Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Roopali Desai
Nominee to be United States Circuit Judge for the Ninth Circuit
July 20, 2022

1. **During your 16 years in private practice, you have tried approximately 70 cases to verdict or judgment, and you have briefed and argued numerous appeals, including before the Ninth Circuit and the Arizona Supreme Court. You have also represented a wide range of clients, including hospitals, businesses, police officers, and fire fighters. The Committee has received letters of support from the Arizona Police Association, three different fire fighters' organizations, and even from conservative lawyers who have been on the opposite side of litigation. In the fire fighters' letter of support, they wrote that you have "always been an effective communicator across party lines, which is important to us because fire fighters and paramedics serve the entire community."**

   What do you believe has allowed you to work productively with such a wide range of individuals and groups, including conservatives who have been on the opposite side of litigation?

   Response: I am very proud of my relationships with a wide range of lawyers and community leaders. I attribute my success with working productively with such a wide range of individuals and groups on three things. First, I am genuinely interested in learning and understanding different perspectives. Second, I am always respectful with opposing counsel and the courts. And, finally, I respect the rule of law. As an advocate, I am duty bound to zealously advocate for my client, but I always do so with the rule of law in mind.

2. **You have been widely honored for your community service. You serve—or have served—on the boards of numerous organizations that help people in need, such as the Family School Community Food Pantry, which combats food insecurity. As a lawyer, you have worked pro bono for a number of years on a case dealing with whether the Arizona Department of Child Safety has mishandled child abuse cases. And even before law school, you worked for two different organizations that fought child abuse and assisted victims of domestic violence. In 2021, you were named the Mom of the Year by ABC's Phoenix affiliate, along with an Arizona community health center. And *USA Today* honored you in 2022 as one of its Women of the Year.**

   Why do you believe it is important to prioritize community service, while managing the significant demands of being a partner at a law firm?

   Response: Quite simply, I care about my community. My community has given me so much, and I want to give back. My parents were immigrants to this country and worked hard to give their children a better life. But they also always prioritized community and volunteering. I was raised with a strong commitment to public service, and spent many summer vacations during my childhood volunteering at hospitals and nursing homes where my mother worked. I carried that commitment to public service into adulthood and into my profession. An ethical

consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." I am certainly committed to satisfying my ethical responsibilities as a lawyer, but I am also committed to pro bono and volunteer work in the community to teach my daughters and the next generation about the importance of public service.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Roopali H. Desai
Nominee to be United States Circuit Judge for the Ninth Circuit

1. **You have been described as among the people who "helped launch" the campaign to legalize recreational marijuana in Arizona, and you helped draft Proposition 207.**

    a. **The ballot initiative was criticized by multiple health officials because it set a potency floor that barred state officials from setting a maximum THC dose of below 10 milligrams per dose. Why did you include a potency floor in Proposition 207?**

    Response: My involvement in Proposition 207 was as the attorney to Smart & Safe Arizona, the political action committee that sponsored the initiative. The policy choices reflected in the final text of Proposition 207 were made by my client after I provided them with legal advice, and it would thus violate the attorney-client privilege and my ethical obligations under Ethical Rule 1.6 to explain the motivations behind any particular policy choice (including the "potency floor"). What I can say, however, is that one of the main goals of Proposition 207 was to pass safe and moderate legislation for adult-only use of marijuana. For example, Proposition 207 expressly authorized the Department of Health Services to regulate potency of marijuana products within certain parameters; in contrast, the Arizona Medical Marijuana Act (also enacted by initiative many years prior) included no such authorization regarding the potency of the medical marijuana products that can be sold to qualifying patients.

    b. **From 2021 to 2022, you served as an Advisory Board Member on the National Cannabis Roundtable. Please describe what interaction, if any, you had with the National Cannabis Roundtable during the efforts to pass Proposition 207 in 2019 and 2020.**

    Response: None.

2. **In 2021, you drafted an amicus brief on behalf of a progressive dark money group known as Fair Fight Action. Among other things, your brief criticized Arizona Attorney General Mark Brnovich for bringing felony prosecutions for confirmed cases of ballot harvesting.**

    a. **Please describe your understanding of any Supreme Court and Ninth Circuit precedent pertaining to the practice of ballot harvesting.**

    Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court considered whether Arizona's ballot collection

statute, A.R.S. § 16-1005(H), (I), violated Section 2 of the Voting Rights Act of 1965. The Supreme Court held that Arizona has a compelling interest in preserving the integrity of elections and the statute at issue "passe[d] muster under the results test of § 2." The Supreme Court clarified the governing standards that will apply to similar challenges going forward, including (1) the size of the burden, (2) the degree that the rule deviates from past practices and procedures, (3) the size of the racial imbalance, and (4) the overall opportunity to vote. If confirmed, I will apply and follow this binding precedent.

b. In your view, why is it inappropriate for a state attorney general to bring prosecutions for criminal conduct relating to voter fraud?

Response: The argument referenced above was made in an amicus curiae brief on which I served as co-counsel that was filed on behalf of two clients: Fair Fight Action and the Arizona Voter Empowerment Task Force. My clients argued that there were concerns with the way the Arizona Attorney General's Office prosecuted the two cases at issue, and that those concerns might impact the United States Supreme Court's consideration of the plaintiffs' arguments that Arizona's ballot collection statute violated Section 2 of the Voting Rights Act of 1965. The Supreme Court disagreed with the plaintiffs' arguments in *Brnovich*, which is now binding precedent that I will be obligated to apply and follow in future cases if I am confirmed.

3. In your view, do states have the legal authority to ban mask mandates in schools? Why or why not?

Response: I have not researched or analyzed the issue of states' legal authority to ban mask mandates in schools and therefore do not have a view on this issue. Also, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the issue of whether a state has the legal authority to ban mask mandates in schools. What I can say is that under the Tenth Amendment, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There may also be instances where federal laws preempt state laws, or state laws violate the Constitution. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit.

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

Response: I am not familiar with the comments made by Justice Ketanji Brown Jackson in this regard. What I can say is that the Constitution is sacred, and it has an enduring fixed quality to it. One of the geniuses of the Constitution is that it can be changed over time through the amendment process. Also, the Constitution can be applied to new circumstances.

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

   Response: I disagree with this statement. Our Constitution demands a system of justice where judges decide cases objectively and not based on their personal beliefs. Judges must decide cases based on the rule of law. If confirmed, I will abide by these principles.

6. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I am not familiar with the comments made by Judge Stephen Reinhardt in this regard. What I can say is that judges must act impartially consistent with the oath they swear to "administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States."

7. **How would you evaluate a claim that a previously un-enumerated "fundamental" right is protected by the Due Process Clause? In your answer, please cite any relevant Supreme Court and Ninth Circuit precedent that you would consider.**

   Response: The Supreme Court has held that an unenumerated right is recognized under the Due Process Clause of the Fourteenth Amendment if it 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." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted).

8. **Assume that the original public meaning of a statutory or constitutional provision is clear. Under what circumstances would it be appropriate for a federal judge to decline to apply the original public meaning of that provision?**

   Response: The Supreme Court has looked to the original public meaning to interpret the Constitution in some cases, such as in N*ew York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *District of Columbia v. Heller,* 554 U.S. 570 (2008),

and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

9. Under existing federal law, may a small business owner decline to provide customers with service on the basis of a sincerely held religious belief? Please explain your answer, citing any relevant statutes or Supreme Court precedent.

Response: The Supreme Court has addressed the Free Exercise Clause of the First Amendment and RFRA in previous decisions. An individual's religious beliefs are protected if they are sincerely held, and a sincere religious belief need not be consistent with any particular faith tradition. *See, e.g., Frazee v. Illinois Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989). Ordinarily, if a law that incidentally burdens religion is neutral and generally applicable, rational basis scrutiny applies. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531–32 (1993); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990). Courts employ a two-part analysis to determine whether a law is neutral and generally applicable. Each part, in turn, requires two steps.

The first part of the two-part analysis looks at whether a law is neutral. A law must satisfy two steps to be neutral. First, it must be facially neutral. *Lukumi*, 508 U.S. at 533-34. If the law is not facially neutral, it is subject to strict scrutiny. *Id*. Second, there cannot be any religious animus in the enactment or enforcement of the facially neutral law. If the enactment or enforcement of a facially neutral law was motivated by religious animus, it is subject to strict scrutiny. *Id.* at 534-42; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018).

The second part of the two-part analysis looks at whether a law is generally applicable. A law must satisfy two steps to be generally applicable. First, there can be no exemptions to the law that invite "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). If the law makes such an invitation, it is not generally applicable and is subject to strict scrutiny. *Id*. Second, the law cannot be overbroad and underinclusive such that it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*.

Recently, the Supreme Court held in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. at 1296. Further, the Supreme Court clarified that, where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny

analysis only if the government "show[s] that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id*. at 1297.

I would note that, if the law imposing the restriction is a federal law, it would be subject to RFRA and therefore would change the analysis. Even if the federal law was facially neutral and generally applicable, if it imposed a substantial burden on religion, RFRA would require the law to be subject to strict scrutiny review.

If confirmed, I would faithfully and impartially apply the Supreme Court's decisions protecting religious freedom under the First Amendment.

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

Response: In *Meyer v. Nebraska*, the Supreme Court held that parents have some rights to direct the education of their children under the Due Process Clause of the Fourteenth Amendment. 262 U.S. 390, 400 (1923); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (acknowledging the right "to direct the education and upbringing of one's children").

11. How do you decide when text is ambiguous?

Response: The Ninth Circuit has explained that, when interpreting a statute, the court must "first analyze its language to determine whether its meaning is plain." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1180–81 (9th Cir. 2013) (citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009); *McDonald v. Sun Oil Co*., 548 F.3d 774, 780 (9th Cir. 2008)). "The preeminent canon of statutory interpretation requires [courts] to presume that the legislature says in a statute what it means and means in a statute what is says there. Thus, [a court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id*. (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, (2004)).

If confirmed and confronted with an issue of constitutional or statutory interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit interpreting the text at issue. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start (and, if possible, end) with the text of the constitution or statute, including relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would consider persuasive authority from other courts, as well as legislative history.

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?

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. Like prior judicial nominees, however, I will note that because it is unlikely that de jure racial segregation in schools would come before me if I am confirmed to the Ninth Circuit, I feel comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. Like prior judicial nominees, however, I will note that because it is unlikely that de jure constitutionality of anti-miscegenation laws would come before me if I am confirmed to the Ninth Circuit, I feel comfortable stating that I believe *Loving v. Virginia* was correctly decided.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *Griswold v. Connecticut*.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. I will note, however, that in *Dobbs v. Jackson Women's Health*, the Supreme Court overruled *Roe v. Wade*. Because *Roe* is no longer binding precedent, I would not apply the ruling in that case if confirmed.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. I will note, however, that in *Dobbs v. Jackson Women's Health*, the Supreme Court overruled *Planned Parenthood v. Casey*. Because *Casey* is no longer binding precedent, I would not apply the ruling in that case if confirmed

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *Gonzales v. Carhart*.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *Columbia v. Heller*.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *McDonald v. City of Chicago*.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.*

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *New York State Rifle & Pistol Association v. Bruen.*

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit, including *Dobbs v. Jackson Women's Health.*

13. Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.

Response: The plain language of 18 U.S.C. § 1507 states: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence[.]"

14. Under Supreme Court precedent, is 18 U.S.C. § 1507 constitutional on its face?

Response: I have not researched or analyzed the constitutionality of this 18 U.S.C. § 1507. Regardless, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the issue.

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

Response: On February 9, 2021, I formally expressed my interest in being considered for a position on the United States Court of Appeals for the Ninth Circuit to Senator Kyrsten Sinema and Senator Mark Kelly, following Judge Andy Hurwitz's announcement of his intent to take senior status. On March 4, 2022, an attorney from the White House Counsel's Office contacted me and requested information from me about my background and experience. On April 18, 2022, I interviewed with an attorney from the White House Counsel's Office. After that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice who were completing an investigation into my background. On June 15, 2022, President Biden announced his intent to nominate me, and my nomination was submitted to the Senate.

16. 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: On February 28, 2022, I spoke briefly with Mr. Robert Raben about my interest in being considered for a position on the United States Court of Appeals for the Ninth Circuit. I had no further communications with Mr. Raben or anyone associated with the Raben Group thereafter. I have not had any contact or

communications with anyone directly or associated with the Committee for a Fair Judiciary.

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

Response: No.

18. 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 February 9, 2022, I spoke briefly with Mr. Zachary Gima with the American Constitution Society about my interest in being considered for a position on the United States Court of Appeals for the Ninth Circuit. On February 10, 2022, I sent Mr. Gima a copy of the letter of interest and my resume that I sent to Senator Sinema and Senator Kelly. On a few occasions I spoke with Andrew Jacobs from the Arizona Chapter of the American Constitution Society.

19. 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: No.

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

Response: No.

21. 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: No.

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

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

Response: No.

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

Response: No.

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

Response: I believe this question intends to refer to the Alliance for Justice, not Demand Justice. I spoke to Nan Aron once in January 2021 after one of my mentors introduced me to her. This brief conversation did not relate to my nomination or my interest in being considered for a position on the United States Court of Appeals for the Ninth Circuit.

23. **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: 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: I have not been in contact with anyone associated with Arabella Advisors regarding my nomination or my interest in being considered for a position on the United States Court of Appeals for the Ninth Circuit.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

26. The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.

a. Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

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

Response: No.

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

Response: Please see my answer to Question 16.

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

Response: On the afternoon of July 20, 2022, the Office of Legal Policy sent me these questions. I reviewed the questions, conducted researched as needed, and drafted answers based on my recollection, my preparation notes, and my legal

research. I provided my answers to the attorneys from the Office of Legal Policy who provided feedback. The final answers are my own.

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

Questions for the Record for Roopali Desai, Nominee for the Ninth Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes. There are many federal and state laws that prohibit discrimination on the basis of race. The Supreme Court has recognized race as a suspect class. Government action that discriminates against a suspect class, including race, is subject to strict scrutiny review.

2. In a legal challenge to Arizona H.B. 2023, which prohibited ballot harvesting, you argued the bill not only had the incidental effect of lowering minority turnout, but that it was actually "*designed* to suppress voting in minority communities." The United States Supreme Court ruled 6-3 in *Brnovich v. Democratic National Committee*, 594 U.S. ____ (2021) that Arizona's prohibition on ballot harvesting was, in fact, constitutional, and that the prohibition was not designed to suppress voting in minority communities. In light of this ruling, do you still believe that H.B. 2023 was designed to suppress minority voting?

Response: The argument referenced above was made in an amicus curiae brief on which I served as co-counsel that was filed on behalf of two clients: Fair Fight Action and the Arizona Voter Empowerment Task Force in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). In that case, the Supreme Court considered whether Arizona's ballot collection statute, A.R.S. § 16-1005(H), (I), violated Section 2 of the Voting Rights Act of 1965. The Supreme Court held that Arizona has a compelling interest in preserving the integrity of elections and the statute at issue "passe[d] muster under the results test of § 2." The Supreme Court clarified the governing standards that will apply to similar challenges going forward, including (1) the size of the burden, (2) the degree that the rule deviates from past practices and procedures, (3) the size of the racial imbalance, and (4) the overall opportunity to vote. The Supreme Court disagreed with the plaintiffs' arguments in *Brnovich*, which is now binding precedent that I will be obligated to apply and follow in future cases if I am confirmed.

a. Did you file this legal challenge on behalf of, *inter alia*, Fair Fight Action?

Response: Please see my answer to Question 2.

b. Has Fair Fight Action ever disputed the integrity of an election?

Response: The *Brnovich* case is the only lawsuit in which I have represented Fair Fight Action because it related to Arizona laws. I cannot speak to Fair Fight Action's work in connection with elections results.

c. Despite the implementation of H.B. 2023, in 2020, Arizona had its highest voter turnout ever, with 79.9 percent of registered voters returning their ballots, per the Arizona Secretary of State. And, according to the Brennan Center, minority turnout actually increased since the anti- ballot harvesting law was enacted, and is now at the highest rate it has ever been in at least a quarter-century. Do you have any reason to believe that these statistics are incorrect?

Response: I am not familiar with this information and therefore do not have an opinion about its accuracy.

3. 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: The Supreme Court has held that an unenumerated right is recognized under the Due Process Clause of the Fourteenth Amendment if it 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." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). If confirmed, I would carefully evaluate any future claims under Supreme Court precedent and this standard.

4. Please explain your stance on school choice. Why do you hold those beliefs?

Response: "School choice" means different things to different people. I do not have a personal definition of "school choice." What I can commit to you and the Committee is that any personal belief I hold on any issue will not be relevant to my decisionmaking if I am confirmed to the Ninth Circuit.

5. 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: In my nearly twenty years of experience as a civil litigator, I have observed countless judges many of whom are models for the type of jurist I would hope to be. If confirmed, I would employ the traits that I think are most important for all judges, which are as follows: (a) fairly and impartially decide the issues in the case before me; (b) faithfully and impartially follow the rule of law and the binding precedent of the Supreme Court and Ninth Circuit; (c) demonstrate respect for the parties and allow them the opportunity to be heard; (d) exercise restraint and only decide issues before me; and (e) provide a clear and accessible written ruling.

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

Response: I understand "originalism" to be the view that the Constitution should be interpreted in the way the relevant text would have been understood at the time it was adopted.

The Supreme Court has looked to the original public meaning to interpret the Constitution in some cases, such as in N*ew York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

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

Response: I do not have a personal definition of "living constitutionalism." Black's Law Dictionary defines "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). I do not characterize myself as adopting this or any interpretive methodology. If confirmed, I would look to Supreme Court and Ninth Circuit precedents to determine the particular interpretive methodology that ought to apply to a particular constitutional provision.

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

Response: If confirmed and confronted with an issue of constitutional interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start (and, if possible, end) with the text of the constitution, and then consider applicable canons of construction or other interpretive principles.

The Supreme Court has looked to the original public meaning to interpret the Constitution in some cases, such as in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

9. 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: In confirmed as a circuit court, I am bound Supreme Court and Ninth Circuit precedent. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification. In *Bostock v. Clayton* Cty., the Court explained that "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." 140 S. Ct. 1731, 1738 (2020).

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

Response: Our Constitution is sacred, and it has an enduring fixed quality to it. One of the geniuses of the Constitution is that it can be changed over time through the amendment process. Also, the Constitution can be applied to new circumstances.

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

Response: Yes.

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

Response: Yes.

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

Response: In my nearly twenty years as a civil litigator and appellate lawyer, and as a law clerk on the Ninth Circuit before entering private practice, I have not had significant experience with the issue of pretrial detention. If confirmed, when faced with questions regarding what offenses trigger a presumption in favor of pretrial detention in the federal criminal system, I will analyze the issue by researching and applying the relevant statutes—in this case, 18 U.S.C. § 3142—and looking to Supreme Court and Ninth Circuit precedent.

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

Response: I have not researched and analyzed this issue.

14. 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 Supreme Court has addressed the Free Exercise Clause of the First Amendment and RFRA in previous decisions. An individual's religious beliefs are protected if they are sincerely held, and a sincere religious belief need not be consistent with any particular faith tradition. *See, e.g., Frazee v. Illinois Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989). Ordinarily, if a law that incidentally burdens religion is neutral and generally applicable, rational basis scrutiny applies. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531–32 (1993); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990). Courts employ a two-part analysis to determine whether a law is neutral and generally applicable. Each part, in turn, requires two steps.

The first part of the two-part analysis looks at whether a law is neutral. A law must satisfy two steps to be neutral. First, it must be facially neutral. *Lukumi*, 508 U.S at 533-34. If the law is not facially neutral, it is subject to strict scrutiny. *Id*. Second, there cannot be any religious animus in the enactment or enforcement of the facially neutral law. If the enactment or enforcement of a facially neutral law was motivated by religious animus, it is subject to strict scrutiny. *Id.* at 534-42; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018).

The second part of the two-part analysis looks at whether a law is generally applicable. A law must satisfy two steps to be generally applicable. First, there can be no exemptions to the law that invite "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). If the law makes such an invitation,

it is not generally applicable and is subject to strict scrutiny. *Id*. Second, the law cannot be overbroad and underinclusive such that it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*.

Recently, the Supreme Court held in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. at 1296. Further, the Supreme Court clarified that, where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny analysis only if the government "show[s] that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id*. at 1297.

I would note that, if the law imposing the restriction is a federal law, it would be subject to RFRA and therefore would change the analysis. Even if the federal law was facially neutral and generally applicable, if it imposed a substantial burden on religion, RFRA would require the law to be subject to strict scrutiny review.

If confirmed, I would faithfully and impartially apply the Supreme Court's decisions protecting religious freedom under the First Amendment.

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

Response: Please see my answer to Question 14.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court held that the religious organizations were entitled to a preliminary injunction. 141 S. Ct. 63, 66 (2020). The Supreme Court held that the religious organizations were likely to succeed on the merits of their First Amendment claims because they had made a "strong" showing that the regulations were not neutral to religion and "single out houses of worship for especially harsh treatment." *Id*. at 66. Upon applying the strict scrutiny standard, the Court found that the regulations were not narrowly tailored to achieve the compelling interest of reducing the spread of COVID-19. *Id*. at 67. Finally, the Court found that the religious organizations would be irreparably harmed without the injunction, and there was no evidence that granting the injunction would be harmful to the public. *Id*. at 67–68.

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

Response: The Supreme Court held in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. at 1296. Further, the Supreme Court clarified that, where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny analysis only if the government "show[s] that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id*. at 1297.

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

Response: Yes.

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

Response: The Supreme Court held in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), that the Colorado Civil Rights Commission violated the Free Exercise Clause when it failed to neutrally apply a facially neutral public accommodations law where the transcript from commission meetings showed a religious animus against the cakeshop owner's sincerely held religious beliefs.

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

Response: Yes. The Ninth Circuit has held that a religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). A sincerely held religious belief may be based on personal religious conviction and need not be based on a "tenet, belief or teaching of an established religious body." *Frazee v. Illinois Dept. of Employment Sec*., 489 U.S. 829, 831–33 (1989). Thus, a court may not inquire into the "truth or verity" of the belief if it is held sincerely. *United States v. Ballard*, 322 U.S. 78 (1944); *see also Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014).

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

Response: Please see my answer to Question 20.

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

Response: Please see my answer to Question 20.

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

Response: As a judicial nominee to the Ninth Circuit, it is inappropriate for me to opine on the official position of any religious organization.

21. 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 First Amendment's Religion Clauses include the "ministerial exception," which "protects the rights of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2052 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North Americ*a, 344 U.S. 94, 116 (1952)). The Supreme Court in *Our Lady of Guadalupe* held that the "ministerial exception" barred two teachers from bringing employment discrimination claims against a religious school. 140 S. Ct. at 2060. The Supreme Court explained that whether the "ministerial exception" applies to any employee's federal statutory claim requires a review of "what an employee does," and not simply on the employee's title. *Id*. at 2064. In *Our Lady of Guadalupe,* the employees performed "vital religious duties," and thus the "ministerial exception" applied to these employees and barred their discrimination claims. *Id*.

22. For nearly a decade, you have held membership with the ACLU of Arizona, for which you are also a former board member. You claim to support the ACLU because they are "committed to standing up for the rights and civil liberties of all Americans and isn't afraid to do so even when it may be unpopular or difficult." Regarding civil liberties, you also filed an amicus brief on behalf in *Brush & Nib Studio, LC v. City of Phoenix*, doing so on behalf of Americans United for the Separation of Church and State. Your brief argued that it would violate the Establishment Clause to allow the studio owners to preserve their sincerely held religious beliefs by declining to print same-sex wedding invitations. In making this argument, you compared the studio owners' sincerely held religious beliefs to a hotel owner who banned a Jewish group from using a pool, to a shooting range that declared itself a "Muslim- free zone," and other examples of religious discrimination. Should an owner of a business who holds sincere religious views be forced to choose between adherence to her faith and keeping their business open?

Response: I served as a Board Member of the ACLU of Arizona for five years several years ago, from 2014-2019.

Unrelated, in December 2018, I was co-counsel with an attorney from Americans United for Separation of Church and State on an amicus curiae brief filed in *Brush & Nib Studio v. City of Phoenix* on behalf of a group religious, religiously affiliated, and civil rights organizations. As noted in the brief itself, my clients included "Christian, Jewish, Muslim, Hindu, Sikh, multi-faith, and nonsectarian organizations."

In the amicus curiae brief, my clients argued that interpreting Arizona's Free Exercise of Religion Act to support broad religious exemptions from the City of Phoenix's facially neutral and generally applicable public accommodation ordinance could cause a conflict with the Establishment Clause of the First Amendment to the U.S. Constitution by "substantially burden[ing] third parties." In support of this argument generally, the amicus curiae brief cited *Lee v. Weisman*, 505 U.S. 577, 587 (1992), *Cutter v.*

Wilkinson, 544 U.S. 709, 722 (2005), *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 710 (1985), *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989), *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018), and *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

The arguments in the amicus brief that was filed on behalf of my clients in *Brush & Nib Studio* was in my role as an advocate. I understand and take seriously the distinction between the roles and responsibilities of an advocate and a judge. Like many nominees who have come before me and transitioned from advocate to judge, if confirmed, I will faithfully and impartially apply the precedents of the Supreme Court and the Ninth Circuit.

Our Constitution demands a system of justice where judges decide cases objectively and not based on their personal beliefs. Judges must decide cases based on the rule of law. If confirmed, I will abide by these principles and the judicial oath set forth in 28 U.S.C. § 453.

23. 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 a city policy refusing to contract with state-licensed foster care agencies affiliated with religious organizations who did not certify same-sex couples as foster parents was unconstitutional because it burdened the agencies' free exercise of religion by endorsing practices inconsistent with their religious beliefs. The Supreme Court held that the restrictions on religious entities permitting individual exemptions was not generally applicable and therefore subject to strict scrutiny. Because the city failed to establish a compelling interest in denying the exception to the religious organization, the policy did not survive strict scrutiny.

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

Response: In *Carson v. Makin*, 596 U.S. __ (2022), the Supreme Court held that Maine's tuition assistance program violated the Free Exercise Clause because it barred religious schools from receiving tuition assistance solely because they are religious schools. Like in its previous decisions in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that the Free Exercise Clause does not permit states to "expressly discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Carson*, slip op. at 8.

25. Please explain your understanding of the U.S. Supreme Court's holding and

reasoning in *Kennedy v. Bremerton School District.*

Response: The Supreme Court recently decided *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407 (2022), in which the Court discussed an argument raised by a party about a "direct tension" between the Establishment Clause and Free Exercise Clause as applied to its decision to suspend an employee. *Id*. at 2426. The Supreme Court rejected that argument and provided guidance going forward about the relationship between those two clauses of the First Amendment that I will faithfully apply if confirmed.

26. 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: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), was a case brought under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") relating to the enforcement of regulations requiring Amish houses to have septic systems to dispose of used water. In Justice Gorsuch's concurrence, he identified additional factors that the lower courts and administrative authorities should consider on remand in light of the Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). He explained that RLUIPA requires strict scrutiny, and that courts "cannot rely on broadly formulated governmental interests but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Mast*, 141 S. Ct. at 2432 (internal quotation marks, alterations, and citations omitted). *Mast*, 141 S. Ct. at 2432.

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

Response: Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the issue.

I will note that the plain language of 18 U.S.C. § 1507 states: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence[.]"

28. 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: I am not familiar with employee training programs of the federal courts. I would expect that all trainings must comply with the Constitution.

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

Response: Please see my answer to Question 28.

30. 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: If confirmed, I will hire law clerks and staff who are qualified and will comply with the Constitution and applicable laws.

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

Response: As a judicial nominee, it is not my role to comment on the Executive Branch's nomination decisions.

32. Is the criminal justice system systemically racist?

Response: I have not studied this issue and therefore do not have a basis on which to formulate an opinion. Further, to the extent this question raises policy issues, it is for policymakers and not judges to address.

33. 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: I have not studied this issue and therefore do not have a basis on which to formulate an opinion. Further, to the extent this question raises policy issues, it is for policymakers and not judges to address. If confirmed, I would be bound to apply Supreme Court precedent regardless of the composition of the Supreme Court.

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

Response: No.

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

Response: In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court held that the Second Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a gun in the home for self-defense" and "an individual's right to carry a hand-gun for self-defense outside of the home." 597 U.S. __ (2022), slip op. at 1. In that case, like in *United States v. Heller*, the Supreme Court looked to the text and original public meaning of the Second Amendment and stated that the government may not subject "an individual's right to carry a hand-gun for self-defense outside of the home" to the determination of a government official that such individual has a particular need greater than the general population to carry a firearm for self-defense. *Id*. at 63 (invalidating New York's "proper-cause" requirement).

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

Response: In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court held: "In keeping with Heller, . . . when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" 597 U.S. ___ (2022) slip op. at 8 (quoting *Konigsberg v. State Bar of Cal*., 366 U.S. 36, 50 n. 10 (1961)).

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

Response: Yes. The Supreme Court has explained that the Second Amendment protects the individual right of "ordinary, law-abiding, adult citizens" to keep and bear arms. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), slip op. at 23 (citing *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008)).

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

Response: I am not aware of any Supreme Court decision stating that the right to own a firearm receives less protection than the other individual rights specifically enumerated in the Constitution. The Supreme Court has held that the Second and Fourteenth Amendments protect the right to own a firearm as consistent with the original public meaning. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), slip op. at 15.

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

Response: I am not aware of any Supreme Court decision stating that the right to own a firearm receives less protection than the right to vote under the Constitution. The Supreme Court has held that the Second and Fourteenth Amendments protect the right to own a firearm as consistent with the original public meaning. *New York State Rifle &*

Pistol Association v. Bruen, 597 U.S. __ (2022), slip op. at 15.

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

Response: Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the issue.

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

Response: Generally, the executive branch has the authority to use its discretion within its constitutional authority. The Supreme Court has described prosecutorial discretion as "carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." *Bond v. United States*, 572 U.S. 844, 865 (2014).

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

Response: No.

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

Response: In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Center for Disease Control did not have the authority under Section 361(a) of the Public Health Service Act, 58 Stat. 703, as amended, 42 U.S.C. § 264(a), to impose a nationwide eviction moratorium for certain residential rental properties.

Senator Josh Hawley
Questions for the Record

Roopali Desai
Nominee, U.S. Court of Appeals for the Ninth Circuit

1. **When, if ever, do you believe that a First Amendment free exercise claim can trump an antidiscrimination law?**

Response: The Supreme Court has addressed the Free Exercise Clause of the First Amendment and RFRA in previous decisions. An individual's religious beliefs are protected if they are sincerely held, and a sincere religious belief need not be consistent with any particular faith tradition. *See, e.g., Frazee v. Illinois Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989). Ordinarily, if a law that incidentally burdens religion is neutral and generally applicable, rational basis scrutiny applies. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531–32 (1993); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990). Courts employ a two-part analysis to determine whether a law is neutral and generally applicable. Each part, in turn, requires two steps.

The first part of the two-part analysis looks at whether a law is neutral. A law must satisfy two steps to be neutral. First, it must be facially neutral. *Lukumi*, 508 U.S at 533-34. If the law is not facially neutral, it is subject to strict scrutiny. *Id*. Second, there cannot be any religious animus in the enactment or enforcement of the facially neutral law. If the enactment or enforcement of a facially neutral law was motivated by religious animus, it is subject to strict scrutiny. *Id.* at 534-42; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018).

The second part of the two-part analysis looks at whether a law is generally applicable. A law must satisfy two steps to be generally applicable. First, there can be no exemptions to the law that invite "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). If the law makes such an invitation, it is not generally applicable and is subject to strict scrutiny. *Id*. Second, the law cannot be overbroad and underinclusive such that it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*.

Recently, the Supreme Court held in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), that "government regulations are not neutral and generally applicable, and therefore

trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id*. at 1296. Further, the Supreme Court clarified that, where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny analysis only if the government "show[s] that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id*. at 1297.

I would note that, if the law imposing the restriction is a federal law, it would be subject to RFRA and therefore would change the analysis. Even if the federal law was facially neutral and generally applicable, if it imposed a substantial burden on religion, RFRA would require the law to be subject to strict scrutiny review.

If confirmed, I would faithfully and impartially apply the Supreme Court's decisions protecting religious freedom under the First Amendment.

2. **Do you believe that state bans on ballot harvesting are voter suppression?**

   Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court held that Arizona's ballot collection statute, A.R.S. § 16-1005(H), (I), did not violate Section 2 of the Voting Rights Act of 1965. The Supreme Court held that Arizona has a compelling interest in preserving the integrity of elections and the statute at issue "passe[d] muster under the results test of § 2." The Supreme Court clarified the governing standards that will apply to similar challenges going forward, including (1) the size of the burden, (2) the degree that the rule deviates from past practices and procedures, (3) the size of the racial imbalance, and (4) the overall opportunity to vote. If confirmed, I will apply and follow this binding precedent.

3. **Do you believe that state voter ID requirements are voter suppression?**

   Response: The Supreme Court held in *Crawford v. Marion County*, 553 U.S. 181 (2008), that voter identification laws were not per se unconstitutional and upheld the Indiana voter identification requirements at issue in that case.

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

   Response: Yes.

5. **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: No. Our Constitution demands a system of justice where judges decide cases objectively and not based on their personal beliefs. Judges must decide cases based on the rule of law. If confirmed, I will abide by these principles.

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

Response: Please see my answer to Question 5(a).

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

Response: The *Pullman* abstention doctrine applies in federal court cases that raise both federal constitutional claims and state law claims. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941). Under the *Pullman* abstention doctrine, federal courts should abstain from deciding the case where resolution of the state law claim could resolve the entire case and the state law issue is unclear. *Id*. The Ninth Circuit has held that "*Pullman* requires that the federal court abstain from deciding the federal question while it awaits the state court's decision on the state law issues." *United States v. State Water Res. Control Bd*., 988 F.3d 1194, 1209 (9th Cir. 2021).

Under the *Younger* abstention doctrine, federal courts should abstain from enjoining certain state proceedings based on a claim that the underlying state statute is facially unconstitutional. *See Younger v. Harris*, 401 U.S. 37, 54 (1971). The Ninth Circuit has held that the *Younger* abstention doctrine prohibits a federal court from enjoining "three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020).

The *Burford* abstention doctrine requires as follows: "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (internal quotations and citation omitted);

see also *Burford v. Sun Oil Co*., 379 U.S. 315 (1943). The Ninth Circuit has held that the *Burford* abstention doctrine applies if the party invoking the doctrine shows "(1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc*., 942 F.2d 1401, 1405 (9th Cir. 1991).

Under the *Colorado River* abstention doctrine, federal courts should not stay a case where there are concurrent state and federal suits addressing the same subject matter unless the "clearest of justifications" shows that a stay would be in the interest of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818-19 (1976). The Ninth Circuit has held that there are "eight factors to be considered 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." *United States v. State Water Res. Control Bd*., 988 F.3d 1194, 1203 (9th Cir. 2021) (internal citation omitted).

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

7. **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, in my nearly twenty years of practice as a litigator and appellate lawyer, I have worked on one case involving a religious liberty

claim. I was co-counsel on an amicus curiae brief that was filed in the Arizona Supreme Court on behalf of a diverse group of religious, religiously affiliated, and civil rights organizations. My clients' amicus brief argued that, under a line of Supreme Court decisions applying the Establishment Clause, religious exemptions from generally applicable laws can be unconstitutional if they impose substantial burdens on third parties who do not share those beliefs. In *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1727 (2018), the Supreme Court explained that it is a "general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." (Citations omitted). Under that decision and several others, my clients advanced an argument that to apply Arizona law to permit religious objections to overcome a law banning discrimination in places of public accommodations could lead to the government favoring religious adherence over those who do not subscribe to a particular faith.

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

Response: Please see my answer to Question 7.

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

Response: The Supreme Court has looked to the original public meaning to interpret the Constitution in some cases, such as in N*ew York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

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

Response: If confirmed and confronted with an issue of constitutional or statutory interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit interpreting the text at issue. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start (and, if possible, end) with the text of the constitution or statute, including relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would consider persuasive authority from other courts, as well as legislative history.

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

Response: If confirmed, I would look to and follow the guidance of the Supreme Court and Ninth Circuit regarding the types of legislative history that are more probative of congressional intent than others. I will note that the Supreme Court has explained that certain types of legislative history, such as "failed legislative proposals," are "particularly dangerous" to rely upon because such history is generally not probative of legislative intent in enacting a statute. *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted). Also, "[s]ubsequent legislative history — which presumably means the post-enactment history of a statute's consideration and enactment — is a contradiction in terms." *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) (internal quotation marks omitted).

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

Response: The text of the Constitution and the binding precedent of the Supreme Court are the relevant authorities for circuit court judges to consult when interpreting the provisions of the U.S. Constitution, not the laws of foreign nations.

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

Response: The legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment is (1) whether the execution protocol presents a "substantial risk of serious harm;" and (2) whether there is a "feasible" and "readily implemented" alternative method of execution that will significantly reduce the "risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008). In *Bucklew v. Precythe*, the Court clarified that, where "the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." 139 S. Ct. 1112, 1125 (2019) (quotation marks and citations omitted).

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

Response: Please see my answer to Question 10.

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

Response: The Ninth Circuit is bound by the Supreme Court's decision in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009). In that case, the Supreme Court held that there was no due process right (procedural or substantive) to access DNA evidence for a habeas petitioner.

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

Response: No.

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

Response: Please see my answer to Question 1.

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

Response: Please see my answer to Question 1.

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

Response: The Ninth Circuit has held that a religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). A sincerely held religious belief may be based on personal religious conviction and need not be based on a "tenet, belief or teaching of an established religious body." *Frazee v. Illinois Dept. of Employment Sec*., 489 U.S. 829, 831–33 (1989). Thus, a court may not inquire into the "truth or verity" of the belief if it is held sincerely. *United States v. Ballard*, 322 U.S. 78 (1944); *see also Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014).

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

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

Response: In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms in the home for self-defense.

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

Response: No.

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

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

Response: It is my understanding that Justice Holmes meant by that statement what he explained in his dissent in *Lochner v. New York*, which is that the "Constitution is not intended to embody a particular economic theory." 198 U.S. 45, 75 (1905).

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. However, I will note

that the Supreme Court largely abrogated *Lochner* in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). For that reason, if confirmed, I will not follow *Lochner*, but will follow the applicable Supreme Court and Ninth Circuit precedent.

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

Response: I cannot think of any. However, I will note that only the Supreme Court can overrule its own precedent. If confirmed to the Ninth Circuit, I will faithfully and impartially apply all binding Supreme Court precedent.

a. If so, what are they?

Response: Please see my answer to Question 19.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: The Supreme Court has held that evidence showing that a defendant holds more than 80% share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. *Eastman Kodak Co. v. Image Tech. Servs., Inc*., 504 U.S. 451, 481 (1992). *Kodak* cited earlier Supreme Court precedent for the proposition that "over two-thirds of the market is a monopoly." *Id*. (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). The Ninth Circuit has relied on these decisions to hold that a "65% market share" typically "establishes a prima facie case of market power." *See Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1206 (9th Cir. 1997). Although "numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power," *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1434 (9th Cir. 1995), it is worth noting that the Ninth Circuit has also held that a company with less than 50% market share may have monopoly power

if "entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id*. at 1438, n.10.

If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit regarding what constitutes a monopoly. I do not have an opinion about Judge Learned Hand's comment.

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

Response: Please see my answer to Question 20(a).

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

Response: Please see my answer to Question 20(a).

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

Response: In *Erie Railroad Co. v. Tompkins*, the Supreme Court stated that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938). However, in certain limited areas such as admiralty law, antitrust law, and bankruptcy law, the Supreme Court has indicated that federal common law might exist. *See, e.g., Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713 (2020).

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

Response: Ordinarily, the interpretation of a state constitutional provision is a matter of state law. Federal courts must follow state interpretations of the constitutional provision at issue when interpreting a state constitutional provision. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Please see my answer to Question 22.

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

Response: Under our system of government and the concept of federalism, state constitutions may provide greater protections than the federal Constitution.

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

Response: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. Like prior judicial nominees, however, I will note that because it is unlikely that de jure racial segregation in schools would come before me if I am confirmed to the Ninth Circuit, I feel comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: This is an issue that is currently subject to considerable debate both at the Supreme Court and in the Ninth Circuit. *See Department of Homeland Security v. New York*, 589 U. S. ____ (2020). I will note that Federal Rule of Civil Procedure 65 governs the procedures for issuance of an injunction. Also, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, "the scope of injunctive relief is dictated by the extent of the violation established…." *Id*.

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

Response: Please see my answer to Question 24.

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

Response: Please see my answer to Question 24.

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

Response: Please see my answer to Question 24.

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

Response: The federal government is a government of limited power, and as stated in the Tenth Amendment, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Federalism plays an important role in our constitutional system. First, it protects and furthers individual liberties because states can provide greater protections than what the federal Constitution provides. Second, federalism empowers each separate state to govern as the citizens of that state decide, which makes the states accountable to the people.

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

Response: Please see my answer to Question 6.

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

Response: If confirmed, I would evaluate the facts and legal claims in the record before me, consider the arguments of the parties, and research and apply the precedents of the Supreme Court and Ninth Circuit to determine the availability of damages and/or injunctive relief in each case.

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

Response: The Supreme Court has held that an unenumerated right is recognized under the Due Process Clause of the Fourteenth Amendment if it 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." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted). Examples of cases recognizing such rights include *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (the right to have children), *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right to direct the education and of one's children), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the right to marital privacy).

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

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

Response: Please see my response to Question 1. Also, the Religious Freedom Restoration Act of 1993 (RFRA), which applies to restrictions imposed by the federal government, works hand in hand with the First Amendment to protect persons from a substantial burden on their exercise of religion. Further, the First Amendment's religion clauses includes the "ministerial exception," which "protects the rights of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2052 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North Americ*a, 344 U.S. 94, 116 (1952)).

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 held that, "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (quoting *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)).

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 answers to Questions 1 and 30(a).

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 16.

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

Response: Please see my answer to Question 30(a). Under RFRA, a rule of general applicability – if it substantially burdens a person's exercise of religion – is subject to strict scrutiny.

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

Response: No.

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

a. **What do you understand this statement to mean?**

Response: I understand Justice Scalia's comment to mean that judges should faithfully and impartially apply the rule of law in each case regardless of the outcome.

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

Response: Yes.

a. **If yes, please provide appropriate citations.**

Response: As a litigator and appellate lawyer in private practice for nearly twenty years, I have worked on many cases in which my clients challenged state and federal statutes as unconstitutional on their face and/or as applied. There are too many cases to list, but some examples appear in my response to Question 17 of my Senate Judiciary Questionnaire along with summaries of those cases.

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

Response: No.

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

Response: To the extent this question raises policy issues, it is for policymakers and not judges to address. What I can say is that I am proud to be an American and am grateful for the opportunities this country afforded my immigrant parents and their children.

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

Response: Yes.

36. How did you handle the situation?

Response: I zealously represented the interests of my client and advanced colorable arguments under the law consistent with my obligations as an advocate and the ethical rules governing lawyers.

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

Response: Yes.

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

Response: My views of the law have not been shaped by any particular Federalist Paper.

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

Response: If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. My personal beliefs on this or any other issue would not play a role in my decision making.

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

Response: To the best of my recollection, I have never testified under oath other than at my hearing before the Senate Judiciary Committee.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

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

Response: As a litigator and appellate lawyer in private practice for nearly twenty years, I have helped lawyers in my firm and outside of my firm with numerous briefs filed in state and federal court and on which I am not listed as counsel. My assistance on those briefs ranged from minor editing to high-level review of legal issues. Because of the ad hoc nature of my work in this regard, as well as the large number of briefs on which I have assisted, I am unable to provide a list of all the briefs.

44. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. If so, please describe the circumstances.

Response: Please see my answer to Question 44.

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

Response: Judicial nominees take an oath before they testify at their Senate Judiciary Committee hearing, and they are required under that oath to testify truthfully. Judicial nominees are also subject to Canon 3(A)(6) of the Code of Conduct for United States Judges, which prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." To adhere to their oath and the Code of Conduct, nominees should not express their views on legal issues that may come before them. Further, our Constitution demands a system of justice where judges decide cases objectively and based on the rule of law. If confirmed, I will abide by these principles.

Questions for the Record for Roopali Hardin Desai
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

Roopali H. Desai

1. **Please explain how you are prepared, or how you plan to prepare, to consider appeals that focus on criminal matters, if confirmed, since your legal experience has been focused on civil issues.**

   Response: In my nearly twenty years of professional experience as a civil litigator, appellate lawyer, and Ninth Circuit judicial law clerk, I have frequently been required to research, learn, and analyze legal issues and subject areas that I had not confronted before. Based on that experience, I am confident in my ability to thoroughly research and quickly get up to speed on any legal issue that may be presented to me as circuit judge. In addition, if confirmed, I would confer with my colleagues on the court, take advantage of judicial education opportunities offered by the Federal Judicial Center, and participate in other training programs offered by the Ninth Circuit.

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

   Response: In my nearly twenty years of experience as a civil litigator, I have observed countless judges many of whom are models for the type of jurist I would hope to be. If confirmed, I would employ the traits that I think are most important for all judges, which are as follows: (a) fairly and impartially decide the issues in the case before me; (b) faithfully and impartially follow the rule of law and the binding precedent of the Supreme Court and Ninth Circuit; (c) demonstrate respect for the parties and allow them the opportunity to be heard; (d) exercise restraint and only decide issues before me; and (e) provide a clear and accessible written ruling.

3. **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: No. If confirmed and confronted with an issue of constitutional or statutory interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit interpreting the text at issue. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start (and, if possible, end) with the text of the constitution or statute, including relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would consider persuasive authority from other courts, as well as legislative history.

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

   Response: No. See my answer to Question 3.

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

   Response: Under the First Amendment, the government is prohibited from abridging free speech. Private owners of a shopping center are not government actors. The Supreme Court has stated that a privately-owned shopping center that restricts speech does not violate the First Amendment where there was "no such dedication of [petitioner's] privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 570 (1972). I will note, however, that state law may limit a shopping center owner's ability to restrict speech on the property. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that California Supreme Court decision allowing individuals to exercise state-protected rights of expression and petition on a shopping center owner's private property did not violate federally recognized property rights or the First Amendment).

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*, 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." I554 U.S. 570, 580 (2008) (quoting *United States v. VerdugoUrquidez*, 494 U.S. 259 (1990)).

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

   Response: As a general matter, the Supreme Court has consistently held that because the Due Process Clause of the Fourteenth Amendment 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. **Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?**

Response: I am not currently aware of binding Supreme Court or Ninth Circuit precedent on this question. If confirmed, I will faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit.

9. At what point does equal protection of the law attach to a human life?

Response: The Supreme Court in *Dobbs v. Jackson Women's Health Org*. applied rational basis review to uphold Mississippi's 15-week abortion ban and, in doing so, explained that decision making generally about the right to abortion is being returned to the people and their elected representatives. 597 U.S. __ (2022), slip op. at 3 (Kavanaugh, J. concurring) ("The Constitution neither outlaws abortion nor legalizes abortion.").

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

Response: Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the issue.

I will note that the Supreme Court held in *Crawford v. Marion County*, 553 U.S. 181 (2008), that voter identification laws were not per se unconstitutional and upheld the Indiana voter identification requirements at issue in that case.

Senator Mike Lee
Questions for the Record
Roopali H. Desai, Nominee to be United States Circuit Judge for the Ninth Circuit

1. How would you describe your judicial philosophy?

Response: In my nearly twenty years of experience as a civil litigator, I have observed countless judges many of whom are models for the type of jurist I would hope to be. If confirmed, I would employ the traits that I think are most important for all judges, which are as follows: (a) fairly and impartially decide the issues in the case before me; (b) faithfully and impartially follow the rule of law and the binding precedent of the Supreme Court and Ninth Circuit; (c) demonstrate respect for the parties and allow them the opportunity to be heard; (d) exercise restraint and only decide issues before me; and (e) provide a clear and accessible written ruling.

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

Response: If confirmed and confronted with an issue of constitutional or statutory interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit interpreting the text at issue. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start (and, if possible, end) with the text of the Constitution or statute, including relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would consider persuasive authority from other courts, as well as legislative history.

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

Response: Please see my answer to Question 2. Also, the Supreme Court has looked to the original public meaning to interpret the Constitution in some cases, such as in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

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

Response: Please see my answers to Question 2 and Question 3.

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: Please see my answer to Question 2.

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: Please see my answer to Question 2. The "original intent" of the law is how the individuals who drafted the law intended it to be understood. The "original public meaning" refers to how individuals in the public would have understood the law at the time it was enacted or adopted. In *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020), the Supreme Court explained: "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *In District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court conducted a textual analysis and considered contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the text of the Second Amendment at the time of ratification.

6. What are the elements of Article III justiciability?

Response: Following are the elements of Article III justiciability: (1) the plaintiff must have suffered an "injury in fact" that is concrete and particularized and actual or imminent; (2) the injury must be traceable to the challenged action of the defendant; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

7. When does a federal court have subject matter jurisdiction over a case?

Response: Federal courts are "courts of limited jurisdiction." *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). They have the authority to hear cases that (1) are within the judicial power granted by the Constitution; and (2) have been authorized by Congress. *See Aldinger v. Howard*, 427 U.S. 1 (1976); *see also* 13 Wright & Miller, Federal Practice and Procedure § 3522, p. 100.

8. Can subject matter jurisdiction be waived?

Response: No.

9. When should a federal court apply state law?

Response: The Supreme Court has held that, "[e]xcept in matters governed by acts of Congress, the law to be applied in any case is the law of the state. And

whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

10. When should a court apply federal common law?

Response: In *Erie Railroad Co. v. Tompkins*, the Supreme Court stated that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938). However, in certain limited areas such as admiralty law, antitrust law, and bankruptcy law, the Supreme Court has indicated that federal common law might exist. *See, e.g., Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713 (2020).

11. Can federal courts decide issues of state-law?

Response: Please see my answer to Question 9.

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

Response: The federal government is a government of limited power, and as stated in the Tenth Amendment, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Congress has the powers that are enumerated in the Constitution, including the Necessary and Proper Clause which grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. In *McCullough v. Maryland*, the Supreme Court held that Congress has implied powers derived from the Necessary and Proper Clause. 17 U.S. 316, 436-37 (1819). It stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id*. at 421.

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

Response: The Supreme Court has held that the "'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948)). If confirmed, I would evaluate Congress's power to enact a law under the relevant precedents of the Supreme Court and the Ninth Circuit.

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

Response: The Supreme Court has held that an unenumerated right is recognized under the Due Process Clause of the Fourteenth Amendment if it 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." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted). Examples of cases recognizing such rights include *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (the right to have children), *Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right to direct the education and of one's children), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the right to marital privacy).

15. What rights are protected under substantive due process?

Response: Please see my answer to Question 14.

16. 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: The Supreme Court recently held that substantive due process does not protect a right to abortion. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022). Also, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) largely abrogated *Lochner v. New York*, 198 U.S. 45 (1905). If confirmed, I would faithfully and impartially apply the Supreme Court's precedents regarding substantive due process protections for personal and economic rights.

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

Response: Congress's powers under the Commerce Clause are addressed in cases such as *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. I (2005). Specifically, Congress has the power to regulate: (1) the use of the channels of interstate commerce, (2) the regulation and protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that, in the aggregate, have a substantial effect on interstate commerce.

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

Response: A group of people qualifies as a "suspect class" if the group has "the traditional indicia of suspectedness." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). The Supreme Court has stated that a group of people classified by race, religion, national origin, or alienage is a suspect class. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-32 (1971).

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

Response: Checks and balances and separation of powers safeguard liberty under our Constitution by preventing the excessive accumulation of power in any one branch of the government. In *Seila Law v. CFPB*, the Supreme Court stated: "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Their solution to governmental power and its perils was simple: divide it." 140 S. Ct. 2183, 2202 (2020) (citation omitted).

20. 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: If confirmed, I would evaluate the facts and legal claims in the record before me, consider the arguments of the parties, and research and apply the precedents of the Supreme Court and Ninth Circuit in a case presenting a question of whether one branch exceeded its constitutional authority.

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

Response: None. Our Constitution demands a system of justice where judges decide cases objectively and not based on their personal beliefs. Judges must decide cases based on the rule of law. If confirmed, I will abide by these principles.

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

Response: Judges should endeavor to avoid both.

23. 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 researched or analyzed this issue and therefore do not have a basis on which to formulate an opinion. If confirmed, I would evaluate the facts and legal claims in the record before me, consider the arguments of the parties, and research and apply the precedents of the Supreme Court and Ninth Circuit.

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

Response: I understand "judicial review" to refer to the constitutional authority of the judicial branch to determine the legality of actions taken by the legislative or

executive branch. *See Marbury v. Madison*, 5 U.S. 137 (1803). I understand "judicial supremacy" to refer to the concept that the Supreme Court's decisions are binding on coordinate branches of the federal government and the states.

25. 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: Elected officials take an oath to uphold the Constitution. *See* U.S. Const., art. VI, § 3. Moreover, state legislators and executive and judicial officers are bound to follow decisions of the Supreme Court interpreting the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

26. 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: The role of the judiciary is limited to deciding cases by applying the rule of law. Judges do not make law or enforce the law.

27. 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: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. Only the Court of Appeals sitting en banc or the Supreme Court has the authority to overrule precedent.

28. 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: None.

29. 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: I am not familiar with these statements. "Equity" means different things to different people. Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." Equity, Black's Law Dictionary (10th ed. 2014).

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

Response: "Equality" means different things to different people. Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary defines "equity" and "equality" differently.

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

Response: The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. In confirmed, I will faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit.

32. How do you define "systemic racism?"

Response: "Systemic racism" means different things to different people. I do not have a personal definition of "systemic racism."

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

Response: "Critical race theory" means different things to different people. I do not have a personal definition of "critical race theory." Black's Law Dictionary defines "critical race theory" as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Critical Race Theory, Black's Law Dictionary (11th ed. 2019).

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

Response: I have not researched or analyzed this issue and therefore do not have a basis on which to formulate an opinion. If confirmed, I would evaluate the facts and legal claims in the record before me, consider the arguments of the parties, and research and apply the precedents of the Supreme Court and Ninth Circuit.

35. In December 2018, you wrote and submitted an amicus brief to the Arizona Supreme Court in the case *Brush & Nib Studio* v. *City of Phoenix* on behalf of the organization Americans United for Separation of Church and State. In the brief you argued that "the Establishment Clause does not permit religious exemptions that – instead of protecting religious institutions' internal exercise of their beliefs – substantially burden third parties who do not share those beliefs." What Supreme Court precedent did you rely on to make this assertion?

Response: In December 2018, I was co-counsel with an attorney from Americans United for Separation of Church and State on an amicus curiae brief filed in *Brush & Nib Studio v. City of Phoenix* on behalf of a group religious, religiously affiliated, and civil rights organizations. As noted in the brief itself, my clients included "Christian, Jewish, Muslim, Hindu, Sikh, multi-faith, and nonsectarian organizations."

In the section of the amicus curiae brief where the sentence cited above appears, my clients argued that interpreting Arizona's Free Exercise of Religion Act to support broad religious exemptions from the City of Phoenix's facially neutral and generally applicable public accommodation ordinance could cause a conflict with the Establishment Clause of the First Amendment to the U.S. Constitution by "substantially burden[ing] third parties." In support of this argument generally, the amicus curiae brief cited *Lee v. Weisman*, 505 U.S. 577, 587 (1992), *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 710 (1985), *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989), *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018), and *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

36. In your argument you relied in part on the following passage from *Sherbert* v. *Verner*, "[n]or does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties." 374 U.S. 398, 409 (1963). How does this statement from the Court support your assertion that a religious exemption must not "substantially burden third parties who do not share those beliefs"?

Response: In the relevant portion of *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), the Supreme Court explained as follows:

> In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. *See School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560. Nor does the recognition of the appellant's right

> to unemployment benefits under the state statute serve to abridge any other person's religious liberties.

(Emphasis added). The emphasized sentence suggests that the outcome may have been different had there been evidence that recognizing the right to unemployment benefits under the circumstances of that case would have "abridge[d] any other person's religious liberties."

37. You submitted this brief six months after the Supreme Court handed down its decision in *Masterpiece Cakeshop*, yet you argued for an outcome that would have contradicted holding of *Masterpiece Cakeshop*. How did you distinguish *Masterpiece Cakeshop* from *Brush & Nib Studio* v. *City of Phoenix*?

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court did not reach the merits of the underlying Free Speech and Free Exercise claims. Instead, it summarized its holding as follows:

> Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Id. at 1723-24. In its conclusion, the Supreme Court further explained that:

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

Id. at 1732. As a result, the argument my clients raised in their amicus curiae brief filed in *Brush & Nib Studio v. City of Phoenix* six months later did not "contradict[]" the holding in *Masterpiece Cakeshop*.

If confirmed, I would faithfully and impartially apply the Supreme Court's decisions protecting religious freedom under the First Amendment, including the decision in *Masterpiece Cakeshop.*

38. What assurances can you offer me that you will faithfully apply the principles of *Masterpiece Cakeshop* to other First Amendment cases if you are confirmed to the Ninth Circuit?

Response: The arguments in the amicus brief that was filed on behalf of my clients in *Brush & Nib Studio* was in my role as an advocate. I understand and take seriously the distinction between the roles and responsibilities of an advocate and a judge. Like many nominees who have come before me and transitioned from advocate to judge, if confirmed, I will faithfully and impartially apply the precedents of the Supreme Court and the Ninth Circuit.

Our Constitution demands a system of justice where judges decide cases objectively and not based on their personal beliefs. Judges must decide cases based on the rule of law. If confirmed, I will abide by these principles and the judicial oath set forth in 28 U.S.C. § 453.

39. What has the Supreme Court said about the relationship between the Establishment Clause and the Free Exercise Clause?

Response: The Supreme Court recently decided *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407 (2022), in which the Court discussed an argument raised by a party about a "direct tension" between the Establishment Clause and Free Exercise Clause as applied to its decision to suspend an employee. *Id*. at 2426. The Supreme Court rejected that argument and provided guidance going forward about the relationship between those two clauses of the First Amendment that I will faithfully apply if confirmed.

Senator Ben Sasse
Questions for the Record for Roopali H. Desai
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 13, 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: In my nearly twenty years of experience as a civil litigator, I have observed countless judges many of whom are models for the type of jurist I would hope to be. If confirmed, I would employ the traits that I think are most important for all judges, which are as follows: (a) fairly and impartially decide the issues in the case before me; (b) faithfully and impartially follow the rule of law and the binding precedent of the Supreme Court and Ninth Circuit; (c) demonstrate respect for the parties and allow them the opportunity to be heard; (d) exercise restraint and only decide issues before me; and (e) provide a clear and accessible written ruling.

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

   Response: I understand "originalism" to be the view that the Constitution should be interpreted in the way the relevant text would have been understood at the time it was adopted.

   The Supreme Court has looked to the original public meaning to interpret the Constitution in some cases, such as in N*ew York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would look to Supreme Court precedent to determine when the original public meaning of the Constitution's text should be used to interpret its provisions.

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

   Response: Please see my answer to Question 3.

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

   Response: Our Constitution is sacred, and it has an enduring fixed quality to it. One of the geniuses of the Constitution is that it can be changed over time through the amendment process. Also, the Constitution can be applied to new circumstances.

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

   Response: I have not studied the judicial philosophy of particular justices. Rather than trying to emulate a particular judge, if confirmed, I would employ the traits that I think are most important for all judges: (a) fairly and impartially decide the issues in the case before me; (b) faithfully and impartially follow the rule of law and the binding precedent of the Supreme Court and Ninth Circuit; (c) respect the parties; (d) exercise restraint and only decide issues before me; and (e) provide a clear and accessible written ruling.

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: As a nominee for the Ninth Circuit, it is not my role to question whether the Supreme Court or Ninth Circuit has correctly decided a case. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit. Only the Court of Appeals sitting en banc or the Supreme Court has the authority to overrule prior circuit court precedent and only the Supreme Court has authority to overrule Supreme Court precedent.

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: Please see my answer to Question 7.

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: If confirmed and confronted with an issue of constitutional or statutory interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit interpreting the text at issue. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start (and, if possible, end) with the text of the constitution or statute, including relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would consider persuasive authority from other courts, as well as legislative history.

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: No. Judges must consider the factors under 18 U.S.C. § 3553(a) when imposing a sentence.

Questions from Senator Thom Tillis
for Roopali H. Desai
Nominee to be United States Circuit Judge for the Ninth Circuit

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: Judicial activism means different things to different people. My understanding of judicial activism is when judges seek to obtain certain outcomes in cases based on their personal views rather than on settled law, or when judges reach issues that are not before them. Neither are appropriate.

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

   Response: Judges are expected to act impartially consistent with the oath they swear to "administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States."

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

   Response: No. The limited role of Article III judges is to apply the law to the cases before them.

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

   Response: Judges must fairly and faithfully apply precedent to the cases before them regardless of any personal views they may hold. If confirmed, I would adhere to this principle, which I believe is critical to our system of justice under the Constitution.

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

   Response: No.

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

   Response: If confirmed, I would faithfully and impartially apply the law, including the Second Amendment and the Supreme Court's decisions in *New York State Rifle & Pistol*

Association v. Bruen, 597 U.S. __ (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: If confirmed, I would evaluate the facts and legal claims in the record before me, consider the arguments of the parties, and research and apply the precedents of the Supreme Court and Ninth Circuit. Some relevant precedents relating to the Second Amendment rights and pandemic restrictions include *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: If confirmed, I would evaluate the facts and legal claims in the record before me, consider the arguments of the parties, and research and apply the precedents of the Supreme Court and Ninth Circuit. The Supreme Court has set forth a two-part test to determine whether government officials are entitled to qualified immunity under §1983: (1) whether there is a violation of a statutory or constitutional right; and (2) whether the right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Supreme Court has held that "clearly established" means that, "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

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

Response: To the extent this question raises policy issues, it is for Congress and not judges to decide. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit regarding qualified immunity.

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

Response: Please see my answer to Question 10.

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

a. What experience do you have with copyright law?

Response: In my nearly twenty years as a litigator and appellate lawyer, and as a law clerk on the Ninth Circuit before entering private practice, I have not had significant experience with copyright law.

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

Response: In my nearly twenty years as a litigator and appellate lawyer, and as a law clerk on the Ninth Circuit before entering private practice, I have not had significant experience with the Digital Millennium Copyright Act.

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

Response: In my nearly twenty years as a litigator and appellate lawyer, and as a law clerk on the Ninth Circuit before entering private practice, I have not had significant experience with intermediary liability for online service providers that host unlawful content posted by users.

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: In my nearly twenty years as a litigator and appellate lawyer, and as a law clerk on the Ninth Circuit before entering private practice, I have not had significant experience with intellectual property issues, including copyright. I have provided legal analysis and advice to clients on First Amendment and free speech issues, and have drafted and filed, or aided in drafting, multiple briefs in state and federal court on First Amendment and free speech issues. One example of a case I worked on that involved First Amendment issues is *United Food & Commercial Workers Local 99 v. Bennett*, 817 F. Supp. 2d 1118 (D. Ariz. 2011); 934 F. Supp. 2d 1167 (D. Ariz. 2013), which is included on my Senate Judiciary Questionnaire.

13. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it

from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

Response: If confirmed and confronted with an issue of statutory interpretation, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit interpreting the statute at issue. If there is, I would faithfully and impartially apply the precedent to the case before me. If there is no such precedent, I would always start with the text of the statute, including any relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would also consider persuasive authority from other courts, as well as legislative history.

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

Response: If confirmed and confronted with an issue of whether or how to apply the "advice and analysis" of a federal agency, I would first look to see if there is precedent from the Supreme Court or Ninth Circuit relating to the "advice and analysis" of the agency or any analogous agency advice. If there is no such precedent, I would look to the legal standards for judicial deference to an agency's "advice and analysis." *See Skidmore v. Swift & Co*., 323 U.S. 134 (1944); *see also Christensen v. Harris Cnty*., 529 U.S. 576, 587 (2000); *Chevron, U.S.A., Inc v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984).

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

Response: To the extent this question raises policy issues, it is for Congress and not judges to decide. If confirmed, I would faithfully and impartially apply the precedents of the Supreme Court and Ninth Circuit regarding any claim that an online service provider had sufficient notice.

14. 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: If confirmed, I would faithfully and impartially apply any applicable Supreme Court or Ninth Circuit precedent to the case before me. If there is no applicable precedent, I would interpret the statute by looking at its plain text, including any relevant statutory definitions, and then consider applicable canons of construction or other interpretive principles. Where appropriate, I would also consider persuasive authority from other courts, as well as legislative history.

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 Question 14(a).

15. 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: I have not researched or analyzed the issue of "judge shopping" or "forum shopping" and therefore do not have a basis on which to formulate an opinion. Also, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the propriety of a party's use of certain rules of procedure, including venue rules. I will note, however, that in the District of Arizona, cases are assigned to judges randomly. This procedure limits judge shopping and promotes public confidence in the judiciary.

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

Response: Please see my answer to Question 15(a).

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: No.

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

Response: Please see my answer to Question 15(a).

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: This question raises policy issues that are best addressed by policymakers.

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? Should such a rule apply only where a single judge sits in a division?

Response: Please see my answer to Question 16(a).

17. 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: Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or judicial nominee from commenting "on the merits of a matter pending or impending in any court." As a nominee to the Ninth Circuit, because this is an issue that I might confront if I am confirmed, it would be inappropriate for me to opine on the issue.

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

Response: Please see my answer to Question 17(a).