Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Rita Faye Lin
Nominee to be United States District Judge, Northern District of California

1. **In a college piece, you wrote that: "The problem with the Christian Coalition is not that they are Bible-thumpers (there are personal beliefs that often result from religious experiences) but that they're bigots." If you are confirmed, how can litigants be assured that you will not allow this bias on your part to impact your rulings and opinions?**

   Response: I do not agree with that statement today. I wrote that when I was 20 years old, in an emotional reaction to the death of Matthew Shepard, and it reflected my limited life experience. I'm now more than 24 years older than I was when I wrote those words, and I am proud to have friends, colleagues, and associates who have a wide range of religious, political, and personal views. And, in general, my adult life over the last two decades as a wife, mother, and member of our local church has enriched my understanding of the human experience, as has my professional career as a civil litigator, federal prosecutor, and judge. In my four years as a judge, I have adjudicated all cases before me without bias of any kind, and I would do the same on the federal bench, if confirmed.

2. **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. Judges should set aside their personal values in interpreting the law, including the Constitution. Instead, judges should interpret the law fairly and impartially, applying binding precedent to the factual record and evidence in the case before them.

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

   Response: 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." *Black's Law Dictionary* (11th ed. 2019).

4. **Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker?**

   Response: That is a question better answered by policymakers and law enforcement officials. The adequacy and appropriateness of a government response to a call for service is an issue that could come before me as a judge, so it would be inappropriate for me to comment further.

5. **Is it appropriate for protestors to ignore social distancing mandates and gathering limitations to protest racial injustice?**

   Response: If confirmed and confronted with a case involving the application of COVID-19 mandates to a protest, I would fully and faithfully apply the binding precedents of the Supreme Court and Ninth Circuit to the facts and evidence before me. Depending on the specific facts, that could include the Supreme Court's recent decisions regarding the application of COVID-19 restrictions to burden the exercise of constitutional rights in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

6. **Is it appropriate for the government to use law enforcement to enforce social distancing mandates and gathering limitations for individuals attempting to practice their religion in a church, synagogue, mosque or any other place of religious worship?**

   Response: If confirmed and confronted with a case involving the application of COVID-19 mandates to individuals attempting to practice their religion in a place of religious worship, I would fully and faithfully apply the binding precedents of the Supreme Court and Ninth Circuit to the facts and evidence before me. Depending on the specific facts, that could include the Supreme Court's recent decisions regarding the application of COVID-19 restrictions to burden free exercise in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

7. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: Yes, if the officer reasonably suspects (1) that the person is committing or has committed a crime and (2) that the person is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968).

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

   Response: I am unfamiliar with the cited statement from then-Judge Ketanji Brown Jackson concerning a "living constitution." I believe the Constitution has an enduring fixed quality that does not change over time, though it is applied to new circumstances in our modern times. The Constitution may be changed only through the amendment process provided in Article V.

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

   Response: I am unaware of any Supreme Court decision analyzing the constitutionality of 18 U.S.C. § 1507. The Supreme Court upheld a potentially analogous state statute in Louisiana against a facial constitutional challenge in *Cox v. Louisiana*, 379 U.S. 559, 564

(1965). As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding the constitutionality of a law. If confirmed, I would fully and faithfully apply any precedents of the Supreme Court and Ninth Circuit in any case concerning the constitutionality of 18 U.S.C. § 1507 or a state analog to that statute.

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

Response: Generally, no. Judicial decisions should be made based on the applicable law and the factual record and evidence before the court. However, in some circumstances, the law requires the court to consider equity. For example, in adjudicating a request for a preliminary injunction, courts must examine the "balance of equities" and the "public interest." *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where required by law, it is proper for courts to consider equities.

11. What is implicit bias?

Response: Merriam-Webster's Dictionary defines "implicit bias" as "a bias or prejudice that is present but not consciously held or recognized."

12. Is the federal judiciary affected by implicit bias?

Response: I have not reviewed empirical research on whether the federal judiciary holds biases or prejudices that are present but not consciously held or recognized. That is a question better directed at academics or psychologists. As a sitting judge and judicial nominee, it would be inappropriate for me to opine on the issue, because I could be presented with a case alleging that the judge handling it acted in a biased manner. If confirmed and confronted with such a case, I would fully and faithfully apply the binding precedents of the Supreme Court and Ninth Circuit to the factual record and evidence before me.

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

Response: I am not aware of having implicit biases. As a judge, my oath requires me to adjudicate matters fairly and without bias, and to recuse myself in any situation in which I could not be unbiased.

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

Response: Criticism of an opinion typically involves finding fault with the reasoning of an opinion. An "attack" on a judge typically involves a threat of violence or a physical assault. That term is also sometimes used to describe *ad hominem* attacks on a judge's character or background.

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

Response: The Constitution delegates to Congress the power to determine the size of the Supreme Court. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on the issue. I will faithfully apply all precedents of the Supreme Court regardless of its size.

16. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

Response: I do not regard any single factor as the most important in sentencing. Sentencing is a highly individualized, fact-specific determination. If I am confirmed, I would apply binding precedents of the Supreme Court and the Ninth Circuit regarding sentencing, and I would consider all the factors outlined in 18 U.S.C. § 3553(a).

17. In what situation(s) does qualified immunity not apply to a law enforcement officer in California?

Response: In a suit under 42 U.S.C. § 1983 against a law enforcement officer in any state, qualified immunity does not apply when the plaintiff has demonstrated both (1) that the officer violated a statutory or constitutional right; and (2) that the right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

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

Response: That is a question best suited for policymakers and law enforcement officials. As a sitting judge and judicial nominee, I should not express an opinion on that topic. In my current assignment as a judge overseeing criminal trials, parties sometimes contend that law enforcement investigation in a particular case was insufficient and/or affected by lack of funding, and it would therefore be inappropriate for me to state a personal view regarding the appropriate level of such funding.

19. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: There is not any specific Supreme Court decision that exemplifies my judicial philosophy. My judicial philosophy is to resolve the case or controversy before me in a manner that is diligent, open-minded, and fair. I diligently review the applicable law, factual record, evidence, and written submissions of the parties. I listen with an open mind to the parties' arguments and the evidence presented. Then, I provide the parties with a prompt decision that clearly explains my ruling and the reasoning behind it, as well as any issues that I have not decided. For each case that comes before me, I set a

tone in the courtroom that treats litigants with respect and dignity and conveys my recognition of how important the case is to the individual parties.

20. Please identify a Ninth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: There is not any specific Ninth Circuit decision that exemplifies my judicial philosophy. As to my judicial philosophy, please see my response to Question 19.

21. 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: Yes. As a sitting judge and judicial nominee, I generally refrain from expressing an opinion regarding whether a particular case was correctly decided. However, because it is unlikely that I will ever be asked to adjudicate the constitutionality of laws requiring racial segregation, I can state my view that *Brown* was correctly decided.

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

Response: Yes. As a sitting judge and judicial nominee, I generally refrain from expressing an opinion regarding whether a particular case was correctly decided. However, because it is unlikely that I will ever be asked to adjudicate the constitutionality of laws prohibiting interracial marriage, I can state my view that *Loving* was correctly decided.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court overruled *Roe v. Wade*, and *Roe* is no longer good law.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court overruled *Casey*, and *Casey* is no longer good law.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

22. How do you understand the difference, if any, between freedom of religion and freedom of worship?

Response: Freedom of religion is significantly broader than the freedom of worship. The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly" but also protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022).

23. Do you believe that the federal government should decriminalize possession of any drugs?

Response: That is a question best suited for policymakers. As a sitting judge and judicial nominee, it would be inappropriate for me to comment on that topic because drug laws or amendments to drug laws could be the subject of litigation before me. In any case involving a law decriminalizing possession of drugs, I would fairly and impartially assess the case based on the evidence presented and the applicable law, including any binding precedents.

24. Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?

Response: I have not studied whether First Amendment protections are more often applied to certain parties. As a sitting judge and judicial nominee, it would be inappropriate for me to comment on any personal views regarding the First Amendment, which is a topic of potential litigation in the courts. In any case involving the First Amendment, I would fairly and impartially assess the case based on the evidence presented and the applicable law, including any binding precedents.

25. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

Response: Where a statute or regulation covers individual conduct that is within the plain text of the Second Amendment's protections, the government must demonstrate that the statute or regulation is "consistent with this Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

Response: Yes. First, I diligently review the parties' written submissions, the applicable law, and the factual record and evidence, and research any legal issues with which I am not already familiar. Second, I listen to the arguments of the attorneys and the evidence presented with an open mind. I am transparent with the attorneys regarding my initial thoughts, so that they can probe and challenge my thinking. Third, I render my decision based entirely on the law and the facts before me, and I limit my ruling to the case or controversy presented. I make a clear record of my factual findings and legal reasoning, so that if there is an appeal, the appellate court can understand the basis for my decision and assess it thoroughly.

27. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."

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

Response: No.

b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

29. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

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

Response: No.

b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: No.

c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

30. **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.

31. 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.

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

Response: In February 2021, I submitted applications to the State Chairs of Senator Feinstein's and Senator Padilla's Judicial Advisory Committees for consideration for nomination to the United States District Court for the Northern District of California. On March 19, 2021, I received a request from the State Chair of Senator Feinstein's Judicial Advisory Committee to schedule an interview. On March 22, 2021, in preparation for that interview, I provided supplemental materials to Senator Feinstein's Committee, which I was informed would also be shared with Senator Padilla's Committee. On March 31, 2021, I interviewed with the State Chair of Senator Feinstein's Judicial Advisory

Committee. On April 19, 2022, I received an email communication from Senator Padilla's Counsel on Judicial Nominations requesting an interview, and spoke to him the next day. On May 20, 2022, I interviewed with attorneys from White House Counsel's Office. On May 21, 2022, the White House Counsel's Office advised that I was being considered for nomination to the United States District Court for the Northern District of California. Since May 22, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On August 1, 2022, my nomination was submitted to the Senate.

33. 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.

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

Response: In early 2021, I had a conversation with a friend and former colleague who was on the board of the American Constitution Society's Bay Area chapter at that time, though she is no longer on the board now. In that conversation, the subject of my application to the federal bench came up. My friend asked if she could pass along information about my application to the American Constitution Society and I agreed. I have not had any contact with the American Constitution Society regarding my application since then.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On May 20, 2022, I interviewed with attorneys from White House Counsel's Office. On May 21, 2022, the White House Counsel's Office advised that I was being considered for nomination to the United States District Court for the Northern District of California. Between May 22, 2022, and July 17, 2022, I communicated with the Office of Legal Policy at the Department of Justice ("OLP") concerning my vetting and background check. On July 28, 2022, White House Counsel's Office communicated to me that the White House anticipated that it would announce its intent to nominate me the next day, which it did. On August 1, 2022, my nomination was submitted to the Senate. Between August 4, 2022, and August 17, 2022, I communicated with OLP regarding my Senate Judiciary Questionnaire, the attachments, and the financial disclosure forms. Between November 2, 2022, and November 30, 2022, I communicated with the White House Counsel's Office staff and/or OLP staff regarding the confirmation hearing. I received questions for the record on December 7, 2022, from OLP. After I drafted my responses, I received feedback from OLP regarding my draft responses, finalized my responses, and then transmitted the responses back to OLP for filing.

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

Response: I received the questions on December 7, 2022, from the Office of Legal Policy at the Department of Justice. I reviewed the questions, conducted legal research, and drafted my responses. I received feedback from the Office of Legal Policy regarding my draft responses, which I considered before finalizing my responses.

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

Questions for the Record for Rita Lin, nominated to be United States District Judge for the Northern District of California

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. Racial discrimination is illegal under a variety of federal laws. Supreme Court precedents establish that government classifications based on race are subject to strict scrutiny, and allow such classifications only when narrowly tailored to serve a compelling government interest. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

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

Response: The Supreme Court has held that unenumerated rights are protected under the Due Process Clause when such rights are objectively "deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997). If I were confirmed and I had a case before me that sought recognition of an unenumerated right not previously recognized under binding precedent, I would apply *Glucksburg* and any other relevant precedent of the Supreme Court and the Ninth Circuit.

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

Response: My judicial philosophy is to resolve the case or controversy before me in a manner that is diligent, open-minded, and fair. I diligently review the applicable law, factual record, evidence, and written submissions of the parties. I listen with an open mind to the parties' arguments and the evidence presented. Then, I provide the parties with a prompt decision that clearly explains my ruling and the reasoning behind it, as well as any issues that I have not decided. For each case that comes before me, I set a tone in the courtroom that treats litigants with respect and dignity and conveys my recognition of how important the case is to the individual parties.

While I am not sufficiently familiar with the judicial philosophies of each Supreme Court Justice from those Courts to state whose is most analogous to mine, Justice Kagan was my first-year Civil Procedure professor in law school, and I have always admired her ability to explain complex legal concepts in a way that everyone can understand. In issuing my rulings, I strive to live up to her example of communicating in a clear, plainspoken way.

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Black's Law Dictionary* (11th ed. 2019). I do not use any particular label to describe my approach to interpreting the law. If confirmed, I would follow the interpretive methods that the Supreme Court and Ninth Circuit have used to interpret the law at issue, including applying the original public meaning where appropriate. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Black's Law Dictionary* (11th ed. 2019). I believe the Constitution has an enduring fixed quality that does not change over time, though it is applied to new circumstances in our modern times. The Constitution may be changed only through the amendment process provided in Article V. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents.

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

Response: If I were confirmed and presented with a constitutional issue of first impression whose resolution is not controlled by binding precedent, I would follow the precedents of the Supreme Court and Ninth Circuit concerning the methods of interpretation applicable to that constitutional provision, including applying the original public meaning where appropriate. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: In some circumstances, it can be. For example, in certain First Amendment contexts, the constitutional analysis includes looking to "contemporary community standards." *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002). I would follow binding precedents of the Supreme Court and Ninth Circuit in determining when the public's current understanding should be considered in determining the meaning of the Constitution or a statute.

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

Response: No. I believe the Constitution has an enduring fixed quality that does not change over time, though it is applied to new circumstances in our modern times. The Constitution may be changed only through the amendment process provided in Article V. If confirmed, I would follow binding Supreme Court and Ninth Circuit precedent and interpret the Constitution in the manner directed by those precedents.

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

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: Yes.

a. Was it correctly decided?

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to state an opinion regarding whether a particular case was correctly decided. If confirmed, I would fully and faithfully follow the binding precedents of the Supreme Court and the Ninth Circuit.

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

Response: Yes.

a. Was it correctly decided?

Response: Yes. As a sitting judge and judicial nominee, I generally refrain from expressing an opinion regarding whether a particular case was correctly decided. However, because it is unlikely that I will ever be asked to adjudicate the constitutionality of laws requiring racial segregation, I can state my view that *Brown* was correctly decided.

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

Response: Under the Bail Reform Act, a rebuttable presumption in favor of pretrial detention arises when a person has been charged with one or more of the offenses listed in 18 U.S.C. § 3142(e)(2) and (e)(3), which includes certain offenses involving drug trafficking, firearms, terrorism, human trafficking, and minor victims.

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

Response: The presumption under the Bail Reform Act reflects Congress's determination that a defendant's arrest for certain offenses suggests "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 1342(e).

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

Response: Yes. Under the Constitution, laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). If the law treats any comparable secular activity more favorably than religious exercise, or if the government acts out of hostility toward religious beliefs, strict scrutiny applies. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). To survive strict scrutiny, the law must be narrowly tailored to further a compelling government interest.

In addition to the protections of the Constitution, the Religious Freedom Restoration Act prohibits the federal government from substantially burdening a person's free exercise of religion unless the law is the least restrictive means of furthering a compelling government interest. *See* 42 U.S.C. § 2000bb-1. The RFRA applies to organizations, including closely held for-profit corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: Strict scrutiny would apply to any law that either (1) treats religious organizations or religious people non-neutrally or (2) singles them out for discrimination with rules not generally applicable to others. *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Such a law would be permissible only if narrowly tailored to serve a compelling government interest. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546.

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of

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

Response: The Supreme Court granted the request for a preliminary injunction. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The Court concluded that the petitioners had shown a likelihood of success on the merits. The Court held that the executive order was not neutral because it "single[d] out houses of worship for especially harsh treatment," and that the executive order failed strict scrutiny because less restrictive rules could serve the government's interest in reducing COVID-19 risk. *Id.* at 67. The Court further concluded that the other requirements of a preliminary injunction were met, including irreparable harm based on the curtailment of the petitioners' free exercise rights. *Id*.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted a preliminary injunction against the application of California's COVID-19 restrictions to prohibit more than three households from gathering inside the home for religious worship. The Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. The Court found that California allowed secular businesses to assemble more people indoors than comparable at-home religious gatherings, even though the Court found that the secular activities did not pose any lesser health threat than the at-home religious activities. *Id.* at 1297. The Court therefore applied strict scrutiny, and found that California failed to show that its restrictions were narrowly tailored to a compelling government interest. *Id.*

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

Response: Yes.

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

Response: The Supreme Court concluded that the Colorado Civil Rights Commission violated a baker's free exercise rights when it treated his refusal to provide services for a same-sex wedding with a "clear and impermissible hostility toward the sincere religious

beliefs that motivated his objection." *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018).

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

Response: Yes, so long as those religious beliefs are sincerely held. "[I]it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Court are not arbiters of scriptural interpretation." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981).

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: It is inappropriate for me to opine on the official position of any religion on any topic. That is a question for religious leaders.

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

Response: The Supreme Court has recognized a "ministerial exception" that prevents courts from hearing employment disputes involving those holding certain important positions with churches and other religious institutions. In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the ministerial exception applied to two teachers at a private Catholic school whose duties included "educating and forming students in the Catholic faith." *Id.* at 2069. The Court found that this role "lay at the core of the mission of the schools where they taught," and that "judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* The Court therefore found that the ministerial exception precluded the courts from hearing the teachers' employment discrimination claims. *Id.*

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

Response: The Supreme Court held that Philadelphia's refusal to contract with Catholic Social Services was not based on a generally applicable rule, because the city ordinance granted city officials discretion to waive the provisions at issue. *Fulton v. City of Pennsylvania*, 141 S. Ct. 1868, 1878 (2021). Strict scrutiny therefore applied. The Court found that there was "no compelling reason" for Philadelphia's decision to deny the exception to Catholic Social Services while making the exception available to others, and therefore found Philadelphia's refusal to be in violation of the Free Exercise Clause. *Id.* at 1881-82.

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

Response: The Supreme Court held that Maine's tuition assistance program violated the Free Exercise Clause by limiting such assistance to "non-sectarian" schools. *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022). The Court found that Maine's program excluded religious schools from a public benefit based on their religious nature, which penalized free exercise and triggered strict scrutiny. *Id*. The Court further held Maine's program failed strict scrutiny because excluding religious schools from the tuition assistance program was not required by the Establishment Clause, and was therefore not a compelling government interest. *Id*.

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

Response: The Supreme Court held that Bremerton School District violated the free speech and free exercise rights of a high school football coach by disciplining him for engaging in a quiet prayer on the football field after games. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). The Court rejected the school's argument that it was required to restrict the coach's First Amendment rights in order to comply with the Establishment Clause, concluding that the coach's actions were his own private expression and not undertaken as a spokesman for the school. *Id*. at 2429.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated the judgment and remanded the case back to the Minnesota courts for further

proceedings in light of *Fulton v. City of Pennsylvania*, 141 S. Ct. 1868, 1878 (2021). Justice Gorsuch wrote a separate concurrence noting that the lower courts had incorrectly applied the Religious Land Use and Institutionalized Persons Act. *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring). The issue in *Mast* was an ordinance requiring a modern septic system that was contrary to the Swartzentruber Amish's faith. Justice Gorsuch found that the lower court had erred in treating "the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." *Id.* "Courts cannot rely on broadly formulated governmental interests, but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id*. (internal quotation marks and alterations omitted).

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

Response: I am unaware of any Supreme Court decision analyzing the interaction between the First Amendment right to assembly and 18 U.S.C. § 1507. The Supreme Court upheld a potentially analogous state statute in Louisiana against a facial constitutional challenge in *Cox v. Louisiana*, 379 U.S. 559, 564 (1965). As a sitting judge and judicial nominee, it would be inappropriate for me to comment further on the factual scenario described in the question. If confirmed, I would fully and faithfully apply any precedents of the Supreme Court and Ninth Circuit to any case alleging a violation of 18 U.S.C. § 1507, and would analyze the case based on relevant or analogous precedents and the factual record.

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

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

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

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

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

Response: No.

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

Response: I am not aware of the court providing any such trainings, and if confirmed, I would not support providing such trainings.

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

Response: Yes. If I am confirmed, I will select and hire law clerks and other staff in compliance with all applicable federal laws prohibiting racial discrimination in hiring.

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

Response: The Constitution delegates the appointment power to the President, with the advice and consent of the Senate. When carrying out those duties, the executive and legislative branches must act in compliance with the Constitution and any applicable federal laws. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on the legality or appropriateness of the consideration of race or sex in making political appointments.

30. Is the criminal justice system systemically racist?

Response: Systemic issues are for policymakers to address. As a judge, my role is to decide the individual case or controversy before me. If I were presented with a case in which there were allegations of racial discrimination, I would assess it based on the factual record and evidence in the case, as well as the applicable law.

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

Response: The Constitution delegates to Congress the power to determine the size of the Supreme Court. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on the issue. I will faithfully apply all precedents of the Supreme Court regardless of its size.

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

Response: No.

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

Response: The Second Amendment "protect[s] an individual right to armed self-defense." *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

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

Response: Where the Second Amendment's text covers the conduct at issue, the government must demonstrate that its regulation of that conduct is "consistent with this Nation's historical tradition of firearm regulation." *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

Response: Yes. The Second Amendment protects "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *see also McDonald v. Chicago*, 561 U.S. 742 (2010).

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

Response: No. The interpretation of the Second Amendment "accords with how we protect other constitutional rights." *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

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

Response: The right to own a firearm is a fundamental right, like the right to vote. *McDonald v. Chicago*, 561 U.S. 742 (2010). I am aware of no authority suggesting that the right to own a firearm is entitled to less protection than the right to vote.

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

Response: The Supreme Court held that the executive branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As a sitting judge and a judicial nominee, it would be inappropriate for me to comment further, because cases are currently pending in the courts concerning the scope of the Executive's authority to decline to enforce certain laws.

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

Response: Black's Law Dictionary defines "prosecutorial discretion" as a "prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the

court." *Black's Law Dictionary* (11th ed. 2019). In the administrative law context, a "substantive rule" (also known as a "legislative rule") is an "administrative rule created by an agency's exercise of delegated quasi-legislative authority" and "has the force of law." *Black's Law Dictionary* (11th ed. 2019).

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

Response: No. State legislatures enacted state death penalty statutes, and the President lacks the authority to invalidate or abolish state laws. Likewise, for federal offenses, Congress enacted the federal death penalty statute, 18 U.S.C. § 3591 *et seq.*, and the President lacks the authority to invalidate or abolish federal laws.

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

Response: The Supreme Court held that the Centers for Disease Control and Prevention (CDC) lacked the statutory authority to issue a nationwide moratorium on evictions based on the COVID-19 pandemic. *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021). The Court concluded that it would have expected "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," and that there was no such clear statement in the Public Health and Service Act. *Id*. at 2489 (internal citations and quotations omitted). The Court vacated the stay on the lower court's ruling, finding that applicants were "virtually certain to succeed on the merits of their argument" that the CDC acted beyond its authority. *Id.*

42. You argued *Golinski v. United States Office of Personnel Management*, one of the cases that challenged the Defense of Marriage Act. Leading up to oral argument in the case, you commented publicly, "the demise of this discriminatory statue is long overdue."

a. Would you describe those in Congress who voted for the law, and President Bill Clinton, who signed it into law, as seeking to discriminate?

Response: No. The Supreme Court held in *United States v. Windsor*, 577 U.S. 744 (2013), that the Defense of Marriage Act had the "purpose and effect" of discriminating against same-sex marriages in a manner that violated equal protection and due process. *Id.* at 770. While I was in private practice, my law firm represented Ms. Golinski, and I worked on that representation. As Ms. Golinski noted in her arguments in that case, the fact that a law fails constitutional scrutiny does not mean that the individual legislators who voted for the law were motivated by malice or a hostile intent. The district court made the same point in its ruling in favor of Ms. Golinski. *See Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012).

43. You participated in the preparation of the San Francisco Superior Court's statement on equity and justice. The statement made the following claims.

"persistent systemic racism continues to this day, and there is much work left for courts to do to make racial equity and inclusion a lived reality for all."

a. Is the United States a systemically racist country?

Response: I understand the term "systemic racism" to refer to patterns of racial discrimination. America is the best country in the world, and my parents immigrated here because it is a beacon of freedom and opportunity. Unfortunately, incidents of racial discrimination and racially motivated hate crimes do persist in modern times in our country, and can occur in patterns. I do not have data on the frequency or prevalence of those patterns. When such patterns arise, it is important for those issues to be discussed and for policymakers to consider how to address them. As a judge, I am focused on the individual case or controversy before me, rather than on larger systemic issues. My focus is on treating everyone in my courtroom fairly and without bias, regardless of their background.

b. What is the role of the courts to make racial equity and inclusion a "lived reality" for all?

Response: It is vitally important that courts stand for the core constitutional principle of equal justice under law. Courts have a responsibility to set a tone that is inclusive and inviting to those of all backgrounds. Many people from all walks of life arrive at court with fears or worries about how our justice system will treat them. I often have victims and their family members, as well as defendants and their family members, in my courtroom. I make every effort to show those who appear in my courtroom that I recognize how important the case is to them and that I see, hear, and respect them when it is their turn to address me, regardless of their background.

c. How would we measure the end of systemic racism?

Response: That is a question for policymakers and social scientists. If presented with a case involving a question of measuring whether a pattern of racial discrimination was occurring, I would evaluate the case based on the individual factual record and any expert testimony or other evidence presented, as well as the applicable law.

d. Would it be complete equality of outcome among all racial groups?

Response: Please see my response to Question 43(c).

44. You also signed a document protesting the California Supreme Court Committee on Judicial Ethics Opinions decision that "discouraged participation" by California judges from participating in public demonstrations, concluding that "it is fraught with ethical risk." You were a signatory to a document that argued "Judges are not members of a legal monastery who should be sequestered from engaging their community on critical issues of law, equity and equality."

a. How can judges be neutral arbiters of law when they engage in public protests?

Response: Judges can and should publicly support the core constitutional principle that all people are equal under the law, which is a principle beyond legal dispute. An example provided in the article is a judge holding the hand of her schoolchild in a school march supporting general principles of equality and justice. The article onto which I signed reflected the view that such actions enhance, rather than detract from, public confidence in the judiciary by reaffirming the judicial commitment to equal justice. At the same time, as noted in the cited article, to preserve their impartiality, judges must be very careful in any public setting and may not publicly comment on or attend protests supporting positions on issues that could come before them or other courts.

b. Are there ethical concerns with judges participating in contentious debates?

Response: Yes, depending on the topic of the debate. Among other ethical restrictions, judges may not make public statements concerning issues that could come before them or other courts, and may not comment on politics.

c. In your opinion, would it proper for a judge to engage in a protest concerning a political cause, only to oversee a suit regarding that same cause the following day?

Response: No.

45. You authored a number of college writings that are quite troubling. In a piece published in *Perspective* in December 1998 you wrote, "felt screwed over by a religious right that perverted my faith in support of bigotry, a religious right whose homophobic views tacitly encouraged its followers to violate the most sacred Christian law—to love others as we love our God." You also stated, "The problem with the Christian Coalition is not that they are Bible-thumpers (there are personal beliefs that often result from religious experiences) but that they're bigots."

a. Do you still believe people on the religious right are bigots?

Response: No. I wrote that when I was 20 years old, in an emotional reaction to the death of Matthew Shepard, and it reflected my limited life experience. I'm now more than 24 years older than I was when I wrote those words, and I am proud to have friends, colleagues, and associates who have a wide range of religious, political, and personal views. And, in general, my adult life over the last two decades as a wife, mother, and member of our local church has enriched my understanding of the human experience, as has my professional career as a civil litigator, federal prosecutor, and judge. In my four years as a judge, I have adjudicated all cases before me without bias of any kind, and I would do the same on the federal bench, if confirmed.

b. How old were you when you wrote this article?

Response: I was 20 years old.

c. In *Obgergefell v. Hodges*, Justice Kennedy wrote, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." In your opinion, are people who hold views opposing same-sex marriage decent and honorable?

Response: I agree with Justice Kennedy's statement quoted above.

46. You also authored a piece in the January 1997 issue of *Perspective* entitled "*The New Red Scare: Western Prejudices Against Islamic Fundamentalism*" which caused to you to issue a subsequent apology editorial in *The Harvard Crimson* on February 5, 1997 for implying "that all Orthodox Jews are terrorists or religious lunatics."

a. Was your article anti-Semitic?

Response: No. In my letter to editor in the *Crimson*, I stated that my *Perspective* article had been misinterpreted to imply that I "somehow believe[d]" the above claims when "I meant nothing of the sort."

In general, I no longer agree with the points that I made in the January 1997 *Perspective* article, which reflected a juvenile attempt to draw false equivalencies between movements or events that are clearly not the same. I wrote that article 26 years ago, when I was 18 years old and in my freshman year of college. It was before I went to law school or had any type of professional career and more than twenty years before I became a judge. In my work as a federal prosecutor, I had the honor and privilege of representing the United States in investigations that concerned national security. I am proud of my work supporting and defending our country in that way. As a judge, if I were confronted with a case alleging terrorist acts or material support for terrorism, I would judge it fairly, impartially, and without bias, based on the factual record, the evidence presented, and the binding legal precedents.

b. How old were you when you wrote that article?

Response: I was 18 years old.

Senator Ben Sasse
Questions for the Record for Rita F. Lin
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 30, 2022

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

   Response: No.

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

   Response: My judicial philosophy is to resolve the case or controversy before me in a manner that is diligent, open-minded, and fair. I diligently review the applicable law, factual record, evidence, and written submissions of the parties. I listen with an open mind to the parties' arguments and the evidence presented. Then, I provide the parties with a prompt decision that clearly explains my ruling and the reasoning behind it, as well as any issues that I have not decided. For each case that comes before me, I set a tone in the courtroom that treats litigants with respect and dignity and conveys my recognition of how important the case is to the individual parties.

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

   Response: I do not use any particular label to describe my approach to interpreting the law. If confirmed, I would follow the interpretive methods that the Supreme Court and Ninth Circuit have used to interpret the law at issue, including the application of the law's original public meaning where appropriate. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

   Response: I do not use any particular label to describe my approach to interpreting the law. If confirmed, my approach to interpreting legal texts would begin with the text itself and any applicable Supreme Court and Ninth Circuit precedents. If the meaning of the text is clear and unambiguous, my analysis would stop there, unless dictated otherwise by precedent.

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

   Response: I believe the Constitution has an enduring fixed quality that does not change over time, though it is applied to new circumstances in our modern times. The Constitution may be changed only through the amendment process provided in Article V.

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

   Response: While I am not sufficiently familiar with the jurisprudence of each Supreme Court Justice over that time period to identify whose I most admire, Justice Kagan was my first-year Civil Procedure professor in law school, and I have always admired her ability to explain complex legal concepts in a way that everyone can understand. In issuing my rulings, I strive to live up to her example of communicating in a clear, plainspoken way.

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

   Response: If there is no controlling Supreme Court precedent, an appellate court cannot overturn its own precedent unless the court is sitting *en banc* or the precedent is "clearly irreconcilable" with an intervening decision of the Supreme Court. *See* Fed. R. App. P. 35(a)(1); *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc).

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 response 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: My interpretation of a statute begins with the statutory text itself and any binding precedents interpreting that text. If the meaning of the text is clear and unambiguous, my analysis stops there. If the text is ambiguous, and there is no binding precedent concerning the correct interpretation, I would employ canons of statutory construction and consult binding precedents interpreting analogous texts. If that did not resolve the issue, I would consult persuasive authority from other circuits, and I would employ the methods of interpretation used by the Supreme Court and Ninth Circuit to interpret the text at issue or similar texts, which can include legislative history. General principles of justice would generally not play a role in statutory interpretation, beyond the framework described above.

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. A defendant's racial or ethnic group is not a factor that may be considered in sentencing under 18 U.S.C. § 3553(a).

Senator Josh Hawley
Questions for the Record

Rita Lin
Nominee, Northern District of California

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

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

    Response: Sentencing is a highly individualized, fact-specific determination. If confirmed, I would apply binding precedents of the Supreme Court and the Ninth Circuit regarding sentencing, and I would consider the factors outlined in 18 U.S.C. § 3553(a); the Sentencing Guidelines calculation; the recommendations of the prosecution, defense, and Probation Office; any statements from victims; any statement by the defendant; and the facts and circumstances of the individual case.

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

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

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

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

    d. **The enhancements for the number of images involved**

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

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

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

    Response: It is Congress's decision what penalties should apply to crimes. As a sitting judge and a judicial nominee, it would be inappropriate to express an opinion on my personal policy preferences about what laws Congress should

pass. If confirmed, I will issue sentences in accordance with the laws enacted by Congress and the applicable binding precedents.

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

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

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

Response: If confirmed, to determine whether to consider uncharged criminal conduct in sentencing, I would analyze whether it is "relevant conduct" within Section 1B1.3 of the United States Sentencing Guidelines Manual, and apply any binding precedents of the Supreme Court and the Ninth Circuit on that issue. With respect to what the ultimate sentence would be, please see my response to Question 1(a).

3. 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.

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

Response: I cannot speculate about Justice Marshall's philosophy or his understanding of the judicial oath. I believe that a federal judge is duty-bound to apply the law, including binding precedents, in every case regardless of one's own policy preferences, and that is what I would do if confirmed.

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

Response: Yes.

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

Response: The most common forms of abstention are discussed below.

Pullman abstention is appropriate if all three of the following criteria are met: "(1) the federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear." *United States v. Morros*, 268 F.3d 695, 703-04 (9th Cir. 2001); *see also R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941). In those situations, *Pullman* requires the federal court to abstain from deciding the federal issue while the parties seek a determination from the state court as to the state law issues. *Id.*

Younger abstention applies where a federal suit would interfere with ongoing state proceedings. Such abstention is appropriate where (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding. *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018); *see also Younger v. Harris*, 401 U.S. 37 (1971).

Burford abstention applies upon a showing "(1) that the state has concentrated suits involving the local issue in a particular [state] 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); *see also Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943).

Colorado River abstention applies when a federal court abstains in favor of a concurrent state court proceeding due to considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). The Ninth Circuit has articulated eight factors that the federal court should consider in deciding whether to abstain under *Colorado River*: "(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *Seneca Ins. Co. v. Strange Land*, 862 F.3d 835, 841-42 (9th Cir. 2017).

Although not formally a doctrine of abstention, the *Rooker-Feldman* doctrine refers to the related concept that the lower federal courts do not have subject matter jurisdiction to hear cases that are effectively appeals from final state court judgments. Accordingly, federal district courts may not adjudicate claims that are "inextricably intertwined" with those already resolved by the state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *Rooker-Feldman* applies "when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief

from the state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004).

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

   Response: No.

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

      Response: Not applicable.

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

   Response: If confirmed, I will follow fully and faithfully all Supreme Court and Ninth Circuit precedent as to the interpretive tools required to analyze constitutional provisions, including applying the original public meaning where appropriate. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

   Response: Sometimes. My interpretation of any legal text begins with the text itself and any binding precedents interpreting that text. If the meaning of the text is clear and unambiguous, my analysis stops there. If the text is ambiguous, and there is no binding precedent concerning the correct interpretation, I would employ canons of statutory construction and consult binding precedents interpreting analogous texts. If that did not resolve the issue, I would consult persuasive authority from other circuits, and I would employ the methods of interpretation used by the Supreme Court and Ninth Circuit to interpret the text at issue or similar texts, which can include 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: In any analysis of legislative history, I would follow Supreme Court and Ninth Circuit precedent to determine what legislative history should be consulted and the relative weight of that legislative history. For example, the Supreme Court has held that committee reports are a better source to determine legislative intent than individual legislators' floor statements. *See Garcia v. United States*, 469 U.S. 70 (1984). The Supreme Court has also cautioned that failed legislative proposals are "particularly dangerous" to rely upon and are not generally probative of legislative intent.

United States v. Craft, 535 U.S. 274, 285 (2002). In general, the text of the statute is the best evidence of what the legislature intended.

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

Response: Our constitution is a domestic document, and I would rely upon domestic law to interpret it, unless Supreme Court or Ninth Circuit precedents counseled reliance upon foreign law in the context of the constitutional provision at issue.

9. 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 petitioner bears the burden (1) to show that the method of execution presents a "substantial risk of serious harm," which refers to "severe pain over and above death itself," and (2) to identify an alternative method that is "feasible, readily implemented, and in fact significantly reduce[s]" the risk of harm involved. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (*quoting Glossip v. Gross*, 576 U.S. 863, 877 (2015)) (alterations in original).

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

Response: Yes.

11. 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 Supreme Court has held that substantive due process does not protect a "freestanding right to DNA evidence untethered from the [defendant's] liberty interests." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009). The Supreme Court has further held that procedural due process is violated only when state procedures regarding postconviction access to DNA offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or transgress "any recognized principle of fundamental fairness in operation." *Id.* at 69; *see also Morrison v. Peterson*, 809 F.3d 1059 (9th Cir. 2015) (applying *Osborne*).

12. 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.

13. 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: Strict scrutiny applies to any government burden placed on the free exercise of religion unless the government regulation is a neutral and generally applicable. *Empl. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872 (1990). A law is not neutral and generally applicable if:

> (1) the object or purpose of the law is suppression of religion or religious conduct, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022); *and Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022);
>
> (2) the government acts in a manner hostile toward religious belief, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018);
>
> (3) the law is subject to discretionary individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021); or
>
> (4) the law treats any comparable secular activity more favorably than religious exercise, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

To survive strict scrutiny, the government bears the burden to show that its regulation is narrowly tailored to serve a compelling government interest.

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 state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Strict scrutiny would apply to any law that either (1) treats religious organizations or religious people non-neutrally or (2) singles them out for discrimination with rules not generally applicable to others. *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Such a law would be permissible only if narrowly tailored to serve a compelling government interest. "A law that targets religious conduct for distinctive treatment or

advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. Please see my response to Question 13 for additional applicable precedents.

15. 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 religious beliefs are held sincerely, and thus within the protection of the Free Exercise Clause, so long as they are not "obviously shams and absurdities" or "patently devoid of religious sincerity." *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994). Courts are not to rely on "a judicial perception of the particular belief or practice in question," and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

16. 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: The Supreme Court held in *District of Columbia v. Heller* that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008).

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

Response: No.

17. 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: Justice Holmes' dissent reflects the notion that the "Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). I agree that judges should not view interpretation of the Fourteenth Amendment, or any other law, as a method of social engineering, and that judges should make their decisions fairly and impartially without regard to personal policy preferences.

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

Response: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruled *Lochner*. If confirmed, I would follow the binding precedents of the Supreme Court, which includes *West Coast Hotel* but not *Lochner*.

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

a. If so, what are they?

Response: "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). If confirmed, I would fully and faithfully apply all Supreme Court precedents.

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

Response: Not applicable.

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

a. Do you agree with Judge Learned Hand?

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully apply all precedents of the Supreme Court and the Ninth Circuit as to what constitutes a monopoly, regardless whether they align with Judge Hand's assessment.

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

Response: Please see my response to Question 19(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: I am not aware of Supreme Court precedent specifying a minimum market share for a monopoly under Section 2 of the Sherman Act. The Ninth Circuit has held that "a market share of less than 50 percent is presumptively insufficient to establish market power." *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995). By comparison, 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). That said, the Ninth Circuit has expressed reluctance "to apply bright-line rules regarding market share" and relies on analyzing "certain telltale factors in the relevant market: market share, entry barriers and the capacity of existing competitors to expand output." *Rebel Oil*, 51 C.3d at at 1438 n. 10. If confirmed, I would fully and faithfully apply the antitrust laws and precedents on monopolization to the individual factual record and evidence in the case before me.

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

Response: There is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Generally, in diversity cases, the federal courts apply state substantive law, and in federal question cases, the federal courts apply federal statutory law. There are only a few limited areas of substantive federal common law where there is no statutory law and decisional common law is "necessary to protect uniquely federal interests," such as in admiralty cases and certain controversies between States. *See Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020).

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

Response: State law governs the scope of a state constitutional right. Accordingly, "the views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Generally, yes. However, the same text can mean different things if adopted by different government actors or enacted at different times. Also, federal and state courts may interpret the same text differently, and state court decisions are binding on federal courts with respect to the interpretation of state law.

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

Response: State constitutions may provide greater protections to its citizens than provided by the United States Constitution.

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

Response: Yes. As a sitting judge and judicial nominee, I generally refrain from expressing an opinion regarding whether a particular case was correctly decided. However, because it is unlikely that I will ever be asked to adjudicate the constitutionality of laws requiring racial segregation, I can state my view that *Brown* was correctly decided.

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

Response: Federal Rule of Civil Procedure 65 describes the scope of federal courts' authority to issue injunctions. In general, injunctive relief is an "extraordinary remedy." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). "[I]njunctive 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). The Ninth Circuit has held that "although there is no bar against nationwide relief in federal district court or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (finding the issuance of a nationwide injunction failed the required standard and was an abuse of discretion). If confirmed and faced with a case where a party sought a nationwide injunction, I would fully and faithfully apply Supreme Court and Ninth Circuit precedent to the factual record and evidence before me.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: The Constitution created a federal government of limited, enumerated powers. Those powers that were not delegated to the federal government have been reserved to the states and the people under the Tenth Amendment. This division of power between the federal government and the states is an essential bulwark of liberty. "It assures a

decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: Please see my answer to Question 5.

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

Response: Generally, damages provide a remedy for a past harm, whereas injunctive relief is designed to prevent future harm. I believe litigants should choose which form of relief they seek, and the court should determine whether the facts and the law authorize that relief.

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect those substantive due process rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997).

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

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

Response: Please see my responses to Questions 13 and 15.

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

Response: No. The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly" but also protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v.*

Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022). That extends beyond the right to worship.

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 response to Question 13.

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 response to Question 15.

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

Response: The Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, … unless such law explicitly excludes such application by reference" to the Act. 42 U.S.C. § 2000bb-3.

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with Justice Scalia's statement or its context. However, I understand it to mean that if a judge fairly and impartially sets aside personal beliefs and enters rulings solely based on applicable law and the factual record, that judge will at least occasionally reach results that are at odds with the judge's own personal policy preferences. If a judge never encounters that situation, it can be a sign that the judge is either deliberately or unknowingly allowing personal policy preferences to dictate judicial decisions, in violation of the judicial oath.

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

Response: Yes. In my role as an advocate while in private practice, I worked on matters in which my law firm represented clients who challenged the constitutionality of federal and state laws prohibiting recognition of same-sex marriages.

a. If yes, please provide appropriate citations.

Response: I worked on a matter in which my law firm represented federal employee Karen Golinski in her constitutional challenge to the Defense of Marriage Act. *Golinski v. Office of Personnel Management*, 587 F.3d 956 (9th Cir. 2009) (Kozinski, J.); 781 F. Supp. 2d 967 (N.D. Cal. 2011) (White, J.); 824 F. Supp. 2d 968 (N.D. Cal. 2012) (White, J.); 724 F.3d 1048 (9th Cir. 2013) (Alarcón, Thomas, Berzon, JJ.); 570 U.S. 931 (2013). I also worked on matters in which my law firm represented various professors as *amici curiae* in constitutional challenges to state laws concerning same-sex marriage. *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

32. 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.

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

Response: I understand the term "systemic racism" to refer to patterns of racial discrimination. America is the best country in the world, and my parents immigrated here because it is a beacon of freedom and opportunity. Unfortunately, incidents of racial discrimination and racially motivated hate crimes do persist in modern times in our country, and can occur in patterns. I do not have data on the frequency or prevalence of those patterns. When such patterns arise, it is important for those issues to be discussed and for policymakers to consider how to address them. As a judge, I am focused on the individual case or controversy before me, rather than on larger systemic issues. My focus is on treating everyone in my courtroom fairly and without bias, regardless of their background.

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

Response: Yes.

35. How did you handle the situation?

Response: I set aside my personal views and zealously advocated for my client, advancing the arguments that best supported its position, consistent with my ethical duty as an attorney.

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

Response: Yes.

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

Response: There is no particular Federalist Paper that has most shaped my views of the law.

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

Response: *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), held that this is a "profound moral issue" and returned the issue of abortion to the people and their elected representatives rather than the federal courts. As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue.

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

Response: No.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response: During the consideration of my application for this position, no one from the White House or Department of Justice asked for me to provide my views on any legal issue or question that could come before me as a judge.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No. I do have investments in mutual funds that hold stocks, but am not aware of the specific securities held in those funds.

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

Response: Yes. In 2008, as a law firm associate at Morrison & Foerster, I drafted briefs in connection with cross-motions for summary judgment in a software copyright dispute, but my name did not appear on the pleadings because I was only temporarily helping in the matter and could not be permanently assigned due to competing case obligations. That is the only instance that I can recall in which I authored or edited a brief that was filed in court without my name on it.

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

Response: *SCO Group v. Novell Inc.* 2:04-cv-00139 (D. Utah).

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

44. 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: At the outset of my testimony before the Senate Judiciary Committee, I took an oath to tell the truth. I understand the same obligation extends to these questions for the record. I have attempted to answer each of these questions truthfully and to the best of my ability and in a manner consistent with my ethical obligations as a sitting judge and under the Code of Conduct for United States Judges as it applies to judicial nominees.

Questions from Senator Thom Tillis
for Rita F. Lin
Nominee to be United States Judge for the Northern District of California

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines "judicial activism" as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Black's Law Dictionary* (11th ed. 2019). I do not consider judicial activism appropriate.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: Yes. My duty is to apply the law to the facts before me, without regard to my personal views. That is what I always wanted from judges as an advocate, and it is the backbone of our entire system of law. I do not find it difficult to reconcile myself to doing my duty, because my commitment to the rule of law far outweighs any policy preference I might have. That is the oath I have sworn, and I take it very seriously.

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 will apply all precedents of the Supreme Court and the Ninth Circuit to the facts of each case before me. In the Second Amendment context, I would fully and faithfully follow the Supreme Court's holdings in *District of Columbia v. Heller*, 554

U.S. 470 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), as well as any other applicable precedent.

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 factual record and evidence presented to me and apply any applicable precedent of the Supreme Court and the Ninth Circuit. Depending on the facts, that could include *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), on the scope of the Second Amendment's protections regarding the right to keep and bear arms. It could also include *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), on the application of COVID-19 restrictions to burden constitutional rights.

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: The Supreme Court has held that qualified immunity in a suit under 42 U.S.C. §1983 applies when the plaintiff has failed to demonstrate both (1) that the official violated a statutory or constitutional right; and (2) that the right was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

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: That issue is best left to policymakers. As a sitting judge and a judicial nominee, it would be inappropriate for me to comment on an issue that might come before me. If confirmed, I would fully and faithfully apply Supreme Court and Ninth Circuit precedent in any case involving potential issues of qualified immunity.

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

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: The Supreme Court has held that 35 U.S.C. § 101, which governs patent eligibility, contains an implicit exception for laws of nature, natural phenomena, and abstract ideas. *Alice Corp. v. CLS Bank International*, 573 U.S. 208, 216 (2014). Under Supreme Court precedent applying that exception, claims to the "building blocks" of human ingenuity are ineligible for patent protection, but claims integrating those building blocks into something more can "transform the nature of the claim" into one that is eligible for protection. *Id.* at 217. Specifically, the Court considers whether the elements of the claim individually, and as an ordered combination, disclose an "inventive concept" that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept alone. *Id.* at 217-18; *see also Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66 (2012). As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case or body of cases was correctly decided, or regarding an issue that could come before me. If confirmed and confronted with an issue of patent eligibility, I will apply Section 101, and any applicable Supreme Court and Federal Circuit precedents, to the case or controversy presented to me.

13. **How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.**

    a. ***ABC Pharmaceutical Company*** **develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

    b. ***FinServCo*** **develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?**

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

    d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing**

system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

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

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

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

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

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

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

Response: The Supreme Court has held that 35 U.S.C. § 101, which governs patent eligibility, contains an implicit exception for laws of nature, natural phenomena, and abstract ideas. *Alice Corp. v. CLS Bank International*, 573 U.S. 208, 216 (2014). Under Supreme Court precedent applying that exception, claims to the "building blocks" of human ingenuity are ineligible for patent protection, but claims integrating those building blocks into something more can "transform the nature of the claim" into one that is eligible for protection. *Id.* at 217. Specifically, the Court considers whether the elements of the claim individually, and as an ordered combination, disclose an "inventive concept" that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept alone. *Id.* at 217-18; *see also Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66 (2012). As a sitting judge and a judicial nominee, it would be inappropriate for me to comment on issues that might come before me, and the fact patterns described in these hypotheticals could bear relation to cases that could come before me if confirmed. If I am confirmed and confronted with an issue of patent eligibility, I will apply Section 101, and any applicable Supreme Court and Federal Circuit precedents, to the case or controversy presented to me.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding the public policy effects of a particular case or line of cases, or regarding issues that could come before me. If confirmed, I would follow the precedent established by the Supreme Court and the Federal Circuit concerning the issues of patent eligibility.

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

a. What experience do you have with copyright law?

Response: I worked on two matters concerning software copyrights while in private practice at Morrison & Foerster. In 2008, I represented Autodesk in its suit against Assimilate, Inc., for copyright infringement. *Autodesk Canada Co. v. Assimilate, Inc.*, 08-587-SLR-LPS (D. Del.). I managed the case on a day-to-day basis, including fact development, witness interviews, working with experts, drafting the initial complaint, and motions practice. Also in 2008, I worked on *SCO Group v. Novell Inc.*, No. 2:04-cv-00139 (D. Utah), a high-profile copyright litigation in which SCO and Novell asserted competing claims of copyright ownership over the source code to the Unix operating system. I drafted a series of

briefs on behalf of Novell in connection with cross-motions for summary judgment. It is possible that I also worked on a few other software copyright matters at Morrison & Foerster, but I no longer recall any specific matters beyond the two listed.

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

Response: In 2002, while in law school, I wrote a case summary regarding a suit by motion picture studios to take down source code and object code enabling decryption of encoded DVDs under the Digital Millennium Copyright Act. *Recent Case: Second Circuit Classifies the Posting and Linking of Computer Code as Expressive Conduct Rather than Pure Speech*, 115 Harv. L. Rev. 2042 (2002). A copy was attached to my questionnaire.

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

Response: In my eighteen years as a civil litigator, federal prosecutor, and state court judge, I do not recall having handled a matter concerning the issue of intermediary liability for online service providers.

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: While in private practice, in 2007, I worked as part of a team of attorneys on a *pro bono* matter involving a defamation suit in state court against the creator of a parody blog, which raised First Amendment issues. I also wrote the case summary mentioned in Question 15(b) above. Other than that, in my eighteen years as a civil litigator, federal prosecutor, and state court judge, I do not recall having addressed the issues mentioned in the question.

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

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

Response: My interpretation of any statutory text begins with the text itself and any binding precedents interpreting that text. If the meaning of the text is clear and unambiguous, my analysis stops there. If the text is ambiguous, and there is no binding precedent concerning the correct interpretation, I would employ canons of statutory construction and dictionary definitions. I would also consult binding precedents interpreting analogous statutory texts. If that did not resolve the issue, I would consult persuasive authority from other jurisdictions. Finally, if none of those sources resolved the issue, I would follow the interpretive methods that the Supreme Court and Ninth Circuit have used to interpret the statute at issue, which could include consulting the 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, I would apply the precedents of the Supreme Court and the Ninth Circuit regarding the level of deference afforded to an agency interpretation of its authorizing statute. If the statutory language is clear and unambiguous, the analysis would stop there. If the statutory language is ambiguous, I would generally defer to the agency interpretation if it is reasonable and was adopted through formal rulemaking procedures, unless an exception to *Chevron* deference applied (*e.g.*, the non-delegation doctrine). *See Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 468 U.S. 837 (1984). Informal agency advice and analysis would generally be subject to deference only to the extent that they are persuasive. *See Inhale, Inc. v. Starbuzz Tobacco Inc.*, 755 F.3d 1038, 1041-42 (9th Cir. 2014) ("When interpreting the Copyright Act, we defer to the Copyright Office's interpretations in the appropriate circumstances. Because *Chevron* deference does not apply to internal agency manuals or opinion letters, we defer to the Copyright Office's views expressed in such materials only to the extent that those interpretations have the power to persuade.") (internal citations and quotations omitted).

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: As a sitting judge and judicial nominee, it would be inappropriate for me to comment on an issue that could come before me. If confirmed and faced with a scenario like the one described, I will apply Supreme Court and Ninth Circuit precedents to the factual record and evidence before me.

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

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

Response: If confirmed, and faced with a question about the interpretation of the DMCA, I would begin by evaluating any Supreme Court or Ninth Circuit authority interpreting the provision at issue. If there were no such authority, I would examine the text itself. If the text is clear and unambiguous, my analysis would stop there. If the text is ambiguous, and there is no binding precedent concerning the correct interpretation, I would examine Supreme Court and Ninth Circuit precedent interpreting the DMCA and follow whatever interpretive methods those precedents employed. I would also look to persuasive authority from other circuits, as well as canons of interpretation and dictionary definitions.

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 response to Question 17(a).

18. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: In the district to which I am nominated, the Clerk of the Court randomly and blindly assigns cases to particular divisions and judges pursuant to the Assignment Plan of the Court, set forth in General Order No. 44. If confirmed, I will fully comply with the Assignment Plan of the Court, venue rules, and any other applicable precedents.

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

Response: Please see my response to Question 18(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: I am unfamiliar with the term "forum selling." However, I do not think it is appropriate for judges to take proactive steps for the purpose of attracting a

particular type of case or litigant. A judge should decide cases fairly and impartially based on the factual record and applicable law.

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

Response: I commit that, as a judge, I will not take proactive steps for the purpose of attracting any particular type of case or litigant.

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on an issue that is currently before another court or could come before another court. If confirmed, I will fully and faithfully apply all venue rules and applicable precedents to any venue issues that come before me.

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

Response: Please see my response to Question 19(a).

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on an issue that could come before me or another court. If confirmed, I will fully and faithfully apply all venue rules and applicable precedents to any venue issues that come before me.

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

Response: Please see my response to Question 20.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a

local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to Question 20.

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on an issue that is currently before another court or could come before another court. If confirmed, I will fully and faithfully apply all applicable precedents in the cases that come before me.

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

Response: Please see my answer to Question 21(a).