Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Andrew George Schopler
Judicial Nominee to the U.S. District Court for the Southern District of California

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

   Response: I disagree with it. We are a "government of laws and not of men." *See Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (Frankfurter, J., concurring). That is, we are ruled by the fixed text of our Constitution and statutes, not the personal and political views of individual judges. American constitutional democracy demands that courts reach the answer the law requires, regardless of personal preferences.

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

   Response: A living constitution is a "constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." *Living Constitution*, Black's Law Dictionary (11th ed. 2019).

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

   Response: I agree that we do not have a "living constitution." The Supreme Court has held that the Constitution's "meaning is fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022). Although the Constitution's meaning does not change or evolve, its enduring principles "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*.

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

   Response: Yes, parents have a constitutional right "to direct the education and upbringing of [their] children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

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

   Response: The national debate over police funding regularly spills into the courtroom. *See, e.g.*, *Cameron v. El Segundo*, No. 20-cv-04689-JFW-JC, 2021 WL 3466322, at *2 (C.D. Cal. May 31, 2021) (discussing retaliation claims for publicly "opposing budget cuts" to "the City's police department"). As a sitting judge and a judicial nominee, it

would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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

   Response: The importance of the COVID-19 pandemic to sentencing and release decisions is defined by caselaw. For instance, courts "have no authority to vacate a sentence that is procedurally sound and substantively reasonable" for "resentencing in light of COVID-19." *United States v. Cruz-Gamez*, 821 F. App'x 870, 870 (9th Cir. 2020). And for purposes of pretrial detention, judges have "no authority as a matter of law to permit pretrial release under the Bail Reform Act just because of the current [COVID-19] pandemic's generic risks." *United States v. Jensen*, No. 20CR3354-WQH, 2020 WL 6712198, at *1 (S.D. Cal. Nov. 16, 2020). In certain "extraordinary" or "compelling" cases, defendants with severe health conditions may qualify for compassionate release from prison or temporary release from pretrial detention. *See* 18 U.S.C. § 3582(c)(1)(A) (compassionate release); 18 U.S.C. § 3142(i) (temporary release).

7. **What role should empathy play in sentencing defendants?**

   Response: None.

8. **Do you agree with the following statement: "Not everyone deserves a lawyer, there is no civil requirement for legal defense"?**

   Response: I agree that generally "a person has no right to counsel in civil actions." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). To determine if someone deserved a lawyer, I would faithfully apply binding precedent. Indigent civil litigants have "a right to appointed counsel only when" they "may be deprived of [their] physical liberty" if they lose the case, as with civil juvenile delinquency proceedings. *See Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 26-27 (1981). Federal courts "may under 'exceptional circumstances' appoint counsel for indigent civil litigants pursuant to 28 U.S.C. § 1915(e)(1)." *Palmer*, 560 F.3d at 970. But that statute does not authorize "coercive appointments." *Mallard v. United States Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 310 (1989).

9. **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, *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided. As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. Like many judicial nominees, however, I make an exception for *Brown* because it is foundational to

our justice system and the issue of *de jure* segregation in public education is unlikely to be relitigated.

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

Response: Yes, *Loving v. Virginia*, 388 U.S. 1 (1967), was correctly decided. As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. Like many judicial nominees, however, I make an exception for *Loving*, because it is *Brown*'s direct descendant and the constitutionality of interracial marriage is unlikely to be relitigated.

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

Response: *Roe v. Wade*, 410 U.S. 113 (1973), was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Dobbs* and all other binding precedents.

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

Response: *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Dobbs* and all other binding precedents.

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

Response: As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Griswold* and all other binding precedents.

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

Response: As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Gonzales* and all other binding precedents.

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

Response: As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *McDonald* and all other binding precedents.

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

Response: As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Hosanna-Tabor* and all other binding precedents.

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

Response: As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Bruen* and all other binding precedents.

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

Response: As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Dobbs* and all other binding precedents.

10. Is threatening Supreme Court justices right or wrong?

Response: It is wrong. *See, e.g.*, 18 U.S.C. § 115(a)(1)(B) (outlawing "threat[s] to assault . . . a United States judge"); 18 U.S.C. § 875(c) (outlawing interstate "threat[s] to injure the person of another"); 18 U.S.C. § 1503(a) (outlawing threats "to influence, obstruct, or impede[] the due administration of justice").

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

Response: That statute outlaws certain picketing or parading relating to the administration of justice. Specifically, it prohibits the following categories of conduct when committed with a criminal mental state: (1) picketing or parading "in or near a building housing a court of the United States"; or (2) picketing or parading "in or near a building or residence occupied or used by such judge, juror, witness, or court officer"; or (3) using "any sound-truck or similar device" or resorting to "any other demonstration in or near any such building or residence." 18 U.S.C. § 1507. The prosecution must prove the conduct was committed "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty." *Id*.

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

Response: In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court held that a Louisiana statute "modeled after" 18 U.S.C. § 1507 was constitutional "on its face." *Id*. at 561, 564. To my knowledge, the Supreme Court has not ruled on the facial constitutionality of § 1507 itself.

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

    Response: Constitutionally unprotected "fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

    Response: Constitutionally unprotected "true threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

    Response: When I was commissioned as a U.S. Army officer, I swore to "support and defend the Constitution of the United States." *See* 5 U.S.C. § 3331. Later, when I took my oath as a federal magistrate judge, I made the same promise, as well as swearing to "administer justice without respect to persons," "do equal right to the poor and to the rich," and "faithfully and impartially discharge" all my duties. *See id.*; 28 U.S.C. § 453; *see also* U.S. Const., art. VI. Those oaths define my judicial philosophy. Among other things, they mean that I must respect the Constitution and binding precedent, respect the rule of law, and respect each litigant before me.

    As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply all binding precedents. My judicial philosophy is best exemplified by the hundreds of written court opinions I have authored, one of which is described in my response to Question 16.

16. **Please identify a Ninth Circuit or Southern District of California judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

    Response: My judicial philosophy is best exemplified by the hundreds of written court opinions I have authored. A typical example is *Persian Gulf, Inc. v. BP West Coast Prods., Inc.*, No. 15-cv-1749-TWR-AGS, 2020 WL 7427057 (S.D. Cal. Dec. 17, 2020). In that case, I carefully and thoroughly reviewed the parties' arguments and the voluminous record, and then I applied the relevant precedents to the facts. I believe that the resulting written opinion demonstrates that I respect the Constitution, binding precedent, the rule of law, and each litigant before me. For further discussion of my judicial philosophy, please see my response to Question 15.

17. Under Supreme Court and Ninth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?

Response: A question of fact refers to "a simple historical fact." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). For habeas corpus petitions under 28 U.S.C. § 2254(d), for instance, the Supreme Court defines "issues of fact" as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995); *see also United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998) (same definition for questions of fact). By contrast, a question of law concerns a "pristine legal standard," *Miller*, 474 U.S. at 114, meaning a "rule of law" or a "statutory or constitutional standard," *Lang*, 149 F.3d at 1046-47 (brackets omitted).

"Generally, questions of law are reviewed *de novo*, and questions of fact, for clear error." *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020). The standard of review for a "mixed question" of law and fact depends "on whether answering it entails primarily legal or factual work." *Id*. The Supreme Court has not yet arrived at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion," *Miller*, 474 U.S. at 114, and it has cautioned that "the proper characterization of a question as one of fact or law is sometimes slippery," *Thompson*, 516 U.S. at 110-11. When in doubt, courts look to the "long history of appellate practice" to ascertain the proper standard of review. *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.3 (2018).

18. 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 ensure that Article III standing exists and that I otherwise have jurisdiction to hear the case. *See, e.g.*, U.S. Const., art. III, § 2, cl. 1; 18 U.S.C. § 3231 (criminal jurisdiction); 28 U.S.C. §§ 1330-1369 (civil jurisdiction). If so, I carefully and thoroughly review the parties' arguments as well as the factual record. In each case, I review all the relevant statutory or constitutional provisions, binding Supreme Court and Ninth Circuit precedent, and, if necessary, any nonbinding but persuasive precedent. During my deliberative process, I often discuss the various legal arguments with chambers and court staff, and I may call for oral argument (or re-argument) if any legal ambiguities remain. Throughout the case, I keep an open mind and remind myself of my limited role in the legal system: to faithfully and impartially apply the law to the facts of the case.

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

Response: No.

20. **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.

21. **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: No.

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

    Response: No.

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

    Response: No.

24. **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.

25. **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.

26. **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: I have not had any contact with anyone associated with Arabella Advisors or its known subsidiaries.

    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.

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

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

Response: No.

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

Response: No.

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

Response: No.

28. **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.

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

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

Response: No.

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

Response: No.

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

Response: No.

30. **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: My district has two local selection committees for federal district judges, one each for Senator Dianne Feinstein and Senator Alex Padilla. I applied to Senator Feinstein's local committee on January 25, 2021, and to Senator Padilla's local committee on March 18, 2021. I was interviewed by Senator Feinstein's local committee on March 10, 2021, and by Senator Padilla's local committee on April 13, 2021. On November 8, 2021, I interviewed with the statewide chair of Senator Feinstein's selection committee. Thereafter, I had a series of four interviews: first with the statewide chair of Senator Padilla's selection committee on January 21, 2022; next with Senator Padilla's

statewide co-chair on January 27, 2022; then with counsel to Senator Padilla on February 18, 2022; and lastly with Senator Padilla himself on March 3, 2022.

On March 11, 2022, an attorney from the White House Counsel's Office contacted me, and I interviewed with that Office later in the day. Since March 12, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 14, 2022, my nomination was submitted to the Senate. After my nomination expired on January 3, 2023, my renomination was submitted to the Senate on January 23, 2023.

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

Response: I researched and drafted answers to each question by myself, with former chambers staff sometimes helping with legal research or proofreading. I provided my draft to attorneys at the Office of Legal Policy, who provided feedback. After considering that feedback, I finalized my responses. All answers are my own.

Senator Mike Lee
Questions for the Record
Andrew G. Schopler, Nominee to the United States District Court for the Southern District of California

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

   Response: When I was commissioned as a U.S. Army officer, I swore to "support and defend the Constitution of the United States." *See* 5 U.S.C. § 3331. Later, when I took my oath as a federal magistrate judge, I made the same promise, as well as swearing to "administer justice without respect to persons," "do equal right to the poor and to the rich," and "faithfully and impartially discharge" all my duties. *See id.*; 28 U.S.C. § 453; *see also* U.S. Const., art. VI. Those oaths define my judicial philosophy. Among other things, they mean that I must respect the Constitution and binding precedent, respect the rule of law, and respect each litigant before me.

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

   Response: For statutory interpretation, I always start with the statute's text, including the words and structure of the statute. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009). I also consult any binding Supreme Court and Ninth Circuit precedent. If these methods do not resolve the issue, I consider: the interpretive tools prescribed by the Supreme Court and Ninth Circuit, such as canons of statutory construction; analogous precedents; and persuasive authority from other courts. Finally, if necessary, I consult "[e]xtrinsic materials" like legislative history, as authorized by the Supreme Court, but "only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

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

   Response: For constitutional interpretation, I consult the text of the constitutional provision as well as the sources prescribed by the Supreme Court and Ninth Circuit. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), all nine Justices—the majority and the dissenters—analyzed the Second Amendment's original public meaning and its history. If there was no binding precedent to guide my interpretative analysis, I would consider analogous precedents as well as persuasive authority from other courts.

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

Response: In constitutional interpretation, the text and original meaning play central roles, absent contrary Supreme Court guidance. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment according to the text's original public meaning. If confirmed, I would continue to faithfully apply all Supreme Court and Ninth Circuit precedent on constitutional interpretation.

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

Response: I give great weight to the plain meaning of a statute's text. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009). Please see my response to Question 2 for my overall approach to reading statutes.

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

Response: The plain meaning of a statutory or constitutional provision generally means the original public understanding. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (interpreting the Second Amendment by its original public meaning). On certain constitutional issues, however, the Supreme Court has consulted contemporary understandings. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560-61, 578 (2005) (considering "evolving standards of decency" in holding that the Eighth and Fourteenth Amendments prohibit executing juvenile offenders).

6. What are the constitutional requirements for standing?

Response: For Article III standing, plaintiffs must establish that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

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

Response: Yes. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the Necessary and Proper Clause gives Congress implied powers to implement its enumerated powers. Describing the broad nature of those implied powers, the Court explained, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to

that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id*. at 421.

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

Response: I would evaluate the constitutionality of any law by faithfully and impartially applying Supreme Court and Ninth Circuit precedent. My method of evaluation would not change based on any stated justification for the law. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Please also see my responses to Questions 2, 3, 4, and 5.

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

Response: Yes. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court listed various unenumerated substantive-due-process rights, including the rights to "marry a person of a different race," "marry while in prison," "obtain contraceptives," "reside with relatives," "make decisions about the education of one's children," "engage in private, consensual sexual acts," and "marry a person of the same sex," as well as the right against being "sterilized without consent" and the right "in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures." *Id*. at 2257-58 (citations omitted); *see also Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (listing substantive-due-process rights and assuming that "the traditional right to refuse unwanted lifesaving medical treatment" should be on that list). The Court has also held that there is a substantive-due-process right against "grossly excessive awards" of "punitive damages." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562-63, 585-86 (1996).

In addition, the Court has recognized the right to "expressive conduct," *Texas v. Johnson*, 491 U.S. 397, 403 (1989), the "freedom to associate and privacy in one's associations," *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), as well as several aspects of the "right to [interstate] travel," *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999). Finally, the Court has identified many unenumerated procedural rights. *See, e.g.*, *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("presumption of innocence" in criminal cases); *In re Winship*, 397 U.S. 358, 364 (1970) ("proof beyond a reasonable doubt" standard for criminal trials).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v.*

***New York*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: Under the "established method of substantive-due-process analysis," the Supreme Court will only recognize an unenumerated right—whether personal or economic—if it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Substantive due process protects neither a right to abortion nor *Lochner*-era economic rights. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242, 2262 (2022).

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

Response: Congress may regulate three aspects of interstate commerce: (1) its "channels," (2) its "instrumentalities," as well as "persons or things in interstate commerce," and (3) "activities that substantially affect" it. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). The Commerce Clause power does not extend to regulating purely noneconomic activity without "any connection to" or "predictable impact on" interstate commerce. *Id.* at 23.

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

Response: Race, religion, alienage, and national origin are all suspect classifications. *See Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986); *Friedman v. Rogers*, 440 U.S. 1, 17 (1979). The factors the Court has considered in evaluating "suspect class" status include whether the group (1) is a "discrete and insular minorit[y]," (2) has an "immutable characteristic," (3) suffers "a history of purposeful unequal treatment," and (4) is in "a position of political powerlessness," *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974), as well as (5) the relevance of the group's trait to the "ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

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

Response: The separation of powers between the federal government's three coequal branches is "a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965). The Founders feared the potential corrupting "accumulation of all powers, legislative, executive, and judiciary, in the same hands." *See id*. (quoting The Federalist No. 47 (J. Madison)). So, the Constitution "vests each branch with a different type of power" that restrains and counteracts the other branches. *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018). This system of checks and balances is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

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

Response: In various contexts, the Supreme Court has addressed claims that one branch of government lacked constitutional authority to act. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 226, 229 (1993) (holding that the Judiciary cannot review impeachment trials because the Senate has "sole Power to try all Impeachments"); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an [Executive Branch] officer . . . except by impeachment."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 589 (1952) (reversing Presidential order seizing "most of the Nation's steel mills" for usurping Congress's exclusive "law making power"). If this issue came before me, I would faithfully apply Supreme Court and Ninth Circuit precedent to determine if the branch of government exceeded its constitutional powers.

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

Response: None.

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

Response: Judges violate their solemn constitutional duty "to say what the law is" when they either improperly nullify or improperly approve a law. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). I am not aware of any Supreme Court decision that specifies which error is worse. Judges should "faithfully and impartially discharge" their duties to avoid either outcome. *See* 28 U.S.C. § 453.

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

Response: The major downside of both aggressiveness and passivity is the same: Judges violate their solemn constitutional duty "to say what the law is" when they improperly nullify or improperly approve federal statutes. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). While I am generally aware that more federal statutes have been invalidated since 1857 than before then, I have not researched this issue thoroughly enough to reach an informed conclusion about causes. Among other things, I have not compared comprehensive data for the relevant eras on the number of statutes enacted or on the Supreme Court's numbers of cases heard, statutes approved, or statutes invalidated.

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

Response: Judicial review is the court's "power to review the actions of other branches or levels of government," particularly its "power to invalidate legislative and executive actions as being unconstitutional." *Judicial Review*, Black's Law Dictionary (11th ed. 2019). By contrast, judicial supremacy is the doctrine that the Judiciary's constitutional pronouncements in its exercise of judicial review "are binding on the coordinate branches of the federal government and the states." *Judicial Supremacy*, Black's Law Dictionary (11th ed. 2019).

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court clarified that elected officials' Article VI duty "to support this Constitution" compels them to respect and follow Supreme Court decisions—even when they disagree with those decisions—because "the federal judiciary is supreme in the exposition of the law of the Constitution." *Id*. at 18. Elected officials nonetheless have constitutional means to dissent. They may ask the court to overrule or "reconsider its decisions," or they may change the court opinion "by legislation" or "constitutional amendment." *Id*. at 23 (Frankfurter, J., concurring). For example, when the Supreme Court "shocked the Nation" with its decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), Congress and the states swiftly overrode the *Chisholm* ruling with the Eleventh Amendment. *See Edelman v. Jordan*, 415 U.S. 651, 662 (1974).

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

Response: Hamilton wrote that the Judiciary was the "least dangerous" branch because it "has no influence over either the sword or the purse" and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The Federalist No. 78 (A. Hamilton). The Judiciary's respect and power derives primarily from the wisdom and integrity of its judgments. For this reason, it is vital for judges to make their reasoning as clear as possible; faithfully and impartially apply the law to the facts; and rule without passion, prejudice, fear, or favor.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be

rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Lower-court judges have a duty to "apply binding precedent even when it is clearly wrong." *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021). But *stare decisis* "does not demand that such a [dubious] precedent be expanded to its outer limits." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 539 (1994) (Thomas, J., concurring in the judgment); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring in part) (noting that judges "must apply the Court's precedents—limits and all—wherever they can, rather than widen them unnecessarily at the first opportunity."). If confirmed, I would continue to faithfully apply Supreme Court and Ninth Circuit precedent, consistent with the Constitution.

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

Response: None. A sentencing judge may only consider the factors set forth in 18 U.S.C. § 3553(a), including pertinent Sentencing Commission policy statements. One such policy statement is that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10.

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

Response: I am not familiar with this specific definition of equity or the context in which it was made. Black's Law Dictionary lists nine definitions of equity, including "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019).

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

Response: Yes. Question 24 posits one definition for equity; Black's Law Dictionary lists nine others, including "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). None of these various definitions are the

same as equality, which is the "quality, state, or condition of being equal," especially "likeness in power or political status." *Equality*, Black's Law Dictionary (11th ed. 2019).

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

Response: The Fourteenth Amendment's Equal Protection Clause prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." I am not aware of any binding decision that has considered or adopted the definition in Question 24 for equal-protection purposes. If this issue came before me, I would faithfully apply Supreme Court and Ninth Circuit precedent to determine the Equal Protection Clause's proper scope.

27. How do you define "systemic racism?"

Response: I am not aware of a consensus definition of systemic racism. The term is not defined in Black's Law Dictionary, the Merriam-Webster Dictionary, or the American Heritage Dictionary. The Oxford English Dictionary defines it as "discrimination or unequal treatment on the basis of membership of a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." *Systemic Racism*, Oxford English Dictionary (2022).

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

Response: Critical race theory is a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Critical Race Theory*, Black's Law Dictionary (11th ed. 2019).

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

Response: According to the definitions in my responses to Questions 27 and 28, the difference between these terms is that systemic racism is a form of unequal treatment while critical race theory refers to a reform movement.

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

Questions for the Record for Andrew G. Schopler nominated to be United States District Judge for the Southern 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. A host of laws ban racial discrimination, including the Civil Rights Act of 1964 and the Fair Housing Act of 1968. Also, courts apply strict scrutiny to "all" governmental actions or laws that impose "racial classifications." *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 the Due Process Clause only guarantees an unenumerated substantive right when it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If a litigant sought to recognize a new constitutional right in a case before me, I would follow all Supreme Court and Ninth Circuit precedent regarding unenumerated rights. As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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: When I was commissioned as a U.S. Army officer, I swore to "support and defend the Constitution of the United States." *See* 5 U.S.C. § 3331. Later, when I took my oath as a federal magistrate judge, I made the same promise, as well as swearing to "administer justice without respect to persons," "do equal right to the poor and to the rich," and "faithfully and impartially discharge" all my duties. *See id.*; 28 U.S.C. § 453; *see also* U.S. Const., art. VI. Those oaths define my judicial philosophy. Among other things, they mean that I must respect the Constitution and binding precedent, respect the rule of law, and respect each litigant before me.

I have not found a U.S. Supreme Court Justice in any era who has articulated a judicial philosophy like my personal judicial philosophy.

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

Response: Originalism is variously described as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted" or the "doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." *Originalism*, Black's Law Dictionary (11th ed. 2019). In applying originalism, the Supreme Court has sometimes focused on the original intent of the Framers. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 59 (2004)

(focusing, in a Sixth Amendment confrontation case, on "the Framers' understanding"). Other times, the Court has emphasized the text's original public meaning. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (looking, in a Second Amendment case, to the normal meaning "known to ordinary citizens in the founding generation").

I have never characterized myself as an adherent of any interpretative philosophy, but I have always—and will always—faithfully apply the interpretative philosophy prescribed by the Supreme Court and Ninth Circuit to the cases before me.

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

Response: Living constitutionalism is the "doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019).

I have never characterized myself as an adherent of any interpretative philosophy, but I have always—and will always—faithfully apply the interpretative philosophy prescribed by the Supreme Court and Ninth Circuit to the cases before me.

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: Yes, unless the Supreme Court directed otherwise, I would be bound by the Constitution's original public meaning on a constitutional issue of first impression if that meaning were clear and resolved the issue. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment's words according to their "[n]ormal meaning" as "known to ordinary citizens in the founding generation." *Id*. at 576-77. If confirmed, I would continue to faithfully apply all Supreme Court and Ninth Circuit precedent on constitutional interpretation.

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: The Supreme Court has addressed the public's current understanding differently depending on the context. The Court generally looks to the text's original public meaning. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (interpreting the Second Amendment by its original public meaning). On certain constitutional issues, however, the Supreme Court has consulted contemporary

understandings. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560-61, 578 (2005) (considering "evolving standards of decency" in holding that the Eighth and Fourteenth Amendments prohibit executing juvenile offenders). If confirmed, I would continue to faithfully apply all binding Supreme Court and Ninth Circuit precedent on constitutional and statutory interpretation.

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

Response: No. The Constitution's "meaning is fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022). Although the Constitution's meaning does not change or evolve, its enduring principles "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*.

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, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Dobbs* and all other binding precedents.

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, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *Bruen* and all other binding precedents.

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

Response: Yes.

a. Was it correctly decided?

Response: Yes, *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided. As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. Like many judicial

nominees, however, I make an exception for *Brown* because it is foundational to our justice system and the issue of *de jure* segregation in public education is unlikely to be relitigated.

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

Response: Under 18 U.S.C. § 3142(e)(3), a presumption of pretrial detention arises for various enumerated offenses, including certain: (1) drug-trafficking crimes; (2) terrorism-related offenses; (3) slavery- and human trafficking-related offenses; (4) crimes against minors; and (5) firearms offenses relating to crimes of violence or drug-trafficking. In addition, under a different subsection—18 U.S.C. § 3142(e)(2)—a broader category of crimes may trigger a pretrial-detention presumption if several other requirements are met, including the recent commission of a crime on pretrial release.

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

Response: The policy rationales for the two presumptions are slightly different. The 18 U.S.C. § 3142(e)(3) presumption—which arises more often—reflects Congress's determination that defendants accused of the enumerated crimes generally present a greater flight risk or danger to the community. The rarer § 3142(e)(2) presumption expresses Congress's conclusion that defendants generally present a greater danger to the community when they: (1) are accused of specific enumerated offenses and (2) also have a prior recent history of committing certain crimes on pretrial release.

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. The First Amendment and certain statutes limit the government's ability to burden private institutions' religious exercise. Courts "apply strict scrutiny to [state] regulations that burden religious exercise unless those laws are neutral and generally applicable." *Fellowship of Christian Athletes v. San Jose Unified School Dist. Bd. of Ed.*, 46 F.4th 1075, 1093 (9th Cir. 2022) (citing *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1876 (2021)). Also, the Supreme Court carves out a "ministerial exception" that exempts certain church-employment decisions from antidiscrimination laws—even neutral and generally applicable ones. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Otherwise, courts "apply rational basis review." *See Tingley v. Ferguson*, 47 F.4th 1055, 1084 (9th Cir. 2022).

A state law or action will not be deemed neutral and generally applicable if: it "'discriminate[s] on its face,' or if a religious exercise is otherwise its 'object,'" *see Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2422 (2022); it is applied with "hostility to religion" or a lack of "religious neutrality," *see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1724-25, 1732 (2018); it is subject to "entirely discretionary exceptions," *see Fulton*, 141 S. Ct. at 1878; or it treats "*any*

comparable secular activity more favorably than religious exercise," *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

Also, Congress may provide further statutory safeguards for religious liberty. For instance, the Religious Freedom Restoration Act (which applies against the federal government) and the Religious Land Use and Institutionalized Persons Act provide "greater protection for religious exercise than is available under the First Amendment." *See Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). The Supreme Court has specifically held that RFRA protects both "religious entities," *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020), and observant owners of closely held, for-profit corporations, *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 691, 736 (2014). Please also see my response to Question 14.

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

Response: No, the First Amendment imposes a duty on government "not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). In addition, the Free Exercise Clause establishes an "absolute prohibition against government regulation of religious beliefs." *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983); *see also Bowen v. Roy*, 476 U.S. 693, 699 (1986) (distinguishing between "freedom of individual [religious] belief, which is absolute," and "freedom of individual [religious] conduct," which is subject to some restrictions). So, a state "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1233 (9th Cir. 2020).

Otherwise, courts "apply strict scrutiny" to any state law or action involving "express religious discrimination." *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2260 (2020). Please also see my response to Question 13.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court preliminarily enjoined a Covid-19 executive order that the applicants maintained treated "houses of worship much more harshly than comparable secular facilities." *Id*. at 66. First, the Court ruled that the applicants' "First Amendment [free-

exercise] claims are likely to prevail." *Id*. That is, the applicants made a "strong showing" that the executive order violated religious neutrality and that the challenged rules failed strict scrutiny because there were "less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Id*. at 66-67. Second, the Court concluded that denying relief would cause irreparable harm, as the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. at 67. Finally, the State failed to show that granting relief would harm the public interest. *Id*. at 68.

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 blocking Covid-19 restrictions on at-home religious gatherings. The Court held that 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. Comparability "must be judged against the asserted government interest that justifies the regulation at issue." *Id*. Applying these principles, the Court concluded that the challenged rule treated "some comparable secular activities more favorably than at-home religious exercise," that the government had not carried its burden of establishing that the law passed strict scrutiny, and that the other preliminary-injunction requirements were met. *Id*. at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court invalidated a state commission's order because the commissioners violated their "obligation of religious neutrality" under the Free Exercise Clause by exhibiting hostility to "sincere religious beliefs" during the proceedings before them. *Id*. at 1723, 1729, 1732.

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, they may be. "Heresy trials are foreign to our Constitution." *United States v. Ballard*, 322 U.S. 78, 86 (1944). The Free Exercise Clause embraces "the widest possible toleration of conflicting [religious] views," *id*. at 86, and "sincerely held religious beliefs" need not be based on "the commands of a particular religious organization," *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834

(1989). "Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Employment Security Div*., 450 U.S. 707, 716 (1981).

Instead, for free-exercise purposes, a court's "narrow function" is to assess whether the litigant has "an honest [religious] conviction." *Thomas*, 450 U.S. at 716. In evaluating religious sincerity, courts cannot consider whether a belief is "acceptable, logical, consistent, or comprehensible." *Id*. at 714. "Courts typically give credence to assertions of sincerely held religious beliefs in absence of any challenge to their sincerity or religious motives, and so long as they are not 'so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.'" *Ohno v. Yasuma*, 723 F.3d 984, 1011 (9th Cir. 2013).

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 regarding the scope of religious beliefs that the Free Exercise Clause protects. In addition, the ecclesiastical abstention doctrine precludes civil courts from deciding legal claims that require "resolving underlying controversies over religious doctrine." *Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1233 (9th Cir. 2020) (holding that the First Amendment prohibits government from lending "its power to one or the other side in controversies over religious authority or dogma").

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

Response: In evaluating religious sincerity, courts cannot consider whether a religious belief is an "acceptable" view or interpretation. *Thomas v. Review Bd. of Ind. Employment Security Div*., 450 U.S. 707, 714 (1981). Please also see my responses to Questions 19 and 19a.

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

Response: No, I am not aware of the Catholic Church taking such a position.

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: Both *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), involve the "ministerial exception" to employment-discrimination lawsuits.

In *Hosanna-Tabor*, the Supreme Court refused to entertain a minister's employment-discrimination claim against the religious school where she taught, reasoning that the First Amendment protects religious entities' "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 565 U.S. at 186. In *Morrissey-Berru*, the Court held that similar claims by two Catholic school teachers also fell within the "ministerial exception" as the teachers' responsibilities "lie at the very core of the mission of a private religious school." 140 S. Ct. at 2064. The *Morrissey-Berru* Court eschewed any "rigid formula" for the "ministerial exception," instead instructing courts to consider "all relevant circumstances" to determine whether a position implicates "the fundamental purpose of the exception." *Id*. at 2067.

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

Response: In *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City's same-sex antidiscrimination requirement violated Catholic Social Services' religious free-exercise rights, due to the "inclusion of a formal system of entirely discretionary exceptions." *Id*. at 1878. These exceptions rendered the policy "not generally applicable," triggering strict scrutiny. *Id*. at 1878-79. Because the City offered "no compelling reason" for "denying an exception to [Catholic Social Services] while making them available to others," the Court ruled that the City's actions failed strict scrutiny and violated the Free Exercise Clause. *Id*. at 1882.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court reiterated that strict scrutiny applies when some private schools are disqualified from a generally available public benefit "solely because they are religious." *Id*. at 1997. The Court held that Maine had no "compelling" interest in promoting "stricter separation of church and state than the Federal Constitution requires," and thus struck down the program for violating the Free Exercise Clause. *Id*. at 1997-98, 2002.

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

Response: In *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022), a high-school coach regularly prayed at midfield after games. *Id*. at 2422. His school district disciplined him for this practice "to avoid a violation of the Establishment Clause." *Id*. at 2426. The Supreme Court held that the coach's "private, personal prayer" was protected

from government reprisal by the Free Exercise and Free Speech Clauses. *Id*. at 2422, 2433. It also rejected the school district's "mistaken view" that the Establishment Clause required it "to ferret out and suppress religious observances," concluding that the "Constitution neither mandates nor tolerates that kind of discrimination" against religious expression. *Id*. at 2433.

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), an Amish community was denied a religious exemption from an ordinance requiring them to install "modern septic systems," despite "their religion forbid[ding] the use of such technology." *Id*. at 2431 (Gorsuch, J., concurring). The Supreme Court remanded the case to the lower courts for further consideration of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), which applied strict scrutiny to the denial of religious exemptions. *See id*. at 2430. Justice Gorsuch wrote separately to emphasize that, for strict-scrutiny purposes, the question is not whether the government "has a compelling interest in enforcing its [septic-system requirement] *generally*, but whether it has such an interest in denying an exception from that requirement to the [plaintiffs] *specifically*." *Id*. at 2432 (quotation marks omitted). He also highlighted some facts and rationales that "the lower courts and administrative authorities may wish to consider on remand." *See id*. at 2430, 2432-33.

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: In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court held that a Louisiana statute "modeled after" 18 U.S.C. § 1507 was constitutional "on its face." *Id*. at 561, 564. To my knowledge, the Supreme Court has not ruled on the facial constitutionality of § 1507 itself. If a case involving that statute comes before me, I would interpret it by looking to its text—including the words and structure of the statute—and applying the relevant Supreme Court and Ninth Circuit precedents on statutory interpretation and constitutionality. As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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: Federal actions—including actions by the federal courts—that rely on racial or sexual classifications are constitutionally suspect and subject to heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (requiring an "exceedingly persuasive justification" for any "gender-based government action"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying "strict scrutiny" to "all racial classifications" by government actors). If the issue of employee trainings with these or similar statements came before me, I would faithfully apply Supreme Court and Ninth Circuit precedent to the facts of the case.

As a sitting judge and a judicial nominee, it would be improper to comment on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6). Within the bounds of judicial ethics, however, I can affirm that I have never participated in nor endorsed trainings that included any statements in the above subparts (a) to (d).

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: Yes. So far as I have a say, I will ensure that court trainings comply with the Constitution, federal law, and judicial ethics.

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. Judges must "exercise the power of appointment fairly and only on the basis of merit." Code of Conduct for U.S. Judges, Canon 3B(3).

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

Response: Political appointments are committed to the Executive Branch, typically with the "advice and consent of the Senate." U.S. Const., art. II, § 2. If this issue came before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case. As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

30. Is the criminal justice system systemically racist?

Response: Claims of systemic racism are regularly heard in courts. *See, e.g.*, *Brown v. County of San Bernardino*, 840 F. App'x 297, 298 (9th Cir. 2021) (discussing appellant's "generalized assertions of systemic racism in America"). As a sitting judge and a judicial nominee, it would be improper to comment on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

Within the bounds of judicial ethics, however, I can affirm that: I will "impartially discharge" my duties and "administer justice without respect to persons," *see* 28 U.S.C. § 453; I will never "engage in behavior" that is "prejudiced" or "biased," *see* Code of Conduct for U.S. Judges, Canon 3; and I will never "hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin," *see id*., Canon 2C.

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 number of Supreme Court justices is set at nine by statute. Judiciary Act of 1869, ch. 22, 16 Stat. 44 (1869). As a sitting judge and a judicial nominee, it would be improper for me to praise or disparage any current or contemplated legislation. This principle applies with special force here, as a judge's public comments on the Court's proper dimensions might give some litigants the misimpression that the judge's respect for the Court depends on its size. Whatever Congress decides on this issue, I will faithfully follow all Supreme Court precedents.

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 Supreme Court has held that, based on its original public meaning, the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

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: In general, a firearm restriction is prohibited unless the government demonstrates "that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022). The specific gun restrictions that the Supreme Court invalidated in those three decisions were: (1) a "ban on handgun possession in the home" and a "prohibition

against rendering any lawful firearm in the home operable for the purpose of immediate self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); (2) registration schemes that "effectively bann[ed] handgun possession by almost all private citizens" in the jurisdiction, *McDonald v. Chicago*, 561 U.S. 742, 750, 791 (2010); and (3) a discretionary firearm-licensing regime, in which "public-carry licenses" were issued "only when an applicant demonstrate[d] a special need for self-defense," *Bruen*, 142 S. Ct. at 2122, 2156.

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

Response: Yes. The Second Amendment confers "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). This right is "fundamental" and "applies equally to the Federal Government and the States." *McDonald v. Chicago*, 561 U.S. 742, 791 (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 right to keep and bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: No. Please see my response to Question 36.

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

Response: Under the Constitution, the President must "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. The Executive Branch retains broad discretion to decide "not to prosecute or enforce, whether through civil or criminal process," *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), but that discretion is "subject to constitutional constraints," *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). For example, prosecutorial decisions cannot be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id*. at 608.

If this issue came before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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

Response: Prosecutorial discretion is 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." *Prosecutorial Discretion*, Black's Law Dictionary (11th ed. 2019). I presume a "substantive administrative rule change" refers to a "legislative rule" issued through the Administrative Procedure Act's three-step "notice-and-comment rulemaking" process. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015); *see also* 5 U.S.C. § 553.

Notice-and-comment rulemaking is a public process that invites public input, producing rules with the "force and effect of law." *See Perez*, 575 U.S. at 96. By contrast, prosecutors typically exercise their discretion without public input and cannot make judicially enforceable changes to laws.

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

Response: No. The death penalty is established by federal and state statutes. *See, e.g.*, 18 U.S.C. § 3591. "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

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

Response: In *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam), plaintiffs obtained a judgment from a federal district court vacating the Centers for Disease Control and Prevention's "nationwide moratorium on evictions" for counties with high Covid-19 rates. *Id*. at 2486. Although the district judge ruled that "the statute on which the CDC relies does not grant it the authority it claims," the court nonetheless stayed its judgment while the government appealed. *Id*. Plaintiffs eventually asked the Supreme Court to lift that stay. *Id*. at 2488.

In analyzing the statute that the CDC relied on, the Supreme Court noted, "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors*, 141 S. Ct. at 2489 (quotation marks omitted). Because the statute lacked any clear authority for a nationwide eviction moratorium, the Court concluded that plaintiffs were "virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority." *Id*. at 2486, 2488-89. As the equities also favored the plaintiffs, the Court vacated the stay. *Id*. at 2489-90.

Senator Ben Sasse
Questions for the Record for Andrew G. Schopler
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
December 13, 2022

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

   Response: No.

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

   Response: When I was commissioned as a U.S. Army officer, I swore to "support and defend the Constitution of the United States." *See* 5 U.S.C. § 3331. Later, when I took my oath as a federal magistrate judge, I made the same promise, as well as swearing to "administer justice without respect to persons," "do equal right to the poor and to the rich," and "faithfully and impartially discharge" all my duties. *See id.*; 28 U.S.C. § 453; *see also* U.S. Const., art. VI. Those oaths define my judicial philosophy. Among other things, they mean that I must respect the Constitution and binding precedent, respect the rule of law, and respect each litigant before me.

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

   Response: Originalism is variously described as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted" or the "doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." *Originalism*, Black's Law Dictionary (11th ed. 2019). In applying originalism, the Supreme Court has sometimes focused on the original intent of the Framers. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 59 (2004) (focusing, in a Sixth Amendment confrontation case, on "the Framers' understanding"). Other times, the Court has emphasized the text's original public meaning. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (looking, in a Second Amendment case, to the normal meaning "known to ordinary citizens in the founding generation").

   I have never characterized myself as an adherent of any interpretative philosophy, but I have always faithfully applied—and will always faithfully apply—the interpretative philosophy prescribed by the Supreme Court and Ninth Circuit to the cases before me.

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

Response: Textualism is the "doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." *Textualism*, Black's Law Dictionary (11th ed. 2019).

I have never characterized myself as an adherent of any interpretative philosophy, but I have always faithfully applied—and will always faithfully apply—the interpretative philosophy prescribed by the Supreme Court and Ninth Circuit to the cases before me. For statutory interpretation, for example, I would follow the Supreme Court's guidance that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

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

   Response: No, the Constitution can only be changed through the Article V amendment process. The Supreme Court has held that the Constitution's "meaning is fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022). Although the Constitution's meaning does not change or evolve, its enduring principles "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*.

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

   Response: I have not found a U.S. Supreme Court Justice in any era who has articulated a judicial philosophy like the personal judicial philosophy in my response to Question 2. In teaching legal writing to my law clerks, I most frequently use examples from Chief Justice Roberts and Justices Kagan and Scalia, whose writing styles I admire. Although he passed away before 1953, I also admire the public service of Justice Murphy who was an active U.S. Army reservist in World War II while also serving on the Supreme Court.

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: I am not aware of any formal judicial methodology for reaffirming precedents. "Binding authority must be followed unless and until overruled by a body competent to do so." *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1211 (9th Cir. 2016).

   In deciding whether to overrule precedent, the Supreme Court considers several factors about the challenged decision: "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision," *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448, 2478–79 (2018), as well as "the nature of [the case's] error" and its "disruptive effect on other areas of the law," *Dobbs v. Jackson Women's Health*

Organization, 142 S. Ct. 2228, 2265 (2022). By contrast, the Ninth Circuit will only overrule its precedent when sitting en banc or when that precedent is "clearly irreconcilable" with "intervening higher authority." *See Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). The Ninth Circuit has not established a comprehensive list of factors for overruling precedent. *Cf. United States v. Aguon*, 851 F.2d 1158, 1175–76 (9th Cir. 1988) (Reinhardt, J., concurring) (listing 11 factors to consider when "deciding whether to overrule precedent"), *overruled on other grounds*, *Evans v. United States*, 504 U.S. 255 (1992).

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. Also, the Supreme Court has explained that it is more likely to overrule precedents involving constitutional interpretation than statutory interpretation. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2262 (2022) (holding that *stare decisis* "is at its weakest" when courts "interpret the Constitution").

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

   Response: The Supreme Court has held that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). A court may "resort to legislative history" and extrinsic materials "only when necessary to interpret ambiguous text." *See BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004). General principles of justice may be considered only to the extent they are embodied in binding precedent and canons of statutory construction.

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 sentencing judge may only consider the factors set forth in 18 U.S.C. § 3553(a). In that analysis, the judge may need to consider other defendants' sentences in general "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Race, national origin, creed, and religion "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10; *see also* 18 U.S.C. § 3553(a)(5) (requiring sentencing court to consider "any pertinent [Sentencing Commission] policy statement").

Senator Josh Hawley
Questions for the Record

Andrew Schopler
Nominee, Southern 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: If confirmed, I would use any factually supported Sentencing Guidelines enhancement to "correctly calculat[e] the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). Then I would "consider all of the [18 U.S.C.] § 3553(a) factors," including the Guidelines range, in arriving at an "individualized" sentence "based on the facts presented." *Id*. at 49-50.

    If the facts supported a USSG § 2G2.2(b)(2) enhancement for material that involves "a prepubescent minor or a minor who had not attained the age of 12 years," I would increase the offense level "by **2** levels." *Id*. (boldface in original); *cf.* USSG §§ 2G1.3(b)(5), 2G2.1(b)(1)(A), 2G2.6(b)(1)(A).

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

    Response: If the facts supported a USSG § 2G2.2(b)(4)(A) enhancement for material that portrays "sadistic or masochistic conduct or other depictions of violence," I would increase the offense level "by **4** levels." *Id*. (boldface in original); *see also* USSG §§ 2G2.1(b)(4)(A), 2G3.1(b)(4). When the offense involves such material, this enhancement applies "regardless of whether the defendant specifically intended" to possess or distribute the materials. USSG § 2G2.2 cmt. n.3; *see also* USSG § 2G3.1 cmt. n.4. Please also see my response to Question 1a.

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

    Response: If the facts supported a USSG § 2G2.2(b)(6) enhancement for an offense involving "the use of a computer," I would increase the offense level "by

2 levels." *Id*. (boldface in original); *cf*. USSG §§ 2G1.3(b)(3), 2G2.1(b)(6)(B), 2G2.6(b)(4). Please also see my response to Question 1a.

d. The enhancements for the number of images involved

If the facts supported a USSG § 2G2.2(b)(7) enhancement for the number of images involved, I would increase the offense level accordingly. For example, for an offense involving "600 or more images," I would increase the offense level "by **5** levels." *Id*. at § 2G2.2(b)(7)(D) (boldface in original). In determining the number of images, each "photograph, picture, . . . or computer-generated image" presumptively counts as "one image," but each "video, video-clip, [or] movie" presumptively counts as "75 images." USSG § 2G2.2 cmt. n.6(B). Please also see my response to Question 1a.

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: As a sitting judge and a judicial nominee, it would be improper for me to comment on this policy issue. It is generally improper for me to praise or disparage any sentencing provisions that I would be duty-bound to apply.

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 2a.

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: My sentence would depend entirely on the case-specific facts. For example, a sentencing judge must use the more serious (but uncharged) offense's guideline section "in the case of a plea agreement . . . containing a stipulation that specifically establishes a more serious offense than the offense of conviction." USSG § 1B1.2(a). On the other hand, "in determining the applicable guideline range," a judge cannot use any uncharged-offense information disclosed by the defendant as part of a "cooperation agreement" guaranteeing "that self-incriminating information provided pursuant to the agreement will not be used against the defendant," unless a relevant exception applies. USSG § 1B1.8(a)-(b).

In general, a sentencing judge may consider, without limitation, any "information concerning the background, character and conduct of the defendant." 18 U.S.C. § 3661; USSG § 1B1.4. And judges must consider all relevant conduct, which may include "[c]onduct that is not formally charged or is not an element of the offense of conviction." USSG § 1B1.3 cmt. bkg'd. Please also see my response to Question 1a.

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: I disagree with that philosophy. We are a "government of laws and not of men." *See Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (Frankfurter, J., concurring). That is, we are ruled by the fixed text of our Constitution and statutes, not the personal and political views of individual judges. American constitutional democracy demands that courts reach the answer the law requires, regardless of personal preferences.

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

      Response: Judges swear an oath to "faithfully and impartially discharge" all their duties, *see* 28 U.S.C. § 453, and to "support and defend the Constitution of the United States," *see* 5 U.S.C. § 3331; *see also* U.S. Const., art. VI. Among other things, that oath requires judges to set aside their personal views and policy preferences to reach the results the law demands. It is a violation of the judicial oath to do otherwise.

      I cannot comment further on the quoted philosophy as I do not know the full context of the quote and because it would be improper for me to praise or disparage the views of any Supreme Court Justice.

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: Under the *Pullman* abstention doctrine, federal courts may refrain from hearing cases involving "sensitive federal constitutional questions" if the resolution of unsettled "state law issues may moot or narrow [those] constitutional questions." *Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1147 (9th Cir. 2022); *see Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). *Pullman* abstention is proper when "(1)

the federal constitutional claim touches a sensitive area of social policy, (2) constitutional adjudication plainly can be avoided or narrowed by a definitive ruling by a state court, and (3) a possibly determinative issue of state law is doubtful." *Gearing*, 54 F.4th at 1147 (cleaned up).

The *Younger* abstention doctrine "instructs federal courts to decline to hear" certain federal cases "when a parallel state proceeding is ongoing." *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 587-88 (9th Cir. 2022); *see Younger v. Harris*, 401 U.S. 37, 41 (1971). *Younger* abstention only applies when certain categories of state cases are implicated: (1) "ongoing state criminal prosecutions"; (2) "certain civil enforcement proceedings"; and (3) "civil proceedings involving certain [unique] orders." *Applied Underwriters*, 37 F.4th at 588. To abstain from a federal case implicating these categories, the court must find that the state proceeding: (1) is "ongoing"; (2) "implicates important state interests"; and (3) "provides adequate opportunity to raise constitutional challenges." *Id*. (cleaned up).

The *Burford* and *Thibodaux* abstention doctrines both concern complex or difficult issues involving state sovereignty. *Burford* abstention "protects complex state administrative processes from undue federal interference." *Gilbertson v. Albright*, 381 F.3d 965, 974 n.9 (9th Cir. 2004); *see Burford v. Sun Oil Co*., 319 U.S. 315, 318-19, 333-34 (1943). It only applies when: (1) "the state has concentrated suits involving the local issue in a particular court"; (2) "the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence"; and (3) "federal review might disrupt state efforts to establish a coherent policy." *Poulos v. Caesars World, Inc*., 379 F.3d 654, 671 (9th Cir. 2004). For similar reasons, *Thibodaux* abstention applies to "eminent domain" cases when "state law" is "uncertain" and "any decision by the federal district court would affect state sovereignty." *Tucson v. U.S. West Commc'ns, Inc*., 284 F.3d 1128, 1134 (9th Cir. 2002); *see also Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29 (1959).

The ecclesiastical abstention doctrine is a "qualified limitation" that precludes civil courts from deciding legal claims that require "resolving underlying controversies over religious doctrine." *Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017). If the court can adjudicate the case using "purely secular legal rules" and "neutral principles of law," ecclesiastical abstention does not apply. *Id*. at 1165.

Finally, the Ninth Circuit recognizes two doctrines—*Colorado River* and *Rooker-Feldman*—that function much like abstention doctrines, even if they are not always so classified. *See United States v. State Water Res. Control Bd.*, 988 F.3d 1194, 1202 (9th Cir. 2021) ("*Colorado River* is not an abstention doctrine."); *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 402 n.2 (6th Cir. 2020) ("*Rooker-Feldman* is not an abstention doctrine.").

Under the *Colorado River* doctrine, a federal court may stay or dismiss a federal case if a parallel state proceeding can completely resolve all claims between the parties and if certain "exceptional" circumstances apply. *See State Water*, 988 F.3d at 1202-03 (listing

eight factors to consider); *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-19 (1976).

The *Rooker-Feldman* doctrine recognizes that the Supreme Court is typically the only federal court that may conduct appellate review of final state-court judgments. *See Gouveia v. Espinda*, 926 F.3d 1102, 1107-08 (9th Cir. 2019); *see generally Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Put another way, lower federal courts cannot "review state court decisions," unless Congress says otherwise. *Gouveia*, 926 F.3d at 1108. Notably, Congress has granted federal district courts such authority for "federal habeas review of state prisoners' petitions." *Id*.

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: None.

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

   Response: In constitutional interpretation, the text and original meaning play central roles, absent contrary Supreme Court guidance. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment according to the text's original public meaning. If confirmed, I would continue to faithfully apply all Supreme Court and Ninth Circuit precedent on constitutional interpretation.

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

   Response: I only consider legislative history if required to do so by binding Supreme Court or Ninth Circuit precedent. The Supreme Court has held that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). If textual analysis and binding precedent do not resolve the meaning of a statute, I then consider: the interpretive tools prescribed by the Supreme Court and Ninth Circuit, such as canons of statutory construction; analogous precedents; and persuasive authority from other courts. A court may "resort to legislative history only when necessary to interpret ambiguous text," *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004), and "only to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms," *Exxon Mobil*, 545 U.S. at 568.

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: Some legislative history is more probative than others. For legislative-history inquiries, the "authoritative source" is "Committee Reports on the bill." *Garcia v. United States*, 469 U.S. 70, 76 (1984). In contrast, the Supreme Court disfavors relying on "floor statements by individual legislators," *NLRB v. SW General, Inc*., 580 U.S. 288, 307 (2017), or "failed legislative proposals," *United States v. Craft*, 535 U.S. 274, 287 (2002).

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

   Response: It is not appropriate to consult foreign laws for constitutional interpretation, unless binding precedent specifically prescribes otherwise. The Supreme Court has only looked to international law in narrow circumstances. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court analyzed, among other legal sources, the arms provision in England's "Declaration of Rights," which "has long been understood to be the predecessor to our Second Amendment." *Id*. at 593. And in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that "international authorities" were "instructive," but not "controlling," for interpreting "the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Id*. at 575.

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: To prevail on such an Eighth Amendment claim, a "death row inmate" must: (1) "establish that the State's method of execution presents a substantial risk of serious harm," meaning "severe pain over and above death itself," and (2) "identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2219-20 (2022) (cleaned up); *see also Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (defining a "substantial risk of serious harm" as "an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment" (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

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, that is the holding in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). But the referenced citation is for *Warner v. Gross*, 135 S. Ct. 824 (2015), in which the Supreme Court summarily denied the same inmate's earlier application for a stay of execution.

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: No. *See Jones v. Ryan*, 733 F.3d 825, 837 (9th Cir. 2013) ("The State had no duty to disclose evidence, exculpatory or otherwise, in [petitioner's] initial federal habeas corpus proceeding."); *cf. District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55-56 (2009) (refusing to recognize "a freestanding and far-reaching constitutional right of access" to "DNA testing" in a 42 U.S.C. § 1983 civil-rights lawsuit).

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: Courts "apply strict scrutiny to [state] regulations that burden religious exercise unless those laws are neutral and generally applicable." *Fellowship of Christian Athletes v. San Jose Unified School Dist. Bd. of Ed.*, 46 F.4th 1075, 1093 (9th Cir. 2022) (citing *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1876 (2021)). Also, the Supreme Court carves out a "ministerial exception" that exempts certain church-employment decisions from antidiscrimination laws—even neutral and generally applicable ones. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Otherwise, courts "apply rational basis review." *See Tingley v. Ferguson*, 47 F.4th 1055, 1084 (9th Cir. 2022).

    A state law or action will not be deemed neutral and generally applicable if: it "'discriminate[s] on its face,' or if a religious exercise is otherwise its 'object,'" *see Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2422 (2022); it is applied with "hostility to religion" or a lack of "religious neutrality," *see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1724-25, 1732 (2018); it is subject to "entirely discretionary exceptions," *see Fulton*, 141 S. Ct. at 1878; or it treats "*any* comparable secular activity more favorably than religious exercise," *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

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: The Free Exercise Clause imposes an "absolute prohibition against government regulation of religious beliefs." *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983); *see also Bowen v. Roy*, 476 U.S. 693, 699 (1986) (distinguishing between "freedom of individual [religious] belief, which is absolute," and "freedom of individual [religious] conduct," which is subject to some restrictions). So, a state "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1233 (9th Cir. 2020). Similarly, under the First Amendment, government has a duty "not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Otherwise, courts "apply strict scrutiny" to any state law or action involving "express religious discrimination." *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2260 (2020). Please also see my responses to Questions 13 and 29c.

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 Constitution embraces "the widest possible toleration of conflicting [religious] views," *United States v. Ballard*, 322 U.S. 78, 87 (1944), and "sincerely held religious beliefs" need not be based on "the commands of a particular religious organization," *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834 (1989). "Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Employment Security Div*., 450 U.S. 707, 716 (1981).

Instead, a court's "narrow function" is to assess whether the litigant has "an honest [religious] conviction." *Thomas*, 450 U.S. at 716. In evaluating religious sincerity, courts cannot consider whether a belief is "acceptable, logical, consistent, or comprehensible." *Id*. at 714. "Courts typically give credence to assertions of sincerely held religious beliefs in absence of any challenge to their sincerity or religious motives, and so long as they are not 'so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.'" *Ohno v. Yasuma*, 723 F.3d 984, 1011 (9th Cir. 2013).

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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." *Id*. at 595. In the specific context of that case, the Amendment protected the "right of law-abiding, responsible citizens to [keep and] use arms in defense of hearth and home." *Id*. at 635.

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: *Lochner v. New York*, 198 U.S. 45 (1905), announced a newfound constitutional "right to make a contract" that invalidated a labor law designed to protect workers. *Id*. at 53, 64. In his dissent, Justice Holmes famously protested: "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," a mid-19th century book advocating *laissez-faire* economics. *See id*. at 75 (Holmes, J., dissenting). What Justice Holmes meant is that the "Constitution is not intended to embody a particular economic theory," and thus the Supreme Court should not constitutionalize a policy "of *laissez faire*." *See id*.

I agree that the Fourteenth Amendment did not enact *Social Statics* or any economic theory, as the Court itself later recognized. After overruling *Lochner*, the Court repeatedly cited this Justice Holmes quote with approval. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966).

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

Response: *Lochner v. New York*, 198 U.S. 45 (1905), was largely abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937) (holding that the "Constitution does not speak of freedom of contract," so the government has power to restrict it), and explicitly overruled by *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (ruling that *Lochner* "has long since been discarded").

As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. I will faithfully apply *West Coast Hotel*, *Ferguson*, and all other binding precedents.

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

Response: No.

a. If so, what are they?

Response: None.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: The Ninth Circuit has quoted from this specific case in the past. *See, e.g.*, *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945)). As a sitting judge, it is generally improper for me to praise or disparage the decisions of higher courts. I will faithfully apply all binding precedents.

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

Response: Please see my response to Question 19a.

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

Response: For purposes of an actual monopolization claim under section 2 of the Sherman Antitrust Act, the Ninth Circuit has held that a "market share of sixty-five percent or more usually establishes a prima facie case of monopoly power." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir. 2021). The Supreme Court has not addressed this issue for actual monopolies. But in the context of an attempted monopolization claim, the Court has held that there is no "magic" market-share number: the "relative effect of percentage command of a market varies with the setting in which that factor is placed." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 (1953).

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

Response: "Federal common law" is the caselaw—or judge-made law—of federal courts on matters of federal concern. Before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), such judicial lawmaking embraced both federal and state substantive-law issues. But *Erie* proclaimed that a state's substantive law "is not a matter of federal concern," and, thus, "[t]here is no federal *general* common law." *Id*. at 78 (emphasis added). Under the *Erie* doctrine, federal courts sitting in diversity must now "apply state substantive law and federal procedural law," *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 416 (1996), and "cannot fashion new claims in the way that they could before 1938," *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). Post-*Erie*, federal common law is narrowly confined to matters involving "uniquely federal interests," such as cases about "interstate and international disputes," "admiralty," and certain aspects of antitrust law. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-43 (1981).

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: I would look to that state's judicial decisions to determine the scope of a state constitutional right. Federal courts "are bound by the decision of the State's highest court relating to the state constitution and state statutes." *Memphis & Charleston Ry. Co. v. Pace*, 282 U.S. 241, 244 (1931); *see also Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1210 (9th Cir. 1990) (same); *Skaug v. Sheehy*, 157 F.2d 714, 715 (9th Cir. 1946) (same).

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

Response: Yes, generally. In this context, however, "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: Yes, the national Constitution sets a floor for civil rights, not a ceiling. A state Constitution may—but is not required to—"recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982) (holding that "the Federal Constitution define[s] only a minimum" of "substantive rights").

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

Response: Yes, *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided. As a sitting judge, it is generally improper for me to praise or disparage the Supreme Court precedents that I am duty-bound to apply. Like many judicial nominees, however, I make an exception for *Brown* because it is foundational to our justice system and the issue of *de jure* segregation in public education is unlikely to be relitigated.

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

Response: Yes, the Ninth Circuit has held that there is no bar against "nationwide [injunctive] relief in federal district court or circuit court," but "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). The Supreme Court has upheld nationwide injunctions. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2084, 2089 (2017) (per curiam) (allowing "nationwide preliminary injunction" of executive order to take effect in some respects, but not others).

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

Response: The Supreme Court has not thoroughly analyzed the source of legal authority for nationwide injunctive relief. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (noting that the Court has not yet addressed the "legality" of "universal injunctions"). Lower courts issuing such injunctions have variously relied on their inherent equitable powers or, in some cases, specific constitutional or statutory authority. *See, e.g.*, *Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020) (holding in a nationwide class-action lawsuit that "a nationwide injunction is necessary to provide the [nationwide] class members with complete [equitable] relief"); *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (upholding nationwide scope of injunction on an Executive Branch immigration policy because "partial implementation" of the policy "would undermine the constitutional imperative of 'a *uniform* Rule of Naturalization' and Congress's instruction that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'" (citing U.S. Const., art. I, § 8; Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 115(1), 100 Stat. 3359, 3384) (emphasis added in opinion)).

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

Response: According to the Ninth Circuit, a nationwide scope is appropriate for an otherwise justified injunction only if it is "*necessary* to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). "This rule applies with special force where there is no class certification." *Id*. In addition, all injunctions must meet the threshold requirements for the use of such equitable discretion. *See, e.g.*, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (setting out four-factor test for permanent injunctions); *Azar*, 911 F.3d at 575 (four-factor test for preliminary injunctions);

East Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 762 (9th Cir. 2018) (four-factor test for temporary restraining orders).

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 23b.

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

Response: Federalism—the division of power between national and state governments—is a structural guarantee of freedom and a "bulwark against tyranny." *See United States v. Brown*, 381 U.S. 437, 443 (1965). By balancing authority between joint sovereigns, the Framers hoped that the "different governments will control each other" and avoid the corrupting influences of concentrated power. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991). "In the tension between federal and state power lies the promise of liberty." *Id*. at 459.

In addition to inhibiting "abuses of government power," federalism offers other important advantages: "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*, 501 U.S. at 458.

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 response to Question 5.

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

Response: The Supreme Court has cautioned that an "injunction is a drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and that it should be granted only when it is "essential" to protect "rights against injuries otherwise irremediable," *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The relative advantages and disadvantages of a damages award or injunction would depend on the facts of the case. If such an issue came before me, I would faithfully apply binding precedent to determine whether either remedy was appropriate.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that the Due Process Clause only guarantees an unenumerated substantive right when it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id*. at 720-21. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court listed various unenumerated substantive-due-process rights, including the rights to "marry a person of a different race," "marry while in prison," "obtain contraceptives," "reside with relatives," "make decisions about the education of one's children," "engage in private, consensual sexual acts," and "marry a person of the same sex," as well as the right against being "sterilized without consent" and the right "in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures." *Id*. at 2257-58 (citations omitted); *see also Glucksberg*, 521 U.S. at 719-20 (listing substantive-due-process rights and assuming that "the traditional right to refuse unwanted lifesaving medical treatment" should be on that list). The Court has also held that there is a substantive-due-process right against "grossly excessive awards" of "punitive damages." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562-63, 585-86 (1996).

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

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

       Response: The First Amendment's Free Exercise Clause protects two aspects of religious liberty: "beliefs" and "practices." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). In other words, the Clause safeguards both the right "to harbor religious beliefs inwardly and secretly" and the right "to live out [one's] faith in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2421 (2022); *see also Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (distinguishing between "freedom to hold religious beliefs" and "freedom to act" on them).

    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, these terms are not synonymous. The right to "Free Exercise" of religion is generally considered a broader concept, embracing "freedom of conscience" and "freedom of worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). Please also see my response to Question 29a.

    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: The standard depends on the type of religious exercise. The "freedom to hold religious beliefs and opinions" is "absolute" and cannot be "restricted or burdened." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). On the other hand, the "freedom to act" on "one's religious convictions" is "not totally free from legislative restrictions." *Id*. Such restrictions are typically subject to strict scrutiny unless they are "neutral and generally applicable." *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1876 (2021). Please also see my responses to Questions 13 and 14.

In addition, Congress has provided further statutory safeguards for religious liberty. For instance, the Religious Freedom Restoration Act (which applies against the federal government) and the Religious Land Use and Institutionalized Persons Act provide "greater protection for religious exercise than is available under the First Amendment." *See Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). If RFRA or RLUIPA apply, a court must determine whether the government action substantially burdens "a person's exercise of religion even if the burden results from a rule of general applicability." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 694-95 (2014). If so, strict scrutiny applies. *See id*.

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 "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). Please also see my response to Question 29c.

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: A judge's duty is to reach the results the law demands, regardless of any personal views. I understand this statement to mean that judges who never reach a result that conflicts with their personal views must not be setting those views aside, violating their judicial duty.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: *State v. Steen*, Motion for Appropriate Relief, No. 96 CRS 19104 (N.C. Super. Ct. Dec. 3, 2001) (Mecklenburg County) (arguing that: (1) N.C. Gen. Stat. § 15-144, authorizing short-form first-degree murder indictments, was unconstitutional and should be struck down; and (2) raising an as-applied constitutional challenge to the requirement in N.C. Gen. Stat. § 15A-2005 that any claimed intellectual disability manifest before age 18).

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: Claims of systemic racism are regularly heard in courts. *See, e.g.*, *Brown v. County of San Bernardino*, 840 F. App'x 297, 298 (9th Cir. 2021) (discussing appellant's "generalized assertions of systemic racism in America"). As a sitting judge and a judicial nominee, it would be improper to comment on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

Within the bounds of judicial ethics, however, I can affirm that: I will "impartially discharge" my duties and "administer justice without respect to persons," *see* 28 U.S.C. § 453; I will never "engage in behavior" that is "prejudiced" or "biased," *see* Code of Conduct for U.S. Judges, Canon 3; and I will never "hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin," *see id.*, Canon 2C.

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 fulfilled my duty to represent my client zealously and ethically, without regard to my own personal views or preferences.

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: I cannot say that any of them shaped my view of the law. But for years I have kept a copy of The Federalist Papers by my bed. The papers I revisit most often are Hamilton's essays on the judiciary and judicial review in Federalist Nos. 78 and 81 and Madison's discussions of Congressional power, interstate commerce, and "checks and balances" in Federalist Nos. 42 and 51.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court considered a Mississippi law that defined an unborn child as an "unborn human being." *Id.* at 2243 (citing Miss. Code Ann. § 41-41-191(4)(b) (2018)). By contrast, the Ninth Circuit recently dealt with a California law that distinguishes between a "human being" and a "fetus." *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1088 (9th Cir. 2020) (citing Cal. Penal Code § 187(a)).

As a sitting judge and a judicial nominee, it would be improper to comment on live legal issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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)?

Response: No.

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

Response: No.

c. **Systemic racism?**

Response: No.

d. **Critical race theory?**

Response: No.

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

a. **Apple?**

Response: Yes.

b. **Amazon?**

Response: Yes.

c. **Google?**

Response: Yes, I own shares of Google's parent company Alphabet, Inc.

d. **Facebook?**

Response: Yes.

e. **Twitter?**

Response: No.

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

Response: Yes, I reviewed and suggested factual edits for the United States' brief in opposition to the petition for a writ of certiorari in *Reyes-Bosque v. United States*, 562 U.S. 1141 (2011) (cert. denied), but my name was not listed on the brief.

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

Response: *Reyes-Bosque v. United States*, 562 U.S. 1141 (2011) (cert. denied).

43. Have you ever confessed error to a court?

Response: No.

a. **If so, please describe the circumstances.**

Response: None.

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: Judicial nominees have a moral, ethical, and legal duty of candor when testifying before the Senate Judiciary Committee. *See, e.g.*, Code of Conduct for U.S. Judges, Canon 1 (concerning "high standards of conduct" and "integrity"), Canon 2A (concerning "respect for the law" and "integrity and impartiality of the judiciary"); 18 U.S.C. § 1001 (outlawing false statements to legislative branch); 18 U.S.C. § 1621 (outlawing perjury). Thus, nominees must be candid and forthcoming in responding to all questions, including questions about their judicial philosophy.

Questions from Senator Thom Tillis
for Andrew George Schopler
Nominee to be United States District Judge the Southern 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: Judicial activism is a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." *Judicial Activism*, Black's Law Dictionary (11th ed. 2019). The term is usually used to mean "that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Id*. Judicial activism is inappropriate and violates the judicial oath.

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

   Response: Judges are expected and required to be impartial. Federal judges swear an oath to "impartially discharge" their duties. 28 U.S.C. § 453. Judicial ethics likewise demand that federal judges perform their duties impartially and recuse from any case "in which the judge's impartiality might reasonably be questioned." Code of Conduct for U.S. Judges, Canons 3 & 3C(1).

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

   Response: No.

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

   Response: Yes, faithfully interpreting the law may produce outcomes that judges personally find undesirable. But that is the job. Judges must be "faithful to . . . the law" and never swayed by "partisan interests." Code of Conduct for U.S. Judges, Canon 3A(1). This duty is essential for American constitutional democracy. We are a "government of laws and not of men." *See Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (Frankfurter, J., concurring).

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, and as a currently sitting judge, I will faithfully and impartially apply all binding precedent on the Second Amendment. *See, e.g.*, *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: If a lawsuit raising any of these issues came before me, I would evaluate it under the binding precedents relevant to that case. Depending on the specific facts, many precedents might apply. *See, e.g.*, *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2122, 2156 (2022) (invalidating a discretionary firearm-licensing regime, in which "public-carry licenses" were issued "only when an applicant demonstrate[d] a special need for self-defense"); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (enjoining "California's COVID restrictions" for likely violating religious "free exercise" rights); *McDonald v. Chicago*, 561 U.S. 742, 750, 791 (2010) (striking down registration schemes that "effectively bann[ed] handgun possession by almost all private citizens" in the jurisdiction).

   As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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: To overcome law enforcement's qualified immunity, the plaintiff must show that: (1) the facts "make out a violation of a constitutional right" and (2) that right was "'clearly established' at the time of defendant's alleged misconduct." *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *see also Tarabochia v. Adkins*, 766 F.3d 1115, 1121, 1125 (9th Cir. 2014). Courts may decide "which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson*, 555 U.S. at 236. When considering qualified-immunity cases, I determine whether plaintiffs have carried their burden on these two necessary prongs. If either prong is lacking, I grant qualified immunity, precluding the lawsuit.

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: In *Plumhoff v. Rickard*, 572 U.S. 765 (2014), the Supreme Court held that the constitutionality of law-enforcement actions is analyzed from the perspective of "a reasonable officer on the scene," mindful "that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id*. at 775. I will faithfully apply all Supreme Court and Ninth Circuit precedents. Beyond that, as a sitting judge, it would be improper for me to praise or disparage the qualified-immunity jurisprudence that I am duty-bound to apply.

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

    Response: Please see my responses to Questions 9 and 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: I will faithfully and impartially apply all Supreme Court precedents on patent eligibility. *See, e.g.*, *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc*., 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010). Beyond that, as a sitting judge, it would be improper for me to praise or disparage the patent-eligibility jurisprudence that I am duty-bound to apply.

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

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

       Response: Certain general principles apply to all patent-eligibility cases. Under the Patent Act, an inventor may obtain a patent for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101. But the Supreme Court carves out three concepts that are not patentable: "[l]aws of nature, natural phenomena, and abstract ideas." *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014). For these three categories, the Court employs a two-step framework to determine eligibility. *Id*. at 217. First, courts consider "whether the claims at issue are directed to one of those patent-ineligible concepts." *Id*. If so, at "step two," courts search for an "inventive concept" that might save the claim from ineligibility. *Id*. That is, judges ask whether

the claim's "additional elements"—considered "both individually and 'as an ordered combination'"—transform an unpatentable natural law, phenomenon, or abstract idea "into a patent-eligible *application*" of that concept. *Id*. (emphasis added).

If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. One of the many cases I would be bound to consider is *Mayo Collaborative Services v. Prometheus Laboratories, Inc*., 566 U.S. 66 (2012). In *Mayo*, the Supreme Court held that "natural correlations" are "unpatentable" "laws of nature," unless "the patent claims add *enough* to their statements of the correlations to allow the processes they describe to qualify as patent-eligible processes that *apply* natural laws." *Id*. at 77, 79-80.

As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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

Response: If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. *See, e.g.*, *Bilski v. Kappos*, 561 U.S. 593, 598, 609 (2010) (declining to categorically invalidate all "business methods" patents); *Diamond v. Diehr*, 450 U.S. 175, 186, 191 (1981) (reiterating that "an algorithm[] or mathematical formula" cannot be patented (citing *Parker v. Flook*, 437 U.S. 584 (1978), and *Gottschalk v. Benson*, 409 U.S. 63 (1972))); *Diehr*, 450 U.S. at 187 (holding that a process is not unpatentable "simply because it uses a mathematical formula, computer program, or digital computer"). Please also see my response to Question 13a.

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

Response: If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. *See, e.g.*, *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. 576 (2013) (holding that "a naturally occurring DNA segment is a product of nature and

not patent eligible merely because it has been isolated," but that artificially created DNA "is patent eligible because it is not naturally occurring"). Please also see my response to Question 13a.

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

Response: Please see my response to Question 13b (which also incorporates my response to Question 13a).

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

Response: If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. *See, e.g.*, *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. 576, 589-90 (2013) (reiterating that the general "rule against patents on naturally occurring things" has an exception for "nonnaturally occurring manufacture or composition of matter—a product of human ingenuity 'having a distinctive name, character [and] use'"); *Diamond v. Chakrabarty*, 447 U.S. 303, 310 (1980) (holding that a genetically modified bacterium was patentable because it had "markedly different characteristics from any found in nature"); *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130-32 (1948) (holding that an "ingenious" bacteria-mixture inoculant was not patent-eligible, because the patent holder made "no change [to] the six species of bacteria" used in the inoculant). Please also see my response to Question 13a.

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

Response: Please see my response to Question 13b (which also incorporates my response to Question 13a).

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

Response: If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. *See, e.g.*, *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 580 (2013) (holding that "a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated," but that artificially created DNA "is patent eligible because it is not naturally occurring"); *id.* at 582, 595 (noting that a "method patent" may be available for "an innovative method of manipulating genes" to search for previously unidentified gene sequences); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 77, 79-80 (2012) (holding that "natural correlations" are "unpatentable" "laws of nature," unless "the patent claims add *enough* to their statements of the correlations to allow the processes they describe to qualify as patent-eligible processes that *apply* natural laws"). Please also see my response to Question 13a.

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

Response: Congress has created certain exemptions to patent-infringement liability. *See, e.g.*, 35 U.S.C. § 287(c) (exempting a "medical practitioner" or "related health care entity" from patent-infringement liability for performing "a medical or surgical procedure" under certain circumstances). As a sitting judge and a judicial nominee, it would be improper for me to express any personal views about such policy matters.

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

Response: If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. Please see my responses to Questions 13a and 13e. *See also* 35 U.S.C. § 101 (specifying that inventors may obtain patents for "any new and useful . . . composition of matter").

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: If a case came before me like the one described in this hypothetical, I would faithfully apply Supreme Court and other binding precedents to the facts. *See, e.g.*, *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216-17 (2014) (holding that "[l]aws of nature, natural phenomena, and abstract ideas are not patentable," but "applications of those concepts" might be "patent-eligible"). Please also see my response to Question 13a.

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

Response: Please see my response to Question 13a regarding the Supreme Court's patent-eligibility tests for laws of nature, natural phenomena, and abstract ideas. I will faithfully and impartially apply all Supreme Court precedents on patent eligibility. Beyond that, as a sitting judge, it would be improper for me to praise or disparage the patent-eligibility jurisprudence that I am duty-bound to apply.

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: As a magistrate judge, I have presided over at least 50 federal cases involving copyright law. *See, e.g.*, *Talavera v. Global Payments, Inc.*, No. 21-cv-1585 TWR (AGS), 2021 WL 5331000, at *2-3 (S.D. Cal. Nov. 16, 2021).

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

Response: As a magistrate judge, I have presided over at least four federal cases involving the Digital Millennium Copyright Act, 17 U.S.C. § 512. *See, e.g.*, *Talavera v. Global Payments, Inc.*, No. 21-cv-1585 TWR (AGS), 2021 WL 5331000, at *3-4 (S.D. Cal. Nov. 16, 2021).

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

Response: As a magistrate judge, I have presided over many cases involving online-service providers, but I do not believe any of those cases raised issues of intermediary liability for unlawful user-posted content.

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: As a magistrate judge, I have presided over dozens of federal cases involving First Amendment and free-speech issues, including intellectual-property and copyright cases. *See, e.g.*, *Yablonsky v. California Dept. of Corr. & Rehab.*, No. 18-cv-1122-AGS, 2022 WL 4809345 (S.D. Cal. Sept. 30, 2022). In addition, I have spoken and lectured on First Amendment and intellectual-property issues. On March 28, 2018, for example, I guest lectured at Alliant International University on the U.S. Supreme Court's recent First Amendment decisions. Also, on June 8, 2017, I was on a three-judge panel for the San Diego Intellectual Property Law Association, discussing intellectual-property cases in the federal courts.

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: The Supreme Court has held that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). If textual analysis and Supreme Court and Ninth Circuit precedent do not resolve the meaning of a statute, I then consider: the interpretive tools prescribed by the Supreme Court and Ninth Circuit, such as canons of statutory construction; analogous precedents; and persuasive authority from other courts. A court may "resort to legislative history only when necessary to interpret ambiguous text," *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004), and "only to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms," *Exxon Mobil*, 545 U.S. at 568.

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: The role, if any, of an agency's advice or analysis in applying the law depends on several factors. "If the intent of Congress is clear," the agency's opinion has no role, because the court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984). For ambiguous laws, however, the Supreme Court has various standards for considering a federal agency's interpretations.

Under *Chevron*, courts generally defer to "an agency's construction of the statute which it administers" only if two conditions are met: (1) "Congress has not directly addressed the precise question at issue" and (2) the agency's interpretation "is based on a permissible construction of the statute." 467 U.S. at 842-43. But an agency's interpretations set forth in less formal documents—like "opinion letters," "policy statements, agency manuals, and enforcement guidelines"—are only "entitled to respect" "to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing, among others, *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)).

In addition to statutory interpretation, courts defer "to agencies' reasonable readings of genuinely ambiguous regulations" when the requirements of *Auer* (or *Seminole Rock*) deference are satisfied. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (citing *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945)).

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: When certain conditions are met, the Digital Millennium Copyright Act safeguards an online service provider from copyright-infringement liability for money damages regarding user-directed storage on the provider's network. This safe-harbor protection applies if the provider either: (1) lacks "actual knowledge" of the infringing material or activity, and "is not aware of facts or circumstances from which infringing activity is apparent," or (2) "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1015, 1020, 1020 n.11 (9th Cir. 2013) (citing 17 U.S.C. § 512(c)(1)(A)). If this issue came before me, I would faithfully apply Supreme Court and Ninth Circuit precedent to the facts.

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: Some statutes are written in a manner that allows them to apply to new and different technologies. But judges must faithfully and impartially apply statutes as written and consistent with binding precedent, as discussed in my response to Question 16a. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009).

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: Judges must faithfully apply prior judicial opinions regardless of changes in technology, just as they must faithfully apply statutes as written. Our fixed constitutional principles, however, "apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2306 (2022) (Kavanaugh, J., concurring); *see also New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022) (same).

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

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

       Response: The type of forum shopping described above is not a problem in my district, because there is only one division: all district judges sit in San Diego. Also, all cases are randomly assigned to eligible judges, which limits judge shopping.

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

       Response: Judges have a responsibility to "faithfully and impartially" apply the law. *See* 28 U.S.C. § 453. I will faithfully and impartially apply all Supreme Court and

Ninth Circuit precedents regarding forum shopping. *See, e.g.*, *Ferens v. John Deere Co*., 494 U.S. 516, 527 (1990) (discussing the "policy against forum shopping" articulated in *Van Dusen v. Barrack*, 376 U.S. 612 (1964)).

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

Response: No. Judges must perform their duties "faithfully and impartially," without regard to whether their decisions attract or deter cases or litigants. *See* 28 U.S.C. § 453. Any deviation from this duty is improper and forbidden.

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

Response: I have never engaged in "forum selling," and I will never engage in it.

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: Higher courts must use their discretion to determine the appropriate remedy for any violations of their orders. As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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 19a.

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: I will faithfully and impartially apply all Supreme Court and Ninth Circuit precedents regarding forum shopping. *See, e.g.*, *Ferens v. John Deere Co*., 494 U.S. 516, 527 (1990) (discussing the "policy against forum shopping" articulated in *Van Dusen v. Barrack*, 376 U.S. 612 (1964)). As a sitting judge and a judicial nominee, it would be improper to comment further on issues that may come before me or other courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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. District judges are always free to reconsider or revise their district's local rules and general orders, but it would be improper to comment further on issues that may come before any court. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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: If confirmed, I will follow and enforce my district's local rules and general orders mandating random case assignments. There is only one division in my district: all district judges sit in San Diego. Please also see my response to Question 18a.

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: Higher courts must use their discretion to determine the appropriate remedy for any violations of their orders. As a sitting magistrate judge and a judicial nominee, it would be improper to comment further on issues that may come before any court. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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

Response: Please see my response to Question 21a.