Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge James Edward Simmons, Jr.
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 am not familiar with this quote, but I disagree with it. During my five years as a Superior Court Judge, I have never applied my personal values in reaching any decision. If confirmed as a United States District Judge, I would never apply my personal values in reaching any decision and will faithfully and impartially apply the law according to binding Supreme Court and Ninth Circuit precedent.

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

   Response: Black's Law Dictionary defines the term living constitution as "[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 am not familiar with the context of then-Judge Ketanji Brown Jackson's statement on a living constitution. I believe the Constitution has a fixed meaning and does not change over time, unless it is amended by the process set forth in Article V. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional interpretation.

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

   Response: In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court held that parents have the right to direct their children's education.

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

   Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. In general, questions related to law enforcement funding are best left to policymakers.

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: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. During my five years as a Superior Court Judge, I have presided over thousands of detention hearings, and I have followed the law under the Constitution and made decisions based on the facts presented in each individual case, as to whether an individual was a danger to public safety in addressing bond requests. If confirmed, I will apply the Bail Reform Act, 18 U.S.C. § 3142 in detention hearings and in sentencing, consider the factors under 18 U.S.C. § 3553(a).

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

   Response: Empathy should not play a role at all in any phase of a case. Rather, a judge should treat all parties with dignity and respect and apply the law and binding precedent to the facts of the case.

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

      Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. However, because *Brown v. Board of Education* is unlikely to be relitigated, I am comfortable answering that yes, I believe it was correctly decided.

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

      Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. However, because *Loving v. Virginia* is unlikely to be relitigated, I am comfortable answering that yes, I believe it was correctly decided.

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

      Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. Furthermore, *Roe v. Wade* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and is no longer good law.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. Furthermore, *Planned Parenthood v. Casey* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and is no longer good law.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. If confirmed, I will apply the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. If confirmed, I will apply the precedent in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. If confirmed, I will apply the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. If confirmed, I will apply the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. If confirmed, I will apply the precedent established by the Supreme Court and the Ninth Circuit.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. If confirmed, I will apply the precedent established by the Supreme Court and the Ninth Circuit.

9. **Is threatening Supreme Court justices right or wrong?**

   Response: Depending on the specific facts, threatening Supreme Court justices could violate the law.

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

    Response: 18 USC § 1507 prohibits anyone from picketing or parading in or near a building housing a court of the United States, or in or near a building or residence occupied or used by a judge, juror, witness or court officer 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 office in the discharge of his duty.

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

    Response: I am unaware of any Supreme Court precedent that analyzes 18 USC § 1507 or a state analog statute.

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

    Response: In *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court held that "fighting words" are not protected by the First Amendment and encompasses "words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

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

    Response: In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court held that true threats are not protected by the First Amendment and "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359.

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

Response: I have not studied all of the decisions of the Supreme Court or Ninth Circuit from the last 50 years to be able to answer this question. In my five years as a Superior Court Judge, my judicial philosophy has focused on keeping an open mind, being prepared, faithfully following the law, and treating all parties with respect.

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

Response: Please see my response to Question 14.

16. **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: The Supreme Court has described questions of "basic" or "historical fact" as "questions of who did what, when or where, how or why." *U.S. Bank National Ass'n ex rel. v. Village at Lakeridge, LLC* 138 S. Ct. 960, 966 (2018). A district court's findings on such factual matters "are reviewable only for clear error." *Id.* The Court has explained that there is a category of mixed questions of law and fact which asks, "whether the historical facts found satisfy the [relevant] legal test." *Id.* The Court has instructed that the standard of review for such a mixed question depends on whether trial or appellate courts are "better suited to resolve it." *Id.* When a question requires a court to "expound on the law" or "develop auxiliary legal principles of use in other cases" then "appellate courts should typically review a decision *de novo*." *Id.* at 967. But when a mixed question primarily involves "case-specific factual issues … [then] appellate courts should usually review a decision with deference." *Id.*

17. **Please discuss your federal criminal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many jury trials you have participated in as lead/co-counsel?**

Response: During my 12 years as a prosecutor, I worked entirely in state court and did not have handle any federal criminal cases and did not appear in federal court on any criminal matters. However, during that time, I handled hundreds, if not thousands, of felony and misdemeanor cases, including trying over 50 jury trials to verdict, all as lead or co-counsel. Further, I did work in conjunction with the United States Attorney's Office in San Diego on several criminal prosecutions, including cases related to Project Safe Neighborhoods.

18. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**

a. **How often have you cited to either of these tomes during the course of your work?**

Response: During law school, I studied and learned the Federal Rules of Criminal Procedure. However, during my 12 years as a prosecutor and five years as a Superior Court Judge, I practiced solely in state court and did not cite to either. In the course of seeking this nomination, I have been studying the Federal Rules of Criminal Procedure, Federal Rules of Civil Procedure and Federal Rules of Evidence. In addition, I believe that my extensive criminal experience in state court as a prosecutor and a judge will help me transition effectively if confirmed as a Federal District Judge. Further, I have also been studying the 2021 United States Sentencing Commission's Guidelines Manual and learning the applicable guidelines.

b. **How often have you had an opportunity to work within these constructs during the course of your career?**

Response: Please see my response to Question 18(a).

19. **Please discuss your federal civil legal experience, including the number of cases that you have personally handled.**

Response: During law school, I worked as a law clerk for two different law firms and worked on civil cases, though I did not make any court appearances in those cases. During my 12 years as a prosecutor and five years as a Superior Court Judge, I practiced solely in state court and did not have any cases in federal court.

20. **Please discuss your familiarity with the Federal Rules of Civil Procedure. Specifically:**
    a. **How often have you cited to this tome during the course of your work?**

Response: During law school, I studied and learned the Federal Rules of Civil Procedure. However, during my 12 years as a prosecutor and five years as a Superior Court Judge, I practiced solely in state court and did not cite to the Federal Rules of Civil Procedure. In the course of seeking this nomination, I have studied the Federal Rules of Criminal Procedure, Federal Rules of Civil Procedure, and Federal Rules of Evidence.

b. **How often have you had an opportunity to work within this construct during the course of your career?**

Response: During law school, I worked as a law clerk for two different law firms working on civil cases and assisted with the writing of a motion for summary

judgment in federal court, though I did not make any court appearances in those cases. During my 12 years as a prosecutor and five years as a Superior Court Judge, I practiced solely in state court and did not have any cases in federal court.

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

Response: If confirmed as a United States District Judge, my decisions will be based solely on the facts and applicable law, and I will apply binding Supreme Court and Ninth Circuit precedent.

22. **What is implicit bias?**

Response: During my five years as Superior Court Judge, I have not had the opportunity to research this issue and therefore do not feel that I have a sufficient basis to offer a definition.

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

Response: Please see my response to Question 22.

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

Response: Please see my response to Question 22.

25. **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: When considering a case, the first thing I do is read the briefs, determine the issues in dispute and review the applicable law. I then conduct research on any binding precedent. I have faithfully and impartially followed the law while a Superior Court Judge as my personal views are not relevant to my decision making. The parties before me deserve a decision rooted solely in the law based on the facts of their case. If confirmed, I will continue to faithfully and impartially follow the law and apply Supreme Court and Ninth Circuit precedent.

26. **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.

27. **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.

28. **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.

29. **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.

30. **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.

31. **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.

32. **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.

33. **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: Please see my response to Question 33(a).

    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.

34. **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.

35. **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.

36. **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.

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

Response: On January 30, 2021, I submitted my application for the U.S. District Court for the Southern District of California to Senator Feinstein's Judicial Advisory Committee. On February 19, 2021, I applied to the Office of Senator Padilla. On March 15, 2021, I was interviewed by Senator Feinstein's local advisory committee. On May 12, 2021, I met with the chair of Senator Padilla's judicial evaluation commission. On August 24, 2021, I was interviewed by Senator Padilla's local evaluation commission. On November 16, 2021, I was interviewed by the statewide chair of Senator Feinstein's advisory committee. On January 28, 2022, I was interviewed by the statewide chair of

Senator Padilla's commission. On February 18, 2022, I was interviewed by counsel for Senator Padilla. On March 3, 2022, I was interviewed by Senator Padilla. On March 11, 2022, I interviewed with attorneys from the White House Counsel's Office. Since March 13, 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.

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

Response: I received the questions from the Office of Legal Policy (OLP) on December 7, 2022. I reviewed the questions, conducted research when necessary and provided a set of draft answers to OLP. After receiving feedback from OLP, I finalized my responses for submission to the Senate Judiciary Committee.

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

Questions for the Record for James Edward Simmons Jr., nominated to be United States District Judge for 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: Racial discrimination is illegal and any law that discriminates on the basis of race is subject to strict scrutiny.

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

   Response: In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the Supreme Court provided the framework in assessing whether there are unenumerated rights in the Constitution. The Court provided a two-part test: (1) that the right must be deeply rooted in this Nation's history and tradition; and (2) that there must a be careful description of the asserted right. If confirmed and confronted with a claim that an unenumerated right existed in the Constitution that was not yet articulated, I would apply the framework in *Glucksburg* and any other Supreme Court and Ninth Circuit precedent.

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: In the five years that I have been a Superior Court Judge, my judicial philosophy has focused on keeping an open mind, being prepared, faithfully following the law, and treating all parties with respect. I have not studied the philosophies of all the justices of those courts and thus cannot state which justice has a philosophy most similar to mine.

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

   Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). I do not subscribe to any particular method of constitutional interpretation. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I do not subscribe to any particular method of constitutional interpretation. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

6. **If you were to be presented with a constitutional issue of first impression— that is, an**

issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: If presented with a constitutional issue of first impression whose resolution was not controlled by binding precedent, and the original public meaning of the Constitution was clear, I would follow the original public meaning of the Constitution.

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 public's current understanding of the Constitution or of a statute is not relevant when determining the meaning of the Constitution or a statute. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional or statutory interpretation.

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

Response: I believe the Constitution has a fixed meaning and does not change over time, unless it is amended by the process set forth in Article V. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional interpretation.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. However, because *Brown v. Board of Education* is unlikely to be relitigated, I am comfortable answering that yes, I believe it was correctly decided.

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

Response: The Bail Reform Act of 1984, in 18 U.S.C. 3142(e)(3) lists several offenses in which there is a rebuttal presumption that no condition or combination of conditions will reasonably assure the appearance of a defendant as required and the safety of the community. Some offenses listed include sexual assault, sexual abuse, sex trafficking offenses involving a minor victim, failure to register under the Sex Offender Registration and Notification Act, certain violations of the Controlled Substances Act in which the maximum sentence is 10 years or more.

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

Response: The presumption reflects Congress' determination that defendants accused of certain crimes present a flight risk or danger to the community and that no conditions of pretrial release can reasonably assure that person's appearance in court or the safety of the community.

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: There are identifiable limits to government action imposed or required of private institutions. The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person-(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014). If the government action does not survive strict scrutiny, the law is unconstitutional. See also *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

Further, the Supreme Court has recognized that sincerely held religious beliefs are protected by the Free Exercise Clause of the First Amendment. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). Any governmental burden by states on the free exercise of religion must be neutral and generally applicable. *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). A "law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, the Supreme Court has recognized that a law is not neutral and generally applicable if the "object of a law is to infringe upon or restrict practices because of their religious motivation," *id.* at 533, or if a facially neutral law has been applied with "a clear and impermissible hostility toward the sincere religious beliefs" of an individual, *Masterpiece Cake Shop v. Colorado Civil Rights*

Commission, 138 S. Ct. 1719, 1729-1731 (2018), or if the regulation "treat[s] any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In those cases, the government must show that said regulation is narrowly tailored to meet a compelling government interest. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

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

Response: Please 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 enjoined the State of New York from enforcing an Executive Order put in place during the COVID-19 pandemic. The Court held that the order was not neutral and was not narrowly tailored to meet a compelling government interest. The Court ruled that the loss of First Amendment freedoms for even a minimal period of time, "unquestionably constitutes irreparable injury," and appellants were entitled to injunctive relief. *Id.* at 67.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court enjoined the State of California from enforcing an executive order put in place during the COVID-19 pandemic. The order limited private, at-home religious gatherings. The Court found the order was not neutral nor generally applicable and therefore triggered strict scrutiny. *Id.* at 1296. The order did not survive strict scrutiny because, it "treat[ed] [a] comparable secular activity more favorably than religious exercise," and was not the least restrictive means to address the government interest. *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause of the First Amendment through its handling of a discrimination claim against appellant bakery which refused to sell a wedding cake to a same sex couple, based

upon sincerely-held religious beliefs. The Court found that although the law was facially neutral and generally applicable, the Commission expressed a clear and impermissible hostility toward the sincere religious beliefs of the baker in violation of the Free Exercise Clause. *Id*. at 1729. The Commission's treatment of the baker "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731.

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: The Free Exercise Clause protects sincerely-held religious beliefs. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). In *Frazee*, the Court explained, "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. However, "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." *Id.* at 833. Further, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Division,* 450 U.S. 707, 714 (1981).

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to opine on the official position of any religious organization.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the Religion Clause of the First Amendment protects the right of churches or other religious institutions to decide matters of faith and doctrine without government intervention. As such, the ministerial exception applied and precluded employment discrimination claims. The teachers in these cases did not have the title of minister, but their "core responsibilities as teachers of religion were essentially the same," as they performed "vital religious duties." *Id.* at 2066. As such, the Court ruled that the teachers' employment discrimination claims against the schools were barred under the ministerial exception.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that the City of Philadelphia's refusal to place children in a foster care agency affiliated with the Roman Catholic Church, because it refused to certify same-sex couples as foster parents, violated the Free Exercise Clause of the First Amendment. The Court applied strict scrutiny and ruled that the City offered no compelling interest to support its refusal to deny an exception to Catholic Social Services while making exceptions to others, thus violating the Free Exercise Clause.

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 held that Maine's restriction on the use of tuition assistance payments to religious based private schools violated the Free Exercise Clause of the First Amendment. Maine provided tuition assistance payments to any family whose school district did not provide a public secondary school but excluded religious based schools from the program. Maine argued its restriction was based on the Establishment Clause, but the Supreme Court ruled that the Establishment Clause did not require exclusion of religious based schools and Maine's exclusion of religious based schools did not survive strict scrutiny.

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that both the Free Exercise and Free Speech Clauses of the First Amendment protected a football coach from engaging in a personal religious observance and prohibited the school district from disciplining the coach for such conduct. The Court held that the coach was engaged in private speech, not government speech, when he prayed quietly at midfield after games. The Court rejected the school district's argument that it was justified in restricting the conduct under the Establishment Clause and ruled the coach's dismissal was not justified.

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

Response: Justice Gorsuch's concurring opinion in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), addressed the state court's analysis of the Religious Land Use and Institutionalized Persons Act and the application of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch concluded that the Religious Land Use and Institutionalized Persons Act triggered a strict scrutiny analysis where courts cannot rely on broadly formed governmental interests but must scrutinize the asserted harm of granting specific exemptions to religious claimants. *Id.* at 2432. In this case, the Swartzentruber Amish community presented a less restrictive means to address the government interest that

was rejected by the government. Justice Gorsuch concluded that the government must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate.

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: 18 USC § 1507 prohibits anyone from picketing or parading in or near a building housing a court of the United States, or in or near a building or residence occupied or used by a judge, juror, witness or court officer 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 office in the discharge of his duty.

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;**

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: If confirmed as a United States District Judge, to the extent that I would be involved in organizing or providing trainings on behalf of the court, I would ensure that such trainings are consistent with the law.

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

Response: Yes.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed as a United States District Judge, and presented this issue, I will faithfully and impartially follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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

Response: In my courtroom, every party is treated fairly, regardless of their race, gender religion or political affiliation. If confirmed as a United States District Judge, I will faithfully and impartially follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. This is a matter of policy to be decided by Congress.

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: In *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that the Second Amendment protects the right of a law-abiding citizen to possess a gun inside and outside of the home for self-defense. *See also McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (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 *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that if a regulation places any restrictions on the Second Amendment, the government must show that the regulation is consistent with this Nation's historical tradition of firearm regulation.

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

Response: Yes.

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

Response: No.

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

Response: No.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed as a United States District Judge, I will faithfully and impartially follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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

Response: Prosecutorial discretion refers to the executive's sole ability to make decisions on charging, plea bargaining and sentence recommendations to the court. Substantive administrative rule change refers to binding requirements or procedures formally adopted by an agency.

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

Response: No.

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 Association of Realtors v. HHS*, 141 S. Ct. 2320 (2021), the Supreme Court held that the Centers for Disease Control and Prevention (CDC) exceeded its statutory authority by issuing a nationwide eviction moratorium. The Supreme Court held that congressional authorization was required to extend the moratorium.

42. **You currently serve as a judge on the San Diego Superior Court. According to the numbers provided to the committee, less than one-fifth of your cases involved civil law matters, you have not presided over a single jury trial, and have not written any opinions concerning constitutional issues.**

a. **What professional experience do you have that qualifies you to serve as a federal judge?**

Response: For 12 years I worked as a prosecutor, including one year at the San Diego City Attorney's Office and 11 years at the San Diego District Attorney's Office. For eight and a half of those years, I worked in the Gang Prosecution Unit. While a prosecutor I tried over 50 jury trials to verdict, including several homicide cases, violent gang shootings, assaults, robberies and sexual assault cases. I've handled complicated

matters involving wiretap investigations, criminal gang conspiracy investigations and grand jury proceedings. While handling these matters, I had to become an expert in admitting different types of evidence, including scientific expert testimony and digital evidence.

Since becoming a Superior Court Judge in 2017, for two years, I presided over a misdemeanor and felony arraignment calendar making detention decisions on thousands of cases and taking hundreds, if not thousands of guilty pleas and conducting sentencing hearings.

In 2020, I then moved to a felony settlement department where I presided over thousands of serious felony cases and took hundreds, if not thousands of guilty pleas and conducted sentencing hearings. I also conducted review hearings and probation modification hearings. I was in the felony settlement department for two years.

In April 2022, after only four years on the bench, I became the Supervising Judge for the North County branch of the San Diego Superior Court, the largest branch court in the county. I am the most junior Supervising Judge in the County of San Diego. As the Supervising Judge, I preside over the criminal master calendar and handle case assignments to other judges, conduct arraignments, take guilty pleas, preside over evidentiary hearings, conduct settlement conferences, sentencing hearings and probation revocation hearings. I have also conducted civil bench trials. I currently supervise 22 judicial officers.

Throughout my professional career, I have shown a dedication to hard work, strong ethics, a commitment to following the law, while keeping an open mind and treating all parties with respect. If confirmed as a United States District Judge, I will continue to display those traits and faithfully and impartially apply the law and binding Supreme Court and Ninth Circuit precedent.

Senator Ben Sasse
Questions for the Record for James Edward Simmons, Jr.
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 30, 2022

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

   Response: No.

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

   Response: In the five years that I have been a Superior Court Judge, my judicial philosophy has focused on keeping an open mind, being prepared, faithfully following the law, and treating all parties with respect.

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

   Response: I do not subscribe to any particular method of constitutional interpretation. If confirmed as a United States District Judge, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: I do not subscribe to any particular method of constitutional interpretation. The Supreme Court has described the starting point for review of a statute is the "ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County* 140 S. Ct. 1731, 1738. When "the meaning of the statute's terms [are] plain, [the Court's] job is at an end." *Id.* at 1749. If confirmed as a United States District Judge, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding interpretative methods of analysis.

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

   Response: I believe the Constitution has a fixed meaning and does not change over time, unless it is amended by the process set forth in Article V. If confirmed as a United States District Judge, I would faithfully apply Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional interpretation.

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

Response: There is no particular Supreme Court Justice whose jurisprudence I most admire. If confirmed as a United States District Judge, I would apply Supreme Court precedent without regard to the particular justice who authored them. Further, I commit to keep an open mind, always be prepared, faithfully follow the law, and treat all parties with respect, applying Supreme Court and Ninth Circuit precedent.

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

   Response: If confirmed as a United States District Judge in the Southern District of California, I would be bound by Supreme Court and Ninth Circuit precedent. A decision of the Ninth Circuit is binding on courts in the Ninth Circuit unless it is overruled by the Supreme Court or an *en banc* panel of the Ninth Circuit.

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

   Response: Please see my response to Question 7.

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

   Response: If confirmed as a United States District Judge and I was called upon to interpret a statute, I would first look to the text of the statute and any binding Supreme Court or Ninth Circuit precedent. I would apply binding precedent. If, however, the text of the statute was ambiguous and there was no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit to analogous statutes, as well as persuasive authority from other circuits. As a last resort, if the statute was still ambiguous, I would consider legislative history being mindful that certain types of legislative history have been found by the Supreme Court to be more authoritative than others.

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: Race and ethnicity should not factor into sentencing a defendant for a particular crime. 18 U.S.C. § 3553(a) provides the factors judges should consider in imposing a sentence, including, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Senator Josh Hawley
Questions for the Record

James Simmons
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: I am not familiar with the sentencing practices of then-Judge Ketanji Brown Jackson. However, if confirmed as a United States District Judge, in any sentencing decision, I would analyze the facts of the specific case and I would consider the factors listed in 18 U.S.C. § 3553(a). I will sentence each individual based on the specific facts of that person's case, following all binding precedent.

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

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

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

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

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

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

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

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. This is a question best left to policymakers.

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

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

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

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

3. Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."

a. Do you agree with that philosophy?

Response: I am not familiar with the context of this quote. If confirmed as a United States District Judge, I will faithfully and impartially apply the law and any binding Supreme Court and Ninth Circuit precedent irrespective of my personal views.

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

Response: A judge must faithfully apply the law and follow binding Supreme Court precedent, which I will do, if confirmed.

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

Response: Yes.

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

Response: The Supreme Court has recognized multiple abstention doctrines in which a federal court should abstain from hearing a case in deference to a state court's authority over a case. The doctrines are *Pullman*, *Burford*, *Younger*, *Colorado River*

and *Rooker-Feldman*, which is not technically an abstention doctrine, but nonetheless limits federal courts from hearing certain types of claims.

The *Pullman* abstention doctrine advises that federal courts should abstain from considering a federal constitutional challenge to a state law when the state court proceedings can resolve the issue in a way that avoids the federal issue. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

The *Burford* abstention doctrine directs federal courts to abstain from exercising jurisdiction if a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar or if decisions in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *City of Tucson v. U.S. West Communication, Inc.*, 284 F. 3d 1128, 1132 (9th Cir. 2002); *Burford v. Sun Oil Company*, 319 U.S. 315 (1943).

The *Younger* abstention doctrine advises that federal courts should abstain from intervening in pending state criminal, civil or administrative proceedings when important state interests are involved. *Younger v. Harris*, 401 U.S. 37 (1971).

The *Colorado River* abstention doctrine applies whenever there are parallel proceedings in state court involving the same parties and the same issues. Abstention under this doctrine is based on judicial administration and conservation of judicial resources. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

The *Rooker-Feldman* doctrine, while not technically an abstention doctrine, provides that federal courts below the United States Supreme Court cannot exercise jurisdiction over a state court's decision. If a party seeks relief, they must appeal directly to the Supreme Court. *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

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

   Response: No.

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

      Response: Not applicable.

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

   Response: I would apply the original public meaning of the Constitution to any provision where the Supreme Court has indicated that it is to be considered. See e.g, *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2011 (2022) (Second Amendment). If confirmed, I will faithfully apply the law and any binding Supreme Court and Ninth Circuit precedent to all cases including precedent regarding the specific interpretative methodology to use.

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

   Response: If the statute or regulation is clear, I would not consider legislative history. If the statute was ambiguous, I would consider legislative history using the framework outlined by the Supreme Court in *Garcia v. U.S.*, 469 U.S. 70 (1984). In *Garcia*, the Supreme Court held that when reviewing legislative history, the authoritative source for finding the legislature's intent lies in the committee reports on the bill, which "represen[t] the considered and collective understanding of those Congressman involved in drafting and studying proposed legislation." *Id.* at 76. Reports are "more authoritative" than comments from the floor. *Id.*

   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: Please see my response to Question 8.

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

      Response: I am not aware of any Supreme Court precedent that allows courts to consult the laws of foreign nations and will decline to do so absent any such precedent.

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: In *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 576 U.S. 863 (2015), the Supreme Court held that a petitioner challenging an execution protocol under the Eighth Amendment must establish that the method presents a risk that is "sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers." *Baze*, 553 U.S. at 50. (internal citations and

quotations omitted). A petitioner must also identify an alternative procedure that is feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. *Id.* at 52.

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

Response: Yes.

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

Response: No.

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. If confirmed as a United States District Judge, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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: In *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), the Supreme Court held that a law that burdens the free exercise of religion is not subject to strict scrutiny if the law is neutral and generally applicable. *Id.* at 878-882. In contrast, the Supreme Court has recognized that a law is not neutral and generally applicable if the "object of a law is to infringe upon or restrict practices because of their religious motivation," *Church of Lukumi Bablau Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), or if a facially neutral law has been applied with "a clear and impermissible hostility toward the sincere religious beliefs" of an individual, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729-1731 (2018), or if the regulation "treat[s] any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

In those cases, the government must show that said regulation is narrowly tailored to meet a compelling government interest. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

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: Please see my response to Question 13. Additionally, when a state provides tuition assistance to private schools, it cannot exclude payments to religious based schools, *Carson v. Makin*, 142 S. Ct. 1987 (2022), nor can state action restrict an individual from engaging in private, personal religious observation while at work, *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). Strict scrutiny applies.

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 Free Exercise Clause protects sincerely-held religious beliefs. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). In *Frazee*, the Court explained, "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. However, "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." *Id.* at 833. The Ninth Circuit has held that "the First Amendment does not extend to so-called religions which ... are obviously shams and absurdities and whose members are patently devoid of religion sincerity." *Callahan v. Woods*, 658 F. 2d 679, 683 (9th Cir. 1981). Further, the Supreme Court has held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Division,* 450 U.S. 707, 714 (1981).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that laws that banned possession of a handgun in a home

was unconstitutional, as the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 590.

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: It appears that Justice Holmes meant that the 14th Amendment did not embody a particular economic theory.

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

Response: In *Ferguson v. Sharpa*, 372 U.S. 726 (1963), the Supreme Court abrogated *Lochner*. If confirmed, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

a. If so, what are they?

Response: Please see my response to Question 18.

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

Response: Please see my response to Question 18.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would

be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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

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

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

Response: The Supreme Court has held that a company holding more than 80% of the market share supports a finding of monopoly power. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). The Ninth Circuit has held that "a 65% market share" can "establish a prima facie case of market power." *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). Further, in *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), the Ninth Circuit held that in an attempted monopolization claim, "a 44% market share demonstrates market power if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id.* at 1438.

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

Response: Generally speaking, there is no federal common law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, the Court "has recognized the need and authority in some limited areas to formulate what has come to be known as federal common law" and these instances "fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). "Federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations and admiralty cases." *Id.* at 641. "Federal common law also may come into play when Congress has vested

jurisdiction in the federal courts and empowered them to create governing rules of law." *Id.* at 643.

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: The Supreme Court has ruled that state constitutional law should be applied in such situations. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). If confirmed, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Question 21.

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

Response: A state constitution may provide greater protections than federal provisions.

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

Response: As a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether a particular case was correctly decided or not. However, because *Brown v. Board of Education* is unlikely to be relitigated, I am comfortable answering that yes, I believe it was correctly decided.

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

Response: The Supreme Court has not barred the issuance of nationwide or universal injunctions. Injunctions generally are governed by Federal Rule of Civil Procedure 65. The Ninth Circuit has held that crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. *California v. Azar*, 911 F. 3d 558, 582 (9th Cir. 2018). Further, "although there is no bar against … nationwide relief in federal district or circuit court, such broad relief must be necessary to give prevailing parties the relief to which they are entitled." *Id.*

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Federalism is central to our form of government, the division of power between the federal government and the states. The federal government has enumerated powers in the Constitution and states retain all powers not specifically reserved to the federal government.

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: There are no relative advantages or disadvantages of awarding damages versus injunctive relief. It is very fact and case specific and depends on the requested relief by the parties in an action. Generally, damages compensate a past harm and injunctive relief prevents a future harm. If confirmed, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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 discussed substantive due process rights that were unenumerated in the Constitution, including the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); right to have children (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)); right to direct education and upbringing of child (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); right to marital

privacy and contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965)). The Court provided a two-part test to determine if an unenumerated right is in the Constitution: (1) the right must be deeply rooted in this nation's history and tradition; and (2) there must be a careful description of the asserted right. *Glucksberg*, 521 U.S., at 720-721. If confirmed, I would apply this framework and any other Supreme Court and Ninth Circuit precedent.

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

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

Response: Please see my response to Question 13.

Further, the Supreme Court has recognized that sincerely held religious beliefs are protected by the Free Exercise Clause of the First Amendment. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). Any governmental burden by states on the free exercise of religion must be neutral and generally applicable. *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990).

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person-(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705 (2014). If the government action does not survive strict scrutiny, the law is unconstitutional. *See also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that the Free Exercise Clause of the First Amendment protects "not only the right to harbor private religious beliefs inwardly and

secretly … [but] protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life. *Id.* at 2421.

Further, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court held that the First Amendment was adopted to "curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Id.* at 49.

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my response to Questions 13 and 29a.

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 of 1993 (RFRA) prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person-(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014). If the government action does not survive strict scrutiny, the law is unconstitutional. *See also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with the quote, but I understand it to mean that a judge should not make decisions based on their personal views. A judge must faithfully follow the law, irrespective of their personal views. If confirmed, I will faithfully follow the law and apply binding Supreme Court and Ninth Circuit precedent.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

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

Response: I believe that America is the greatest country in the world. We are not a perfect country, but no country is perfect. We continue to strive toward the mission of our Founding Fathers to be a more perfect union. Only in this great country could someone like me who grew up in Section 8 housing be up for consideration for confirmation to the United States District Court for the Southern District of California.

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

Response: No.

35. How did you handle the situation?

Response: Not applicable.

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: No particular essay in the Federalist Papers has shaped my views of the law.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully follow the law and apply Supreme Court and Ninth Circuit precedent, including *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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: Yes. I testified during a deposition while in law school for the wrongful death lawsuit filed in my mother's case that I previously disclosed in my Senate Questionnaire. I am unaware if a record is available of that testimony or not.

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: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

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: No.

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

Response: Not applicable.

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: As a judicial nominee, I took an oath during my appearance at the Senate Judiciary Committee that the testimony I would provide would be the truth. I have answered each question asked of me truthfully and to the best of my ability and in a manner consistent with ethical obligations as both a sitting judge and judicial nominee.

Questions from Senator Thom Tillis
for James Edward Simmons, Jr.
Nominee to be United States District Judge for 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: Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Judicial Activism,* Black's Law Dictionary (11th ed. 2019). Judicial activism is inappropriate.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: Faithfully interpreting the law could sometimes result in an undesirable outcome, but if I were confirmed as a United States District Judge, I will apply the law impartially and faithfully without regard to any personal views or desired outcome.

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 as a United States District Judge, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent regarding the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of*

Chicago, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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: As a sitting judge and judicial nominee, it is generally inappropriate for me to comment on any hypothetical legal scenario that may come before me. If confirmed, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent regarding laws or regulations restricting the Second Amendment and relating to restrictions imposed during the COVID-19 pandemic, including, but not limited to *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Tandon v. Newsom* 141 S. Ct. 1294 (2021); and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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: In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court held that qualified immunity analysis must follow a two-part inquiry: (1) taken in the light most favorable to the party asserting the injury, whether the facts alleged show the officer's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the alleged violation. If both prongs are met, then qualified immunity does not apply. See also *Pearson v. Callahan*, 555 U.S. 223 (2009).

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: This is a question best left to policy makers. If confirmed, I will faithfully and impartially apply binding Supreme Court and Ninth Circuit precedent to any case in which the issue of qualified immunity was presented before me.

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

Response: This is a question best left to policy makers. If confirmed, I will faithfully and impartially apply binding Supreme Court and Ninth Circuit precedent to any case in which the issue of qualified immunity was presented before me.

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: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply the Patent Act, 35 U.S.C. § 101, and binding Supreme Court and Ninth Circuit precedent to any case brought before me. Such precedents would include *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. 576 (2013); and *Alice Corp* Pty. Ltd. *v. CLS Bank International*, 573 U.S. 208 (2014).

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: As a sitting judge and judicial nominee, it is generally inappropriate for me to comment on any hypothetical legal scenario that may come before me. If confirmed as a United States District Judge, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent regarding patent law including *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. 576 (2013); and *Alice Corp* Pty. Ltd. *v. CLS Bank International*, 573 U.S. 208 (2014).

    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: Please see my response to Question 13(a).

    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: Please see my response to Question 13(a).

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 13(a).

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: Please see my response to Question 13(a).

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 13(a).

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: Please see my response to Question 13(a).

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: Please see my response to Question 13(a).

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: Please see my response to Question 13(a).

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: Please see my response to Question 13(a).

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 13(a). Additionally, as a sitting judge and a judicial nominee, it is generally inappropriate for me to express an opinion regarding whether the current jurisprudence provides clarity and consistency needed to incentivize innovation. If confirmed as a United States District Judge, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent in regard to the Supreme Court's ineligibility tests.

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

a. **What experience do you have with copyright law?**

Response: In my 12 years of practicing law as a prosecutor and five years as a Superior Court Judge, I have no experience handling any cases involving copyright law.

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

Response: In my 12 years of practicing law as a prosecutor and five years as a Superior Court Judge, I have no experience involving the Digital Millennium Copyright Act.

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

Response: In my 12 years of practicing law as a prosecutor and five years as a Superior Court Judge, I have no experience addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: In my 12 years as a prosecutor and five years as a Superior Court Judge, I have handled cases involving criminal threats and the use of music lyrics as evidence of a crime. In such cases, First Amendment claims have been raised and litigated. I have no experience with intellectual property issues, including copyrights.

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: If confirmed, when a case requires statutory interpretation, I would first look to the text of the statute and then determine whether the Supreme Court or Ninth Circuit have previously interpreted the statute at hand. If the text of the statute is clear, my inquiry would end there. If, however, the text of the statute is ambiguous and there is no binding precedent, I would look to the methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and any persuasive authority from other circuits and consider legislative

history, when approval with the limitations outlined by the Supreme Court. See *Garcia v. U.S.*, 469 U.S. 76 (1984).

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

Response: If confirmed, I would apply binding Supreme Court and Ninth Circuit precedent in deciding the level of deference to give an agency's interpretation, depending on the facts and circumstances of the case, including deference applicable under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co,*, 323 U.S. 134 (1944).

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply the law to the facts and follow any binding Supreme Court and Ninth Circuit precedent.

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

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

Response: If confirmed, I will interpret the DMCA as written and apply binding Supreme Court and Ninth Circuit precedent to any case brought before me.

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: If confirmed, I will interpret the DMCA as written and apply binding Supreme Court and Ninth Circuit precedent to any case brought before me.

18. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some

instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: In the Southern District of California, there are no divisions with a single federal district judge and cases are assigned randomly, thus this is not a problem in the Southern District of California.

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

Response: Please see my response to Question 18(a).

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

Response: No. If confirmed, I will faithfully and impartially follow the law and binding Supreme Court and Ninth Circuit precedent consistent with the Code of Conduct for United State Judges.

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

Response: If confirmed, I will faithfully and impartially follow the law and binding Supreme Court and Ninth Circuit precedent consistent with the Code of Conduct for United State Judges.

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent.

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?

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent.

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: In the Southern District of California, all district judges sit in San Diego, so a local rule would be unnecessary to address the concern expressed in this question.

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

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting judge and a judicial nominee, it would be inappropriate for me to express an opinion on this issue. If confirmed, I will faithfully and impartially apply Supreme Court and Ninth Circuit precedent.