguns in the home violates the Second Amendment." *Id.* at 573. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second Amendment right applies to the States through the Fourteenth Amendment, and that Chicago's ban on handgun possession was likewise unconstitutional. The Court reiterated that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *Id.* at 780.

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

Response: The Supreme Court explained in *Heller* that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. I am not aware of any Supreme Court or Ninth Circuit precedent holding that the right secured by the Second Amendment receives less protection than other enumerated rights.

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

Response: The Supreme Court explained in *Heller* that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. I am not aware of any Supreme Court or Ninth Circuit precedent holding that the right secured by the Second Amendment receives less protection than the right to vote.

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

Response: In any case that came before me regarding the legality of an executive official's refusal to enforce a law, I would 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. As a judicial nominee, it would be improper for me to opine on whether any such refusal is appropriate.

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

Response: Broadly speaking, I understand prosecutorial discretion to encompass both decisions as to whether prosecution should occur given the facts and circumstances of a particular case as well as enforcement priorities that guide the allocation of limited resources.

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

Response: No. The circumstances under which a defendant in a federal criminal case may be sentenced to death are governed by statute at 18 U.S.C. § 3591. The President does not have the authority to repeal a statute.

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

Response: In *Alabama Assoc. of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam), the Supreme Court vacated a stay of a district court order vacating "a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need." *Id.* at 2486. The Court explained that the applicant real estate associations were likely to succeed on the merits of their claim that the Centers for Disease Control and Prevention lacked statutory authority to enact the moratorium and that the moratorium put the applicants "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Id.* at 2488–2490.

Senator Josh Hawley
Questions for the Record

Tiffany Cartwright
Nominee, Western District of Washington

1. **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 this quote or its context, but taken alone, I do not agree with that philosophy.

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

    Response: If confirmed, I will faithfully adhere to my oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453. I will follow the precedent of the Supreme Court and the Ninth Circuit as applied to the specific facts and legal claims before me, without regard to my personal views.

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

Response: Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must abstain from cases seeking to enjoin certain pending state court proceedings absent narrow exceptions. *Younger* abstention applies to three categories of state proceedings: (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 perhaps other "extraordinary circumstances where irreparable injury can be shown." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

Pursuant to *Pullman* abstention, "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 *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)). *Pullman* abstention "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 Resources Control Bd.*, 988 F.3d 1194, 1209 (9th Cir. 2021).

Under *Burford* abstention, a federal court may abstain "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)). The Ninth Circuit requires a showing of three factors for *Burford* abstention to apply: "(1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Id.* at 1405.

Courts may also stay a federal action over which they would otherwise have jurisdiction under the *Colorado River* doctrine, which according to the Ninth Circuit, "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, in the interest of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," 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 has instructed courts to consider eight factors in determining whether a *Colorado River* stay is appropriate: (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.

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

Response: To the best of my recollection, no.

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

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

Response: When interpreting the Constitution, the Supreme Court is "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

Response: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). If I am confirmed, I will begin analysis of a legal text with the plain language and any binding precedent from the Supreme Court and the Ninth Circuit. Only if the meaning of the statute is ambiguous after examining those sources would I consult persuasive authority from other courts, canons of statutory construction, or legislative history as a last resort.

There are narrow circumstances, however, in which the Supreme Court has instructed that legislative history should be considered in assessing the purpose of a government action. *See, e.g.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("Factors relevant to the assessment of government neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body'" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (plurality opinion))).

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

Response: The Supreme Court has specifically cautioned against consideration of "postenactment legislative history," explaining that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

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

Response: Federal courts may consult English "common law in place at the Constitution's founding," which can be instructive in determining the Framers' understanding of certain constitutional provisions, such as the Fourth Amendment prohibition on unreasonable searches and seizures. *Lange v. California*, 141 S. Ct. 2011, 2022 (2021).

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

Response: An inmate may show that "a State's refusal to alter its lethal injection protocol could violate the Eighth Amendment only if an inmate first identified a 'feasible, readily implemented' alternative procedure that would 'significantly reduce a substantial risk of severe pain.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1119 (2019) (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008)).

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

Response: Yes; please see my answer to question 6.

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

Response: In *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that there is no "freestanding right to DNA evidence" under the doctrine of substantive due process. *Id.* at 72.

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

Response: No.

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

Response: The standard depends on the type of the state governmental action and the nature of the challenge. For those categories of state governmental action that are covered by the Religious Land Use and Institutionalized Persons Act (RLUIPA), if the action substantially burdens the free exercise of a sincerely held religious belief, even a neutral and generally applicable action must be (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest. *See, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). Action by the federal government, as opposed to state governmental action, is subject to the same standard under the Religious Freedom Restoration Act (RFRA).

For state governmental action that falls outside RLUIPA and is governed by the First Amendment, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But "[f]acial neutrality is not determinative." *Id.* at 534. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* Instead, a court must consider "the effect of a law in its real operation" and other "circumstances" of the government action to determine if "the object or purpose of a law is the suppression of religion or religious conduct." *Id.* at 533–34; *see also, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[G]overnment 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."); *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("Factors relevant to the assessment of government neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body'" (quoting *Lukumi*, 508 U.S. at 540 (plurality opinion))).

In addition, even a facially neutral action may be subject to strict scrutiny if it is not generally applicable, such as where a law "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for

individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (internal quotation marks and citations omitted).

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

Response: Depending on the nature of the allegation, some claims alleging that state governmental action discriminates against a religious group or religious belief would be evaluated under the standards set forth in RLUIPA, *Lukumi*, *Masterpiece Cakeshop*, *Fulton*, and *Tandon*; please see my answer to question 10.

Other claims, particularly those involving an allegation of the denial of a public benefit for reasons related to religion, are governed under the standard set forth in *Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. 2246 (2020), and *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017). Under those cases, "disqualifying otherwise eligible recipients from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza*, 140 S. Ct. at 2255 (internal quotation marks and citations omitted).

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

Response: A court's "narrow function" in evaluating the sincerity of a religious belief is whether the asserted belief "reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas v. Review Bd. of Indian Employment Security Div.*, 450 U.S. 707, 716 (1981)). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. Based on my review of circuit precedent, the Ninth Circuit has not articulated its own standard beyond this Supreme Court precedent.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms, and that the District of Columbia's "prohibition on the possession of usable handguns in the home violates the Second Amendment." *Id.* at 573.

The Supreme Court explained in *Heller* that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The opinion did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27.

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

Response: No.

14. 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 understand that quote to be further explained by the later passage in Justice Holmes's dissent where he writes, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U.S. at 75–76. I agree that our Constitution was made for people of fundamentally differing views, a concept enshrined in the First Amendment.

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

Response: If I am confirmed, as a district court judge I would be guided by Supreme Court and Ninth Circuit precedent regardless of my personal beliefs. The Supreme Court has stated that "[t]he doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *see also West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

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

a. If so, what are they?

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

Response: If I am confirmed, I will be guided by Supreme Court precedent as to whether any of its opinions are no longer good law even if not formally overruled. I commit to faithfully applying all Supreme Court precedents.

16. 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?

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

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

Response to all subparts: If I am confirmed, as a district court judge I will be bound by Ninth Circuit and Supreme Court precedent. In the Ninth Circuit, "[c]ourts generally require a 65% market share to establish a prima facie case of market power." *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

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

Response: In *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no

federal general common law." *Id.* at 78. Certain procedural matters, however, are governed by federal common law, such as the recognition of testimonial privileges in federal court. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 8–9 (1996). The Supreme Court has also recognized "limited areas," such as "admiralty disputes and certain controversies between the States," in which "federal judges may appropriately craft the rule of decision" where it is "necessary to protect unique federal interests." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

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

Response: I would follow the interpretation of the state constitutional provision by the state's highest court. *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1874 (2018).

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 both subparts: A state court is "free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Florida v. Powell*, 559 U.S. 50, 59 (2010). The protections of the U.S. Constitution are binding on the states (except for those portions of the Bill of Rights that have not been incorporated against the states).

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

Response: As a judicial nominee, it is generally improper to critique or comment on decisions of the Supreme Court. However, consistent with the position of previous nominees and given that *de jure* segregation of public schools is so unlikely to be relitigated, I will answer that yes, I believe *Brown v. Board of Education* was correctly decided.

20. 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: Under Ninth Circuit precedent, "[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). "The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives." *Id.* at 583 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) and *United States v. Mendoza*, 464 U.S. 154, 160 (1984)).

21. 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 answer to question 20.

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

Response: "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the supremacy clause." *Id.* (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

23. 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 answer to question 2.

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

Response: Damages and injunctive relief are awarded in different circumstances and have different requirements to prove entitlement to relief. For example, the requirements to establish Article III standing to seek injunctive relief are different than for damages. *See, e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). If I am confirmed, I will carefully evaluate the relief requested in every case that comes before me based on the evidence in the record and the precedent of the Supreme Court and the Ninth Circuit.

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

Response: In *Washington v. Glucksberg*, the Supreme Court reiterated that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." 521 U.S. 702, 719 (1997). The Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests," *id.* at 720, that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," *id.* at 720–21 (internal quotation marks and citations omitted). The Court explained that "a long line of cases" have held that, "in addition to the specific freedoms protected by the Bill of Rights," substantive due process protects:

> the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Pa. v.*] *Casey*, [505 U.S. 833 (1992)].

Id. at 720. In later cases, the Supreme Court has held that substantive due process also encompasses the right to consensual sexual conduct between adults in their homes, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

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

Response: Please see my answers to questions 10 and 11.

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

Response: The Supreme Court has explained that "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (internal quotation marks and citations omitted).

The Court has also recognized that the "exercise of religion . . . involves not only belief and profession but the performance of (or abstention from) physical acts." *Id.* at 877. Whether governmental action that burdens such exercise of religion violates the First Amendment is determined by the standards set forth in *Smith*, *Lukumi*, *Masterpiece Cakeshop*, and *Tandon*. Please see my answer to question 10.

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: Please see my answer to question 10.

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

Response: Please see my answer to question 12.

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

Response: By its terms, the Religious Freedom Restoration Act applies "to all Federal law, and the implementation of that law, whether statutory or otherwise," unless "such law explicitly excludes such application by reference to this chapter." 42 U.S.C. §2000bb-3.

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.

27. 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 quote or its context. However, taken alone, I understand it to mean that a judge must apply the law fairly and impartially without regard to whether she personally agrees with the result.

28. 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: In *Evans v. Crews*, 133 S. Ct. 2742 (2013), I filed a petition for certiorari in the Supreme Court of the United States arguing that Florida's capital sentencing statute violated the Sixth Amendment right to trial by jury as set forth in *Ring v. Arizona*, 536 U.S. 584 (2002). The Supreme Court later agreed with this argument and invalidated Florida's statute in *Hurst v. Florida*, 577 U.S. 92 (2016).

In *Hall v. Florida*, 572 U.S. 701 (2014), I filed an amicus brief in the Supreme Court of the United States on behalf of the American Psychological Association and other similar professional associations arguing that Florida's statute governing the determination of intellectual disability created an unacceptable risk that individuals with intellectual disability would be executed in violation of the Eighth Amendment. The Supreme Court agreed and invalidated Florida's statute.

In *Davis v. Cox*, 351 P.3d 862 (Wash. 2015), I filed an amicus brief in the Washington Supreme Court on behalf of the Washington Employment Lawyers Association arguing that Washington's "anti-SLAPP" statute violated the First Amendment right to petition the government for redress of grievances. The court invalidated the statute under Washington's state constitutional right to trial by jury, interpreted "in light of the petition clause jurisprudence." 351 P.3d at 872–874.

29. 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: Since the time I first applied for consideration for this position, in the interests of security I deactivated private Facebook and Instagram accounts that consisted primarily of family photos. I have provided the Committee with all materials responsive to the Senate Judiciary Questionnaire.

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

Response: Whether certain policies or practices within the United States are systemically racist is an important question for policymakers. If I am confirmed, in any case before me making a claim of race 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 all cases that might come before me, I will take care to treat all litigants fairly and impartially without regard to race or any other personal characteristic.

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

Response: Yes.

32. How did you handle the situation?

Response: Consistent with my obligations as an attorney, I represented my client zealously within the confines of the law and the rules of professional conduct, without regard for my personal views.

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: I recognize that many Americans, including women like myself who have experienced pregnancy, childbirth, and motherhood, possess a wide range of sincerely held beliefs on this subject. If I am confirmed, I am committed to setting aside my personal beliefs to rule fairly and impartially on every matter that comes before me, and it would be improper as a judicial nominee to state my personal beliefs.

36. 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.

37. 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.

38. 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.

39. 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 never substantially authored or edited a brief that was filed in court without my name on it. I occasionally proofread and do other minor edits for my colleagues' briefs.

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

40. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

41. 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: In my testimony before the Judiciary Committee I have answered all questions truthfully and to the best of my ability, consistent with my obligations as a judicial nominee.

Questions for the Record for Tiffany M. Cartwright
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

. Questions for the Record

Senator John Kennedy

Tiffany Cartwright

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: My judicial philosophy is that federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court, based on a fair and impartial application of the law to the actual evidence in the record, being mindful not to stray into the role of either the legislature or the jury.

2. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: The Supreme Court has instructed that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

3. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court concluded that it could consider President Trump's statements when deciding whether a facially neutral presidential proclamation "was issued for the unconstitutional purpose of excluding Muslims." *Id.* at 2415–2420. But statutes are written by Congress—not the President—so even in the rare situation where it was necessary to consider legislative history in construing the meaning of a statute, statements by the President would seem to carry very little if any weight.

4. **What First Amendment restrictions can the owner of a shopping center place on private property?**

   Response: In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court held that property does not "lose its private character merely because the public is generally invited to use it for designated purposes" and that the owner of a shopping center could enforce a policy against distributing handbills on the property. *Id.* at 567–69.

5. **How does the Major Questions Doctrine relate to *Chevron*?**

   Response: Federal courts apply the *Chevron* doctrine when reviewing "an administrative agency's construction of a statute that it administers." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Under *Chevron*, an agency's "interpretation of an ambiguous statute may . . . receive substantial deference," but "only when it appears

that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006). When determining whether Congress has delegated authority to the agency, the Supreme Court has stated that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160). This has sometimes been referred to as the "major questions doctrine." *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

6. **What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that "the people . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

7. **Are non-citizens unlawfully present in the United States entitled to a right of privacy?**

Response: In general, the Supreme Court has consistently held that because the Fourteenth Amendment due process clause refers to "persons," its protections apply to citizens and non-citizens alike. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (explaining that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens" but rather applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

8. **When does equal protection of the law in the United States attach to a human life?**

Response: If I am confirmed, as a district court judge I will be bound by Supreme Court and Ninth Circuit precedent. I am not aware of any binding precedent that directly addresses this question, and as a judicial nominee, it would be improper to opine on a question that could come before me. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it choose, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Id. at 879 (opinion of O'Connor, Kennedy, and Souter) (quoting *Roe v. Wade*, 410 U.S. 113, 164–165 (1973)).

9. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: In *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), the Supreme Court held that Indiana's statute requiring citizens to present photo identification to cast a ballot did not violate the Equal Protection Clause of the Fourteenth Amendment.

10. What is the constitutional basis for a federal judge to issue a universal injunction?

Response: I am not aware of Supreme Court or Ninth Circuit precedent directly addressing the constitutional authority for a nationwide injunction; rather, the crafting of any injunction "is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Under Ninth Circuit precedent, "[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). "The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives." *Id.* at 583 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) and *United States v. Mendoza*, 464 U.S. 154, 160 (1984)).

Senator Mike Lee
Questions for the Record
Tiffany Cartwright, Nominee to be United States District Judge for the Western District of Washington

1. How would you describe your judicial philosophy?

Response: My judicial philosophy is that federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court, based on a fair and impartial application of the law to the actual evidence in the record, being mindful not to stray into the role of either the legislature or the jury.

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

Response: As a district court judge, I would start by applying any Supreme Court or Ninth Circuit precedent interpreting the federal statute. If binding precedent did not resolve the question before me, I would start by examining the plain text of the statute, "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). Only if the meaning of the text was unclear would I consult extratextual sources such as the canons of statutory construction, Supreme Court or Ninth Circuit precedent interpreting similar statutory language or provisions, any persuasive out-of-circuit or district court authority interpreting the statute, or legislative history.

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

Response: As a district court judge, I would apply any Supreme Court or Ninth Circuit precedent interpreting the constitutional provision. If binding precedent did not resolve the specific question before me, I would follow the analytical method set forth by Supreme Court precedent regarding the specific constitutional provision. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Lange v. California*, 141 S. Ct. 2011 (2021) (Fourth Amendment); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (substantive due process).

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

Response: When interpreting the Constitution, the Supreme Court is "guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

Response: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Id.* at 1737.

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

Response: The Supreme Court has stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: The "irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation marks and citations omitted).

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

Response: In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that, through the Necessary and Proper Clause, Congress has the implied power to pass laws necessary to implement its enumerated powers. "[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010).

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

I would examine the arguments of the parties regarding the source of Congressional power for the challenged law and apply Supreme Court and Ninth Circuit precedent regarding the scope of those powers. "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012).

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

Response: In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court summarized many of its cases recognizing rights that are not expressly enumerated in the Constitution, including the right of "[t]he association of people"; the "right to educate a child in a school of the parents' choice"; "not only the right to utter or to print, but the right to distribute, the right to receive, the right to read"; "freedom of inquiry, freedom of thought, and freedom to teach"; and "the right to express one's attitudes or philosophies by membership in a group or by affiliation with it." *Id.* at 482–485. Please also see my answer to question 10.

10. What rights are protected under substantive due process?

Response: In *Washington v. Glucksberg*, the Supreme Court reiterated that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." 521 U.S. 702, 719 (1997). The Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests," *id.* at 720, that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," *id.* at 720–21 (internal quotation marks and citations omitted). The Court explained that "a long line of cases" have held that, "in addition to the specific freedoms protected by the Bill of Rights," substantive due process protects:

> the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood of Pa. v.*] *Casey*, [505 U.S. 833 (1992)].

Id. at 720. In later cases, the Supreme Court has held that substantive due process also encompasses the right to consensual sexual conduct between adults in their homes, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: If I am confirmed, as a district court judge I will be bound by Supreme Court and Ninth Circuit precedent. The Supreme Court has held that "[t]he doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *see also West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

12. What are the limits on Congress's power under the Commerce Clause?

Response: The Supreme Court has interpreted the Commerce Clause to allow Congress to regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)).

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Supreme Court has instructed that "a suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Court has held that classification by race, alienage, ancestry, or religion is inherently suspect. *Id.* at 312 n.4; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: "Separation of powers 'was not simply an abstract generalization in the minds of the Framers; it was woven into the document that they drafted in Philadelphia in the summer of 1787.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *INS v. Chadha*, 462 U.S. 919, 946 (1983)). "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

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

Response: I would carefully examine the arguments of the parties regarding the scope of authority exercised by that branch of government in light of Supreme Court and Ninth Circuit precedent. "The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)). "The

Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'" *Id.* at 534–35 (quoting *McCulloch*, 17 U.S. at 405).

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

Response: A judge should treat all litigants with dignity and respect and do her best to understand each party's perspective, but empathy should not play a role in a judge's consideration of a case.

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

Response: If I am confirmed, I will make every effort to apply the law correctly to the particular case or controversy before me and avoid either scenario.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have not had the opportunity to engage in any historical or empirical analysis of these questions and do not have a sufficient basis to provide an informed opinion.

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

Response: Judicial review is the power of the judicial branch to review actions by the legislative or executive branch, or by the States, and determine whether they conflict with the Constitution. *See Marbury v. Madison*, 1 Cranch 137 (1803). Black's Law Dictionary describes "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019). In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court described *Marbury* as "declar[ing] the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle" is "a permanent and indispensable feature of our constitutional system." *Id.* at 18.

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent

practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: If I am confirmed, as a district court judge I am bound by Supreme Court precedent. In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court considered "a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution." *Id.* at 4. The Court rejected that claim, explaining that "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *Id.* at 18 (quoting *United States v. Peters*, 9 U.S. 115, 136 (1809) (Marshall, C.J.)). "A Governor who asserts a power to nullify a federal court order is similarly restrained." *Id.* at 18–19.

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

Response: I understand that passage of Federalist 78 to describe the limited role of the judiciary in addressing particular cases and controversies and to recognize the concomitant need for the judiciary's independence.

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

Response: If I am confirmed, as a district court judge my obligation is to apply binding Supreme Court and Court of Appeals precedent even if I question its persuasive value. Lower courts should carefully evaluate the specific legal claims and evidence in each case to determine whether and how it is governed by binding precedent.

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

Response: 18 U.S.C. § 3553(a)(6) states that the factors to be considered in imposing a sentence include "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." In

making individual sentencing decisions, I would consider sentences imposed on defendants with similar records who were found guilty of similar conduct to avoid unwarranted disparities based on race, gender, nationality, or any other personal characteristic.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: The word "equity" has many different meanings and applications within the law (for example, the "balance of equities" when considering a request for a preliminary injunction). I am not familiar with this definition and do not have a personal definition of equity. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary distinguishes between "equality" as the "quality, state, or condition of being equal," and "equity" as "fairness; impartiality; evenhanded dealing."

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

Response: The Fourteenth Amendment prohibits a State from denying "any person within its jurisdiction the equal protection of the laws." If I am confirmed, in any case that comes before me raising a claim under the equal protection clause, I will carefully consider the specific claim and evidence in the record and apply the precedent of the Supreme Court and the Ninth Circuit.

27. How do you define "systemic racism?"

Response: I understand systemic racism to refer to policies or practices that create or perpetuate unwarranted racial disparities.

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

Response: I am not personally familiar with the academic discipline of critical race theory, but Black's Law Dictionary describes it as "[a] reform movement within the

legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

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

Senator Ben Sasse
Questions for the Record for Tiffany M. Cartwright
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 25, 2022

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

   Response: No.

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

   Response: My judicial philosophy is that federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court, based on a fair and impartial application of the law to the actual evidence in the record, being mindful not to stray into the role of either the legislature or the jury.

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

   Response: Black's Law Dictionary describes "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I would be guided in my rulings by Supreme Court and Ninth Circuit precedent, rather than by any label or interpretive philosophy. For example, in Fourth Amendment cases, the Supreme Court has instructed that the "common law in place at the Constitution's founding . . . may be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (internal quotation marks and citations omitted).

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

   Response: The Supreme Court has instructed that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Bostock*, 140 S. Ct. at 1737.

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

   Response: The Constitution is an enduring document with principles that remain the same even as they must be applied to contemporary society and "adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

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

   Response: As a litigator, I have focused on understanding the application of Supreme Court precedent to my clients' cases regardless of who authored the opinion, and if I am confirmed, I will apply all Supreme Court and Ninth Circuit precedent faithfully. I do not have sufficient knowledge of the jurisprudence of each individual Justice to be able to say which I admire the most. I greatly admire the clear and accessible writing of Justices Kagan and Gorsuch.

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

   Response: If I am confirmed, as a district court judge I would be bound by all Supreme Court and Ninth Circuit precedent, regardless of whether I believe it conflicts with the original public meaning of the Constitution.

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

   Response: If I am confirmed, as a district court judge I would be bound by all Supreme Court and Ninth Circuit precedent, regardless of whether I believe it conflicts with the original public meaning of the text of a statute.

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

   Response: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). If I am confirmed, I will begin analysis of a legal text with the plain language and any binding precedent from the Supreme Court and the Ninth Circuit. Only if the meaning of the statute is ambiguous after examining those sources would I consult persuasive authority from other courts, canons of statutory construction, or legislative history as a last resort.

   There are narrow circumstances, however, in which the Supreme Court has instructed that legislative history should be considered in assessing the purpose of a government action. *See, e.g.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("Factors relevant to the assessment of government neutrality include

'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body'" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (plurality opinion)).

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

Response: 18 U.S.C. § 3553(a)(6) states that the factors to be considered in imposing a sentence include "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." In making individual sentencing decisions, I would consider sentences imposed on defendants with similar records who were found guilty of similar conduct in order to avoid unwarranted disparities based on race or any other personal characteristic.

Questions from Senator Thom Tillis
for Tiffany M. Cartwright
Nominee to be US 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 understand judicial activism to include making decisions based on policy preferences rather than fair and impartial application of the law as well as deciding issues that are unnecessary to resolution of the case to reach a preferred outcome. I consider both forms inappropriate and detrimental to the rule of law.

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

   Response: Impartiality is both an expectation and an obligation.

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

   Response: No.

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

   Response: Yes, faithfully interpreting the law sometimes results in an outcome that may be seen as undesirable by members of the public or by the judge herself. The legitimacy of the judicial branch depends on public confidence that judges apply the law impartially without regard for their personal beliefs or preferred outcomes.

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

   Response: No.

7. **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: In any case in which a government official asserted qualified immunity, I would carefully evaluate the pleadings or the evidence in the record (depending on the stage at which the immunity was asserted) based on Supreme Court and Ninth Circuit precedent to

determine whether the plaintiff had alleged (on a motion to dismiss for failure to state claim) or a reasonable jury could find (on a motion for summary judgment) a violation of clearly established law. "The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) (internal quotation marks and citations omitted).

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

   Response: The question whether qualified immunity jurisprudence provides sufficient protection for law enforcement is a question for Congress, not the judicial branch. If confirmed, as a district court judge my role would be to apply the qualified immunity precedent of the Supreme Court and the Ninth Circuit, without regard for my personal beliefs about its policy value.

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

   Response: Please see my answer to question 8.

10. **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: My career as a litigator has been primarily in civil rights litigation. During my time at Jenner & Block, I did work on two patent cases, but focused primarily on lost profits calculation and expert testimony that did not relate to patent eligibility jurisprudence. If confirmed, in any case that comes before me, I will work diligently to learn and understand the Supreme Court's patent eligibility jurisprudence, and as a district court judge I would be bound to apply that precedent whether I agreed with it or not.

11. **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: As a judicial nominee, it would be improper for me to comment on hypotheticals involving questions that could come before me. If I am confirmed, I will work diligently to learn the patent eligibility precedent of the Supreme Court and the Ninth Circuit and apply it to the specific facts of any case that comes before me.

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

Response: Please see my answers to questions 10 and 11.

13. 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 law school, I worked on the merits brief for the Muchnick respondents in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), which concerned the question whether the Copyright Act's registration requirement prior to suing for copyright infringement was a jurisdictional requirement.

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

Response: In law school, I took a class on the prosecution of white-collar crime that covered the Digital Millennium Copyright Act, but I have not had experience with it as a practicing lawyer.

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

Response: I do not have experience with this subject.

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: First Amendment and free speech issues are a regular part of my civil rights practice, but not in the context of intellectual property or copyright.

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

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

Response: The Supreme Court "has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). If I am confirmed, I will begin analysis of a legal text with the plain language and any binding precedent from the Supreme Court and the Ninth Circuit. Only if the meaning of the statute is ambiguous after examining those sources would I consult persuasive authority from other courts, canons of statutory construction, or legislative history as a last resort.

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 I am confirmed, as a district court judge I will be bound by the precedent of the Supreme Court and the Ninth Circuit. The Supreme Court and Ninth Circuit have instructed that the amount of deference shown to the analysis of the Copyright Office depends on the source of that analysis. For example, in *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020), the Supreme Court noted that the "Compendium of U.S. Copyright Office Practices . . . is a non-binding administrative manual that at most merits deference under *Skidmore* . . . That means we must follow it only to the extent it has the 'power to persuade.'" *Id.* at 1510 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also, e.g.*, *Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1013 (9th Cir. 2017) (applying *Skidmore* deference to the position of the Copyright Office).

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 I am confirmed and presented with this question, I will work diligently to determine the applicable Supreme Court and Ninth Circuit precedent and apply it fairly and impartially to the specific facts before me. As a judicial nominee, it would be improper for me to state my personal beliefs.

15. 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: There are many circumstances in which judges must apply laws (or constitutional provisions) that were written at a time when today's digital environment could not have been anticipated. In every such case, a judge must do her best to apply the law as written to the contemporary facts presented. It is the role of Congress to determine whether federal law should be amended considering changed factual circumstances.

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

Response: Please see my answer to subpart a.

16. **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 Ninth Circuit has recognized that "forum shopping . . . hinders the equitable administration of laws." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018).

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

    Response: If confirmed, I will make decisions based on the faithful application of Supreme Court and Ninth Circuit precedent, and not out of any effort to attract a particular type of case or litigant. Under the local rules for the Western District of Washington, the assignment of cases between the two divisions is typically governed by the defendants' residence or place of business or the county in which the cause of action arose; however, cases ordinarily assigned to one division may be assigned to the other, and both divisions have more than one judge. Cases are assigned randomly.

    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: Please see my answer to subpart b.

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

    Response: Please see my answer to subpart b.

17. **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 improper for me to opine on this question. This is an important question for policymakers or the Judicial Conference.

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

Response: As a judicial nominee, it would be improper for me to opine on this question. This is an important question for policymakers or the Judicial Conference.

18. 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?

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: As a judicial nominee, it would be improper for me to opine on this question. This is an important question for policymakers or the Judicial Conference.

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: Under the local rules for the Western District of Washington, the assignment of cases between the two divisions is typically governed by the defendants' residence or place of business or the county in which the cause of action arose; however, cases ordinarily assigned to one division may be assigned to the other, and both divisions have more than one judge. Cases are assigned randomly.

19. 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 improper for me to opine on this question.

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

Response: As a judicial nominee, it would be improper for me to opine on this question.