Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Patrick Casey Pitts
Judicial Nominee to the U.S. District Court for the Northern District of California

1. **At your hearing, Senator Kennedy asked you about an article written by Heather Gerken, a dean at Yale Law School, who clerked for Judge Stephen Reinhardt. When Senator Kennedy asked you about the article, you claimed you didn't "know if that is an accurate account of his approach to the law," noting that it was a "secondary account." Given that the "secondary account" was from a former clerk and Judge Reinhardt discussed his views with numerous people including reporters who published articles about his views, do you dispute that the article accurately describes his approach to the law?**

   Response: I believe that Dean Gerken's article accurately recounts some of her own thoughts about Judge Reinhardt based on her own experiences with him. I do not think that a short tribute article is capable of describing the approach to the law taken by Judge Reinhardt over the entirety of his career.

2. **At your hearing, you denied knowing about "a shelf in [Judge Reinhardt's] office where he kept pictures of some of his female 'pretty' clerks, many of which included Judge Reinhardt in the photo as well."[1] According to another former clerk, "Judge Reinhardt made it clear that photographs of male law clerks would not be placed on the shelf and that the shelf was special."[2] You also referred to visiting Judge Reinhardt's chambers. When was the last time you visited his chambers?**

   Response: The last time I visited Judge Reinhardt's chambers was March 16, 2018.

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

   Response: I disagree that judges exercise their own independent value judgments when interpreting the Constitution. As a district court judge, my role, if confirmed, will be to apply the law, including binding Supreme Court and Ninth Circuit precedent, faithfully, objectively, and impartially.

---

[1] https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf.
[2] https://www.congress.gov/116/meeting/house/110505/witnesses/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf.

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

   Response: Black's Law Dictionary defines living constitutionalism as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019).

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

   Response: The Supreme Court has instructed that the Constitution's "meaning is fixed," but that it "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: Yes. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

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

   Response: The proper allocation of local government funds is a policy question to be decided by relevant local lawmakers based on the needs of their communities. As a judicial nominee, it would be inappropriate for me to comment on the merits of that policy issue. If confirmed, I will resolve each civil or criminal case before me on its own merits by applying the law faithfully, objectively, and impartially to the specific facts of the case, regardless of my views on any policy issues.

8. **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: How to protect the community, including during the COVID-19 pandemic, presents a policy question to be decided by federal, state, and local lawmakers and other authorities. As a judicial nominee, it would be inappropriate for me to comment on that policy issue.

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

   Response: Congress set forth the factors that must be considered when sentencing defendants in 18 U.S.C. § 3553(a). If confirmed, I will apply the factors set forth in §3553(a) faithfully, objectively, and impartially in each sentencing decision.

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

    Response: Although the Constitution in most instances does not guarantee indigent civil litigants with a right to government-provided legal counsel, the Due Process Clauses generally protect civil litigants' right to appear through a lawyer should they so choose.

11. **Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:**

    a. **Was *Brown v. Board of Education* correctly decided?**

    Response: Yes. As a judicial nominee, it is generally inappropriate for me to comment on the "correctness" of a particular judicial decision. Because *Brown* is so widely accepted, and because issues of de jure racial segregation in education are almost certainly not going to arise in any future cases before me, I believe that I can state my view that *Brown* was decided correctly without violating the Code of Judicial Conduct.

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

    Response: Yes. As a judicial nominee, it is generally inappropriate for me to comment on the "correctness" of a particular judicial decision. Because *Loving* is so widely accepted, and because issues of state prohibitions on interracial marriage are almost certainly not going to arise in any future cases before me, I believe that I can state my view that *Loving* was decided correctly without violating the Code of Judicial Conduct.

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially. I note that the Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially. I note that

the Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will apply all binding Supreme Court and Ninth Circuit precedents faithfully, objectively, and impartially.

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

Response: 18 U.S.C. § 1507 prohibits certain pickets, parades, sound-trucks and other similar devices, and demonstrations occurring "in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer," where those activities are undertaken for the purpose of "interfering with, obstructing, or impeding the administration of justice," or "influencing any judge, juror, witness, or court officer, in the discharge of his duty."

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

Response: *Cox v. Louisiana*, 379 U.S. 559 (1965), upheld a state statute modeled on § 1507 that prohibited certain picketing near courthouses. As a judicial nominee, it would be inappropriate for me to offer an opinion on issues that might be raised in future cases.

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

Response: "Fighting words" are words "'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'" *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)); *see also Cohen v. California*, 403 U.S. 15, 20 (1971) (fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction").

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

Response: "True threats 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." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

Response: Although I have not yet served as a judge, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453. I will strive to treat every litigant with respect and dignity and will ensure that each party that appears before me feels that they have been treated fairly. I will take the time necessary to develop a complete understanding of the facts and law relevant to each case, and will provide the parties with reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered. Because the U.S. Supreme Court plays a very different role in the federal judicial system than district court judges do, I am not aware of a particular Supreme Court decision from the last 50 years that is a typical example of the approach I intend to take in my role as a district court judge, which will involve faithfully applying the law, including binding Supreme Court and Ninth Circuit precedent.

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

Response: Although I have not yet served as a judge, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453. I will strive to treat every litigant with respect and dignity and will ensure that each party that appears before me feels that they have been treated fairly. I will take the time necessary to develop a complete understanding of the facts and law relevant to each case, and will provide the parties with reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered. Because the Tenth Circuit plays a different role in the federal judicial system than district court judges, I am not aware of a particular Tenth Circuit decision from the last 50 years that is a typical example of the approach I intend to take in my role as a district court judge, which will involve faithfully applying the law, including binding Supreme Court and Ninth Circuit precedent.

18. **Under Supreme Court and Tenth 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: "Basic" or "historical" facts involve "questions of who did what, when or where, how or why." *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). To determine whether a question is primarily legal or primarily factual, courts consider "the nature of the question" and the court "better suited to resolve it," with a focus on "whether answering [the question] entails primarily legal or factual work." *Id.* at 966–67. If the question requires "courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," it is primarily legal, and subject to *de novo* review on appeal. *Id.* at 967. But if it involves primarily "case-specific factual issues" that requires courts to "marshal and weigh evidence, make credibility judgments, and otherwise address … multifarious, fleeting, special, narrow facts," it is a primarily factual question subject to deferential review on appeal. *Id.* (citation omitted).

19. **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: Although I have not yet served as a judge, I intend to take the time necessary to develop a complete understanding of the facts and law relevant to each case, and to issue reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered. I will consult with my judicial colleagues about their approaches as well. I will also ask my law clerks to review the law and facts of each case on their own and to identify for me any areas where they have any doubt, uncertainty, or concerns about my understanding of the law and facts.

20. **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.

21. **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: Some time after I submitted my application to Senator Feinstein and Senator Padilla's Judicial Evaluation Commissions, I spoke with Christopher Kang. He described the judicial nomination process for me based on his prior experience working in the White House.

22. **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.

23. **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.

24. **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.

25. **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: See Response to Question 21.

26. **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: In June 2022 I had a short telephone conversation with Jake Faleschini. I have never been in contact with Rakim Brooks or Daniel L. Goldberg.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

28. **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.

29. **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.

30. **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.

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

Response: In February 2021, I submitted applications to Senator Feinstein and Senator Padilla's Judicial Evaluation Commissions. On February 1, 2022, I interviewed with members of Senator Padilla's Judicial Evaluation Commission for the Northern District of California. In April 2022, I interviewed with the chairs of Senator Padilla's Judicial Evaluation Commission, Senator Padilla's staff, and Senator Padilla. On May 2, 2022, I interviewed with the chair of Senator Feinstein's Judicial Evaluation Commission. On June 8, 2022, I interviewed with attorneys from the White House Counsel's Office. On September 6, 2022, my nomination was submitted to the Senate.

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

Response: I received the questions on December 20, 2022, from the Office of Legal Policy. I then reviewed the questions, conducted any necessary research, and drafted my responses. I provided draft responses to the Office of Legal Policy and received feedback, which I considered in finalizing my responses.

Senator Mike Lee
Questions for the Record
P. Casey Pitts, Nominee to the United States District Court for the Northern District of California

1. How would you describe your judicial philosophy?

Response: Although I have not yet served as a judge, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453. I will strive to treat every litigant with respect and dignity and will ensure that each party that appears before me feels that they have been treated fairly. I will take the time necessary to develop a complete understanding of the facts and law relevant to each case, and will issue reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered.

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

Response: I would start by reviewing the text of the statute and any Supreme Court or Ninth Circuit precedents interpreting or applying the statute. If the text of the statute were clear, or if the Supreme Court or Ninth Circuit had already resolved the issue, I would apply the text or binding precedent. If those sources did not resolve the issue, I would start by analyzing the text and structure of the statute. *Milner v. Navy*, 562 U.S. 562, 570 (2011); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If the text and structure of the statute were ambiguous, I might consider the statute's legislative history, recognizing that such history can sometimes "clear up ambiguity" but cannot "create it." *Milner*, 562 U.S. at 574; *see also Food Marketing Inst.*, 139 S. Ct. at 2364. I would also remember that different forms of legislative history must be accorded different weight: Statements contained in official Senate and House Reports are most helpful, while comments made in hearings or on the floor generally have little or no significance. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 481 (2017). Post-enactment legislative history is not relevant. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). I would also consider Supreme Court and Ninth Circuit precedents that are not directly on point but that might nonetheless provide helpful guidance in resolving the issue, and would consider how other appellate or trial courts have resolved the issue.

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

Response: I would start by reviewing the text of the constitutional provision and any Supreme Court or Ninth Circuit precedents interpreting or applying the provision. If the text of the provision were clear, or if the Supreme Court or Ninth Circuit had already resolved the issue, I would apply the text or binding precedent. If those

sources did not resolve the issue, I would apply the method of constitutional interpretation that binding precedent instructs the courts to apply when interpreting the provision in question. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (setting forth test for interpreting the Due Process Clause); *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (setting forth test for interpreting the Eighth Amendment); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (setting forth test for interpreting the Second Amendment). I would also consider Supreme Court and Ninth Circuit precedents that are not directly on point but that provide helpful guidance in resolving the issue, and would consider how other appellate or trial courts have resolved the issue.

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

Response: The Supreme Court has instructed that certain constitutional provisions must be interpreted primarily on the basis of their text and original meaning. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (Second Amendment). If confirmed, I will faithfully apply this method in all cases where it is appropriate under binding Supreme Court or Ninth Circuit precedent.

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

Response: See my response to Question 2.

6. Is it the role of a judge to decide what the words of a statue mean, or is it to determine legislative prerogatives and congressional intent?

Response: Statutory interpretation starts with the text and structure of the statute. *Milner v. Navy*, 562 U.S. 562, 570 (2011); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Supreme Court held in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738. Where the text of a statute is ambiguous, legislative history may sometimes help "clear up ambiguity" but cannot "create it." *Milner*, 562 U.S. at 574; *see also Food Marketing Inst.*, 139 S. Ct. at 2364. Different forms of legislative history must be accorded different weight. Statements contained in official Senate and House Reports are most helpful, while comments made in hearings or on the floor generally have little or no significance. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 481 (2017). Post-enactment legislative history is not relevant. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

7. You were a coauthor on a paper titled "Applying Bostock to Bargaining, Benefits, and Litigation." There is a footnote in the paper that asserts that Justice Gorsuch's opinion was based "on *his belief* that the meaning of 'sex' had to be determined by reference to its 'original public meaning . . . at the time of [Title VII's] enactment' in 1964." (emphasis added) Do you agree with Justice Gorsuch's "belief" that words should be defined according to original public meaning? Or should meaning change as social norms and linguistic conventions evolve?

Response: The Supreme Court held in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738. If confirmed, I will faithfully apply binding Supreme Court and Ninth Circuit precedents regarding statutory interpretation, including *Bostock*.

8. What are the constitutional requirements for standing?

Response: To establish Article III standing, a plaintiff must establish injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

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

Response: The federal government is "one of enumerated powers" that "can exercise only the powers granted to it." *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819). The Supreme Court has held "that the powers given to the government imply the ordinary means of execution," so long as those means are "appropriate, … plainly adapted to that end," and "not prohibited, but consistent with the letter and spirit of the constitution." *Id.* at 409, 421; *see also* U.S. Const. Art. I, § 8, cl. 18 (providing Congress with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

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

Response: The Supreme Court has held that "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *National Fed. Of Ind. Business v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). Under this binding precedent, I would apply a "functional approach" to determine whether a law falls within the scope of one of Congress's enumerated power. *Id.* at 565; *see also id.* at 569.

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

Response: The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects certain unenumerated rights that are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The Court has held that these rights include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, [and] to bodily integrity," and has "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720 (1997) (citations omitted). As a judicial nominee, it would be inappropriate for me to offer an opinion as to how that test might be applied in the future.

12. What rights are protected under substantive due process?

Response: See my response to Question 11.

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

Response: The Supreme Court has held that substantive due process protects neither abortion nor the economic rights at stake in *Lochner v. New York*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (abortion); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (*Lochner*-type economic rights).

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

Response: The Supreme Court has held that Congress's power under the Commerce Clause includes the power to regulate commerce among the states and the power to regulate activities that have a substantial effect on interstate commerce, including activities "that do so only when aggregated with similar activities of others." *National Fed. Of Ind. Business v. Sebelius*, 567 U.S. 519, 549 (2012) (quotations omitted). That power does not include the power to compel an individual to participate in commerce. *Id.* at 555. Other constitutional provisions and principles limit Congress's Commerce Clause power. For example, Congress cannot use its Commerce Clause power to abrogate States' sovereign immunity. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996).

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

Response: The Supreme Court has explained that "suspect" or "quasi-suspect" classes have generally "been subjected to discrimination," "exhibit obvious, immutable, or distinguishing characteristics that define them as a group," and are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

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

Response: According to the Supreme Court, the Constitution's checks and balances and separation of powers provide "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 123 (1976).

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

Response: I would faithfully apply binding Supreme Court and Ninth Circuit precedent to determine whether the conduct at issue fell within the scope of that branch's constitutional powers. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)) (discussing framework for evaluating exercises of presidential power).

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

Response: A judge's job is to apply the law faithfully, objectively, and impartially, consistent with the judicial oath. *See* 28 U.S.C. § 453. Judges must ensure that they have an objective and impartial view of the facts that is not distorted by their subjective views and understandings.

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

Response: A judge should neither invalidate a constitutional law nor uphold an unconstitutional law. As a judge, I intend to approach each case on its merits; to apply the law faithfully, objectively, and impartially, consistent with my judicial oath, *see* 28 U.S.C. § 453; and to provide whatever relief faithful application of the law demands.

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

Response: I have not studied the history of the Supreme Court's exercise of judicial review in the manner necessary to develop a view with respect to any changes in that practice over time. As a judicial nominee, it would be inappropriate for me to comment on any "downsides" of particular judicial decisions. As a judge, I intend to approach each case on its merits; to apply the law faithfully, objectively, and impartially, consistent with my judicial oath, *see* 28 U.S.C. § 453; and to provide whatever relief faithful application of the law demands.

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

Response: I understand judicial review to require that judges evaluate the constitutionality of the laws they are asked to apply in resolving the cases and controversies properly before them. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). I understand judicial supremacy to involve a view that the federal courts' determination of the Constitution's meaning is binding upon other branches of government. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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

Response: As a judicial nominee, it would be inappropriate for me to comment upon the conduct of elected officials.

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

Response: Hamilton explained that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." The Federalist No. 78 (Alexander Hamilton). Instead, the judiciary's authority and efficacy depends entirely upon the manner in which it exercises its delegated power to decide the cases and controversies properly before it.

24. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has

questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: The Supreme Court has instructed lower courts to follow its precedents, even if those precedents have been criticized in other decisions. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). If confirmed, I intend to approach each case on its merits and apply the law, including binding Supreme Court and Ninth Circuit precedents, faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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

Response: Congress set forth the factors that must be considered when sentencing defendants in 18 U.S.C. § 3553(a). One of those factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). If confirmed, I will faithfully, objectively, and impartially apply the factors set forth in §3553(a) to each individual defendant that appears before me, regardless of the defendant's race, gender, nationality, sexual orientation, or gender identity, and regardless of the race or other group identity of other defendants convicted of the same crime, in order to avoid any "unwarranted sentence disparities" between individual defendants I sentence for the same crime.

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

Response: I do not have any knowledge regarding this definition of "equity" or of the context in which it was developed or applied. Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing" or "the body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary defines "equality" as "the quality, state, or condition of being equal," especially "likeness in power or political status." Black's

Law Dictionary (11th ed. 2019). This differs from the definition of "equity" provided by Black's Law Dictionary, as set forth in my response to Question 26.

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

Response: The Supreme Court has not interpreted the Fourteenth Amendment's Equal Protection Clause as guaranteeing equity as defined above.

29. How do you define "systemic racism?"

Response: I do not have a personal definition of systemic racism. Black's Law Dictionary defines "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." Black's Law Dictionary, "Discrimination" (11th ed. 2019).

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

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

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

Response: See my response to Questions 28 and 29.

32. In your nominations hearing, I asked you about the arguments you made in an amicus brief in the case *United States Department of Health and Human Services* v. *State of Florida*. Do you stand by the arguments you made in that brief?

Response: I believe that the arguments set forth in that brief were well-grounded in Supreme Court precedent and were appropriately made in my role as an advocate for my clients' interests. In upholding the Affordable Care Act's individual mandate, the Supreme Court agreed with the theory and arguments set forth in that brief. *See National Fed. Of Ind. Business v. Sebelius*, 567 U.S. 519, 574 (2012). If confirmed as a federal district court judge, I would apply Supreme Court and Ninth Circuit precedents without regard to arguments I made as an advocate. Said otherwise, applicable legal precedents will guide my decisions whether or not those precedents are consistent with arguments I previously made as an advocate.

33. After the death of Judge Reinhardt – your former boss – you wrote the following statement about his judicial philosophy, "[h]e views his prodigious reversal rate with the Supreme Court as a mark of distinction. In the Judge's view, he didn't

change the Constitution; they did, and he's not about to cede another inch of it to them." If you are confirmed to the district court will you also seek to have a prodigious reversal rate?

Response: I did not write the quoted statement. Instead, it was written by Yale Law School Dean Heather Gerken. *See* Heather Gerken, "Judge Stories," 120 Yale L.J. 529, 530 (2015). If I am confirmed to the district court, my only goal will be to apply the law faithfully, objectively, and impartially and to treat the litigants that appear before me fairly and with dignity and respect.

34. If you are asked to preside over a case where Supreme Court precedent is very clear as to the correct outcome, but you disagree with that precedent, how would you approach the case?

Response: I would apply the Supreme Court precedent.

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

Questions for the Record for P. Casey Pitts, nominated to be United States District Judge for the Northern District of California

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Numerous federal laws prohibit racial discrimination, including the Fifth, Fourteenth, and Fifteenth Amendments to the United States Constitution; the Civil Rights Act of 1866, 42 U.S.C. § 1981; Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, 2000e *et seq.*; and the Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq.*

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

Response: The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects certain unenumerated rights that are "'deeply rooted in the Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). As a judicial nominee, it would be inappropriate for me to offer an opinion as to how that test might be applied in the future.

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: Although I have not yet served as a judge, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453. I will strive to treat every litigant with respect and dignity and will ensure that each party that appears before me feels that they have been treated fairly. I will take the time necessary to develop a complete understanding of the facts and law relevant to each case, and will issue reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered. Because U.S. Supreme Court Justices play a very different role in the federal judicial system than district court judges do, I am not aware of a particular Justice whose judicial philosophy is or was analogous to the approach I intend to take in my role as a district court judge, which will involve faithfully applying the law, including existing Supreme Court and Ninth Circuit precedent.

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" and "the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Black's Law Dictionary (11th ed. 2019). If confirmed, I will

faithfully apply the originalist interpretive method in all cases where it is appropriate under binding Supreme Court or Ninth Circuit precedent. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

Response: Black's Law Dictionary defines living constitutionalism as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Black's Law Dictionary* (11th ed. 2019). If confirmed, in each case I will faithfully apply whatever interpretive method is appropriate under binding Supreme Court or Ninth Circuit precedent, and will consider "changing circumstances" only if precedent so requires. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

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

Response: If I were presented with a constitutional issue whose resolution is not controlled by binding precedent, I would apply whatever methodology is required by existing Supreme Court and Ninth Circuit precedent. If that precedent required following the original public meaning, I would do so.

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

Response: The Supreme Court has instructed that criminal statutes must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954). To determine whether a statute is impermissibly vague, the courts must consider the public's understanding of the statute, and whether the statute can reasonably be construed to ensure the public is on notice of the prohibited conduct. *Id.* at 617–18.

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

Response: The Supreme Court has instructed that the Constitution's "meaning is fixed" but that it "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedents setting forth the appropriate method for applying the Constitution to circumstances beyond those specifically anticipated by the Founders.

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 judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will faithfully apply binding Supreme Court and Ninth Circuit precedent, including *Dobbs v. Jackson Women's Health Organization*.

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 judicial nominee, it would be inappropriate for me to comment on the "correctness" of a particular judicial decision because it might suggest that my willingness to apply particular precedents will be contingent on whether I personally agree with them. If confirmed, I will faithfully apply binding Supreme Court and Ninth Circuit precedent, including *New York Rifle & Pistol Association v. Bruen*.

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

Response: Yes.

a. **Was it correctly decided?**

Response: Yes. As a judicial nominee, it is generally inappropriate for me to comment on the "correctness" of a particular judicial decision. But because *Brown* is so widely accepted, and because issues of de jure racial segregation in education are almost certainly not going to arise in future cases before me, I believe that I can state my view that *Brown* was decided correctly without violating the Code of Judicial Conduct.

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

Response: Under the Bail Reform Act, a rebuttable presumption in favor of pretrial detention exists where there is probable cause to believe that the defendant has committed certain specified offenses of federal law, 18 U.S.C. § 3142(e)(3), or has

previously been convicted of certain specified offenses of federal or state law while on release pending trial, 18 U.S.C. § 3142(e)(2).

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

Response: "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest." *United States v. Salerno*, 481 U.S. 739, 750 (1987).

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

Response: Yes. Although the First Amendment's religious clauses permits laws that "incidentally burden[] religion … so long as they are neutral and generally applicable," "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021). Government conduct is also non-neutral if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Laws that burden religious exercise and that fail to exhibit neutrality and general applicability are permissible only if they are narrowly tailored to government "interests of the highest order." *Fulton*, 141 S. Ct. at 1881.

The First Amendment also "protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2052 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

In addition to these constitutional restrictions, the Religious Freedom Restoration Act of 1993 prohibits the federal government from burdening any person's "exercise of religion even if the burden results from a rule of general applicability," unless that burden furthers a compelling government interest and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Likewise, the Religious Land Use and Institutionalized Persons Act of 2000 establishes a similar test for certain government land use decisions that burden religious exercise. 42 U.S.C. § 2000cc *et seq.*; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695–96 (2014).

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

Response: The First Amendment prohibits the government from discriminating against religious organizations or people unless doing so is narrowly tailored to serve "interests of the highest order." *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022) (citation omitted).

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

Response: The Court held that the applicants had satisfied the three requirements for preliminary injunctive relief. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). The Court held that the applicants were likely to succeed on the merits of their First Amendment claim because the regulations at issue "single[d] out houses of worship for especially harsh treatment" and were not narrowly tailored to a compelling government interest given that the regulations were "far more severe than has been shown to be required to prevent the spread of [COVID19] at the applicants' services" and "many other less restrictive rules … could be adopted to minimize the risk to those attending religious services." *Id.* at 66–67. The Court concluded that the applicants had established irreparable injury because "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Finally, the Court concluded that the State had not shown that granting the requested injunction would injure the public. *Id.* at 68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Court held that the plaintiffs were entitled to emergency injunctive relief against "California's COVID restrictions on religious exercise." *Id.* at 1297. The Court concluded that California's restrictions were non-neutral, and thus subject to strict scrutiny, if they treated "*any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). The Court also explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* The Court concluded that California's restrictions were non-neutral because they treated "some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." *Id.* at 1297. The Court also concluded that California's restrictions could not satisfy strict scrutiny because California had failed "to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities." *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 v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Court concluded that the Colorado Civil Rights Commission had failed to exhibit religious neutrality when considering a discrimination charge filed against a bakery that declined to provide a cake for a gay couple's wedding. *Id.* at 1723–24. The Commission's resolution of the charge instead exhibited "some elements of a clear and impermissible hostility toward the [baker's] sincere religious beliefs." *Id.* at 1729. Those elements included statements that "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain," as well as statements disparaging the baker's religious beliefs. *Id.* Because the Commission had failed to act with religious neutrality, the Court held that the Commission's order sustaining the charge of discrimination "must be set aside." *Id.* at 1732.

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

Response: Yes. The Supreme Court has held that, for purposes of both the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, "it is not for [the courts] to say that [a plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Instead, the federal courts must simply ask whether the beliefs reflect "honest conviction." *Id.* (citation omitted).

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

Response: The Supreme Court has held that, for purposes of both the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, "it is not for [the courts] to say that [a plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Instead, the federal courts must simply ask whether the beliefs reflect "honest conviction." *Id.* (citation omitted). The First Amendment also "protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2052 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

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

Response: The Supreme Court has held that, for purposes of both the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, "it is not for [the courts] to say that [a plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Instead, the federal courts must simply ask whether the beliefs reflect "honest conviction." *Id.* (citation omitted). The First Amendment also "protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2052 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

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

Response: The First Amendment "protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2052 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). As a judicial nominee, it would be inappropriate for me to comment on matters of religious doctrine.

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 First Amendment prohibits certain employment discrimination claims brought against religious schools by teachers responsible for "educating young people in their faith, inculcating its teachings, and training them to live their faith." *Id.* at 2064. To determine whether a particular employee's claims fell within this "ministerial exception," the Court looked beyond the particular title assigned to any particular employee and considered "what [the] employee does." *Id.* The Court concluded that the employees in the two cases before it had "vital religious duties" and were therefore covered by the ministerial exception and unable to pursue Age Discrimination in Employment Act claims against the religious schools that had employed them. *Id.* at 2066.

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 Philadelphia's refusal to contract with Catholic Social Services violated the Free Exercise Clause of the First Amendment because the non-discrimination policy at issue burdened the religion of Catholic Social Services and was not "generally applicable," given that it "incorporate[d] a system of individual exemptions, made available … at the 'sole discretion' of the Commissioner." *Id.* at 1878. The Court held that the City's failure to provide Catholic Social Services with an individual exemption was unconstitutional because the City had "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *Id.* at 1882.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that the exclusion of "sectarian" schools from Maine's tuition assistance program violated the First Amendment because it disqualified those schools from a public benefit solely on the basis of their religious character. *Id.* at 1997. The Court held that Maine's interest avoiding violations of the Establishment Clause was not sufficient to justify the exclusion because a "neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id.*

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 a school district had violated both the speech and free exercise provisions of the First Amendment by disciplining a high school football coach for his silent post-game prayers. The Court held that the district's disciplinary decision could not be justified by the compelling need to avoid an Establishment Clause violation. The Court concluded that the Ninth Circuit had erred by asking, for Establishment Clause purposes, whether a reasonable observer would have considered the coach's actions an endorsement of religion. *Id.* at 2426–27. According to the Court, that standard was derived from *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and had "long ago" been "abandoned" by the Court. *Kennedy*, 142 S. Ct. at 2427, and replaced with a focus on historical practices and understandings, *id.* at 2428. The Court explained that the coach's prayers also "did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion" potentially violative of the Establishment Clause. *Id.* at 2429.

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

***v. Fillmore County*.**

Response: In his concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch set forth his understanding of how strict scrutiny would apply to Fillmore County's refusal to provide an Amish community with an exception to its ordinance "requiring most homes to have a modern septic system for the disposal of gray water"—a requirement that burdened the Amish community's religious beliefs because they viewed their religion as prohibiting the use of such technology. *Id.* at 2431 (Gorsuch, J., concurring). According to Justice Gorsuch, the proper application of strict scrutiny would require considering whether the County had a specific compelling interest in denying the Amish community an exception, not merely whether the County had a general interest in denying exceptions. *Id.* at 2432. It would also require consideration of the exceptions provided to others, including "campers, hunters, fishermen, and owners and renters of rustic cabins," and whether any compelling interest justified permitting those exceptions but not an exception for the Amish community. *Id.* In Justice Gorsuch's view, strict scrutiny would require considering the availability of alternatives that would not burden the Amish community's religion and whether the County had proven that those alternatives were not feasible. *Id.* at 2433.

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: As a judicial nominee, it is generally inappropriate for me to offer any opinion on issues that might be raised in cases pending before me in the future. In any future case involving statutory interpretation, I will faithfully apply binding Supreme Court and Ninth Circuit precedent to resolve the questions presented.

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: I am unaware of what role, if any, I will have in shaping any trainings provided by my court. To the extent I have such a role, I will advocate for trainings that do not teach that valuing merit, hard work, or self-reliance is inherently racist or sexist.

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 judicial nominee, it would be inappropriate for me to comment on the propriety or lawfulness of any political appointment.

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

Response: Whether racial discrimination exists in the United States and what should be done to address any discrimination that does exist are important policy questions. As a judicial nominee, it would be inappropriate for me to comment on those policy questions. If confirmed, I will faithfully and objectively apply the law to the facts of each individual case that comes before me, and will ensure that all parties are treated fairly and equally regardless of their race.

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

Response: The number of justices on the U.S. Supreme Court is a policy question assigned by the Constitution to the legislative and executive branches of the United States Government. As a judicial nominee, it would be inappropriate for me to provide an opinion on that policy question.

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: *District of Columbia v. Heller* held, based on the Court's understanding of the Second Amendment's original public meaning, that the Amendment confers "an individual right to keep and bear arms." 554 U.S. 570, 595 (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: The Supreme Court has invalidated a prohibition on the possession of handguns in one's home, *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008); a requirement that lawfully possessed guns in one's home be disassembled or bound by a trigger lock, *id.* at 630–31; and a prohibition on the carrying of handguns outside the home without possession of a government license issued only upon a showing of "special need," *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122–23 (2022). Beyond those specific categories, the Court has held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and that regulations of that conduct are permissible only if "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

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: The Supreme Court has held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and that regulations of that conduct are permissible only if "consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022). The Supreme Court applies a different approach to other individual rights. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (laws that burden individuals' religious exercise and that fail to exhibit neutrality and general applicability are permissible only if they are narrowly tailored to government "interests of the highest order"). As a judicial nominee, it would be inappropriate for me to express an opinion as to which of the Supreme Court's tests provides more or less protection for enumerated rights. If confirmed, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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

Response: The Supreme Court has held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and that regulations of that conduct are permissible only if "consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022). The Supreme Court has applied a different approach to laws that infringe the constitutional right to vote. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190–91 (2008) (plurality) (arguing that court must apply a balancing test that asks whether the interests served by a restriction are sufficiently weighty to justify the severity of its burden on the right to vote); *but see id.* at 204 (Scalia, J., concurring) (arguing that "nonsevere, nondiscriminatory restrictions" are subject to a deferential standard of review while strict scrutiny is reserved "for laws that severely restrict the right to vote"). As a judicial nominee, it would be inappropriate for me to express an opinion as to which of the Supreme Court's tests provides more or less protection for the right at issue. If confirmed, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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

Response: The Supreme Court has stated that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*, 442 U.S. 114, 124 (1979). As a judicial nominee, it would be inappropriate for me to comment upon the manner in which that discretion is exercised.

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

Response: The Supreme Court has stated that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*, 442 U.S. 114, 124 (1979). Substantive rulemaking involves the development of "'legislative rules'" with "'the force and effect of law,'" and generally requires compliance with the notice-and-comment procedures of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq*. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)).

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. 2485 (2021), the Supreme Court lifted a stay of the lower court's decision invalidating the eviction moratorium imposed by the Centers for Disease Control and Prevention in response to the COVID-19 pandemic. *Id.* at 2486. The Court held that lifting the stay was appropriate because the plaintiffs were "virtually certain to succeed on the merits of their argument that the CDC … exceeded its authority" in imposing the moratorium, given that the statutory authority on which the CDC relied focused only on "the direct targeting of disease" and did not support the CDC's "unprecedented" "claim of expansive authority." *Id.* at 2486, 2489. The Court also concluded that the equities "[did] not justify depriving the applicants of the District Court's judgment in their favor," given that the harm to landlords had increased while the stay was in place while the Government's interests had decreased due to the time already provided "to help ease the transition away from the moratorium." *Id.* at 2489–90.

42. **During your time at Yale University, you wrote an article on the "Don't Ask, Don't Tell" policy. You argued, "Given the contrast between civilian institutions and the image of the military created by defenders of 'Don't Ask, Don't Tell,' it should be no surprise that few 'elite' young people choose to join the military."**

a. **Why are people who join the military not "elite"?**

Response: I do not believe that people who join the military are not "elite." To the contrary, I believe military service is extremely important and honorable, and have multiple family members who served in the United States military, including my grandfather, father, step-father, and uncle, as well as a brother-in-law who is currently serving in the United States Navy.

b. **Please define an "elite young person."**

Response: The article referenced above cited and responded to prior opinion pieces that had focused on the relatively small number of graduates from certain law schools who entered military service, and used the phrase "'elite' young people" in the context of those prior statements by others who had used the word "elite" in the first instance. I do not believe that graduates of any particular institution or institutions are more "elite" than graduates of other institutions.

43. **During your time at Yale Law School, during either then 2005-06 or 2006-07 academic year, there was a discussion on the Yale listserv (commonly referred to as "The Wall") in which several Yale students compared federal law enforcement agents to Nazis.**

a. **Do you recall this discussion?**

Response: No.

b. **Did you participate in this discussion? If so, did you refer to federal law enforcement agents as Nazis?**

Response: See my response to Question 43(a).

44. **You have both clerked for, and publicly praised, Judge Stephen Reinhardt. Over seventy former Reinhardt clerks signed an open letter seeking new procedures for reporting workplace misconduct by judges and supervisors, as well as improved training on sexual harassment.**

a. **In your time clerking for Judge Reinhardt, did you ever witness, or have knowledge of, sexual harassment in Judge Reinhardt's chambers?**

Response: No.

b. **Since your clerkship ended, did you ever witness or have knowledge of sexual harassment in Judge Reinhardt's chambers?**

Response: No.

c. **Did you have knowledge of Judge Reinhardt sorting applicants based on their perceived physical attractiveness, whereby he referred to attractive applicants as "tall," and unattractive applicants as "short," regardless of their physical height?**

Response: No.

45. **You signed a letter in support of a former law clerk, who alleged that she experienced inappropriate conduct, including sexual harassment, while clerking for Judge Reinhardt.**

a. **You previously praised Judge Reinhardt for combining "a profound commitment to justice, fairness, and equality with rigorous and uncompromising legal analysis." Is sexual harassment evidence of a profound commitment to "justice, fairness, and equality?"**

Response: Sexual harassment is not consistent with justice, fairness, or equality.

46. **Do you regret any of your previous statements or writings praising President Bill**

Clinton or Judge Reinhardt?

Response: I do not regret any previous statements or writing praising Judge Reinhardt, which were based on my personal knowledge and experiences. As you noted in Question 45, however, I also signed a letter in support of another individual who clerked for Judge Reinhardt at a different time and whose personal knowledge and experiences were different from mine. I am not aware of previous statements or writings "praising" President Bill Clinton. An October 2001 article that I authored for *The New Journal* described my personal encounter with President Clinton immediately following his speech at Yale University's 2001 tercentennial celebration, but I would not characterize the article as one "praising" him.

a. **If not, why not, given the information now available?**

Response: My statements praising Judge Reinhardt were consistent with my own personal experiences with and knowledge of him, and my *New Journal* article was consistent with my personal encounter with President Clinton after his 2001 speech. As you noted in Question 45, however, I also signed a letter in support of another individual who clerked for Judge Reinhardt at a different time and whose personal knowledge and experiences were different than mine.

Senator Ben Sasse
Questions for the Record for P. Casey Pitts
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
December 13, 2022

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

   Response: No.

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

   Response: Although I have not yet served as a judge, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453. I will strive to treat every litigant with respect and dignity and will ensure that each party that appears before me feels that they have been treated fairly. I will take the time necessary to develop a complete understanding of the facts and law relevant to each case, and will issue reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered.

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

   Response: I would not describe myself using any specific label. If confirmed, I will faithfully apply the originalist interpretive method in all cases where it is appropriate under binding Supreme Court or Ninth Circuit precedent. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

   Response: I would not describe myself using any specific label. I would note, however, that the Supreme Court has instructed that statutory interpretation always starts with the text and structure of the statute. *Milner v. Navy*, 562 U.S. 562, 570 (2011); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If confirmed, I will faithfully apply the textualist interpretive method in all cases where it is appropriate under binding Supreme Court or Ninth Circuit precedent. *See, e.g.*, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

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

   Response: The Supreme Court has instructed that the Constitution's "meaning is fixed" but that it "can, and must, apply to circumstances beyond those the Founders specifically

anticipated." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedents setting forth the appropriate method for applying the Constitution to circumstances beyond those specifically anticipated by the Founders.

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

   Response: Because U.S. Supreme Court Justices play a very different role in the federal judicial system than district court judges do, I am not aware of a particular Justice appointed since January 20, 1953 whose jurisprudence I most admire. Although I have not yet served as a district court judge, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453. I will strive to treat every litigant with respect and dignity and will ensure that each party that appears before me feels that they have been treated fairly. I will take the time necessary to develop a complete understanding of the facts and law relevant to each case, and will issue reasoned decisions that provide the parties with assurance that all of their arguments have been carefully and fairly considered.

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: A panel of the United States Court of Appeals for the Ninth Circuit lacks the power to overrule that Court's prior precedents. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("[A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule."). Circuit precedent can be modified or reversed only by the United States Supreme Court or the en banc Ninth Circuit. *Id.* Federal Rule of Appellate Procedure 35(a) provides that en banc rehearing is appropriate where "necessary to secure or maintain uniformity of the court's decisions" or in cases that involve "a question of exceptional importance." Fed. R. App. P. 35(a)(1)–(2). Rule 35 specifies that a "question of exceptional importance" may be presented if circuit precedent conflicts with "the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B).

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: 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: Statutory interpretation starts with the text and structure of the statute. *Milner v. Navy*, 562 U.S. 562, 570 (2011); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Where the text of a statute is ambiguous, legislative history may sometimes help "clear up ambiguity" but cannot "create it." *Milner*, 562 U.S. at 574; *see also Food Marketing Inst.*, 139 S. Ct. at 2364. Different forms of legislative history must be accorded different weight. Statements contained in official Senate and House Reports are most helpful, while comments made in hearings or on the floor generally have little or no significance. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *Advocate Health Carea Network v. Stapleton*, 581 U.S. 468, 137 S. Ct. 1652, 1661 (2017). Post-enactment legislative history is not relevant. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). The Supreme Court has instructed that, in certain circumstances, courts should also consider the specific purpose of a statute. *See, e.g.*, *Milner*, 562 U.S. at 571. Some states also require consideration of the maxims of jurisprudence. *See, e.g.*, Cal. Civil Code § 3509 (explaining that the maxims of jurisprudence are set forth "to aid in the[] just application" of California's Civil Code); *id.* § 3517 (setting forth maxim that "[n]o one can take advantage of his own wrong"); *id.* § 3518 (setting forth maxim that "[h]e who has fraudulently dispossessed himself of a thing may be treated as if he still had possession"); *id.* §3543 (setting forth maxim that "[w]here one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer").

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: Congress set forth the factors that must be considered when sentencing defendants in 18 U.S.C. § 3553(a). One of those factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). If confirmed, I will faithfully, objectively, and impartially apply the factors set forth in §3553(a) to each individual defendant that appears before me, regardless of the defendant's race or the race of other defendants convicted of the same crime, in order to avoid any "unwarranted sentence disparities" between individual defendants I have sentenced for the same crime.

Senator Josh Hawley
Questions for the Record

Casey Pitts
Nominee, Northern District of California

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

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

    Response: As a judicial nominee, it would be inappropriate for me to comment on particular issues that might come before me. If confirmed, I will faithfully, objectively, and impartially apply the laws governing the determination of an appropriate sentence under the unique facts of each individual case, including by considering the statutory factors set forth in 18 U.S.C. § 3553; the recommended sentence generated through application of the Sentencing Guidelines, including any sentencing enhancements; and the recommendations of the prosecution, defense, and probation office.

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

    Response: See my response to Question 1a.

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

    Response: See my response to Question 1a.

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

    Response: See my response to Question 1a.

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

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

Response: The appropriate statutory penalties for federal criminal defenses are matters of policy assigned to Congress. As a judicial nominee, it would be inappropriate for me to comment on that policy matter. If confirmed, I will faithfully apply the statutory penalties Congress has established for particular federal crimes.

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

Response: See my response to Question 2a.

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

Response: See my response to Questions 1a and 2a.

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

a. **Do you agree with that philosophy?**

Response: No. If confirmed, my role as a district court judge will be to faithfully, objectively, and impartially apply the law, including binding Supreme Court and Ninth Circuit precedent.

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

Response: I do not have any view with respect to Justice Marshall's obligations under the judicial oath.

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: Important abstention and related doctrines that could apply in cases litigated in the United States District Court for the Northern District of California include *Pullman* abstention, *Younger* abstention, *Burford* abstention, the *Rooker-Feldman* doctrine, and the *Colorado River* doctrine.

Pullman abstention applies where a case presents issues of both state law and federal constitutional law and "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy." *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941). The Ninth Circuit has held that "[i]t is appropriate to abstain under Pullman only if each of the following three factors is present: (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (citation and alteration omitted).

Younger abstention prohibits federal courts from exercising their jurisdiction in a manner that would interfere with certain ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37, 53 (1971). '"A federal court may abstain under *Younger* in three categories of cases: (1) parallel, pending state criminal proceedings, (2) state civil proceedings that are akin to criminal prosecutions, and (3) state civil proceedings that implicate a State's interest in enforcing the orders and judgments of its courts." *Herrera v. City of Palmdale*, 918 F.3d 1037, 1043 (9th Cir. 2019) (citation omitted). Under the principles of *Younger* abstention, federal courts "should almost never enjoin state criminal proceedings," and should not enjoin non-criminal proceedings, or issue orders with the same practical effect as an injunction, "*[i]f* a state-initiated proceeding is ongoing, and *if* it implicates important state interests … and *if* the federal litigant is not barred from litigating federal constitutional issues in that proceeding." *Gilbertson v. Albright*, 381 F.3d 965, 975, 978 (9th Cir. 2004) (emphasis in original). Where the federal lawsuit seeks damages rather than declaratory or injunctive relief, courts should stay federal proceedings rather than dismissing them. *Id.* at 984.

Burford abstention may apply where a case "presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)). The doctrine "allows courts to decline to rule on an

essentially local issue arising out of a complicated state regulatory scheme." *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001) (citation omitted). The Ninth Circuit "generally requires certain factors to be present for [*Burford*] abstention to apply: (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991) (quoting *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982)).

"The Rooker–Feldman doctrine recognizes that federal district courts generally lack subject matter jurisdiction to review state court judgments." *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 992 (9th Cir. 2002) (citing *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415 (1923)). "The doctrine also precludes a federal district court from exercising jurisdiction over general constitutional challenges that are 'inextricably intertwined' with claims asserted in state court." *Id.* (quoting *Feldman*, 460 U.S. at 483 n.16). Claims are inextricably intertwined with state court judgments if the success of the federal claim depends on a conclusion that the state court wrongly decided the issues, or if the relief requested would effectively reverse or void the state court's decision. *Id.*

Although "*Colorado River* is not an abstention doctrine, … it shares the qualities of one." *United States v. State Water Resources Control Bd.*, 988 F.3d 1194, 1202 (9th Cir. 2021). A stay or dismissal under *Colorado River* is reserved for "exceptional" circumstances in which the presence of a "concurrent state proceeding" provides "the clearest of justifications" for surrendering federal jurisdiction. *Id.* at 1202–03 (citations and alterations omitted). The Ninth Circuit has instructed courts to consider the following factors in determining whether to stay or dismiss a case under *Colorado River*:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

Id. at 1203.

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

   Response: Yes.

   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: I served as one of the trial court counsel of record for the defendants in *Doe et al. v. San José Unified School District Board of Education et al.*, N.D. Cal. Case No. 4:20-cv-02798-HSG, 9th Cir. Case No. 22-15827. The plaintiffs in that case challenged the San José Unified School District's decision to withdraw official recognition from certain Fellowship of Christian Athletes chapters in the district that were not in compliance with the District's non-discrimination policy. The plaintiffs contend that this withdrawal of recognition violated their rights under the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, as well as the First Amendment's speech and religion clauses. The defendants contend that the District's enforcement of its non-discrimination policy was lawful under *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011); and *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008). Plaintiffs filed their original complaint in April 2020, and I joined as additional trial court counsel for the defendants in September 2021. I did not appear in the proceedings before the Ninth Circuit.

      The *Doe v. San José Unified School District Board of Education* litigation has generated the following published decisions: *Roe v. San José Unified Sch. Dist. Bd.*, 2021 WL 292035 (N.D. Cal. Jan. 28, 2021); *Sinclair v. San José Unified Sch. Dist. Bd.*, 2021 WL 2948871 (N.D. Cal. July 13, 2021); *Sinclair v. San José Unified Sch. Dist. Bd. of Educ.*, 2021 WL 3140883 (N.D. Cal. July 26, 2021); *Sinclair v. San José Unified Sch. Dist. Bd. of Educ.*, 2021 WL 4597078 (N.D. Cal. Oct. 6, 2021); *Fellowship of Christian Athletes v. San José Unified Sch. Dist. Bd. of Educ.*, 2022 WL 1189886 (N.D. Cal. Apr. 21, 2022); *Fellowship of Christian Athletes v. San José Unified Sch. Dist. Bd. of Educ.*, 2022 WL 1786574 (N.D. Cal. June 1, 2022); *Fellowship of Christian Athletes v. San José Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075 (9th Cir. 2022), *vacated on grant of* en banc *rehearing*, _ F.4th _, 2023 WL 248320 (9th Cir. Jan. 18, 2023) (Mem.).

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

Response: If confirmed, I will apply the original public meaning of the Constitution's text in all cases where it is appropriate under binding Supreme Court or Ninth Circuit precedent. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

Response: Statutory interpretation starts with the text and structure of the statute. *Milner v. Navy*, 562 U.S. 562, 570 (2011); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Where the text of a statute is ambiguous, legislative history may sometimes help "clear up ambiguity" but cannot "create it." *Milner*, 562 U.S. at 574; *see also Food Marketing Inst.*, 139 S. Ct. at 2364. Different forms of legislative history must be accorded different weight. Statements contained in official Senate and House Reports are most helpful, while comments made in hearings or on the floor generally have little or no significance. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 481 (2017). Post-enactment legislative history is not relevant. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

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: 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: The laws of foreign nations are never controlling when interpreting the provisions of the U.S. Constitution. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575 (2005). At times, however, the Supreme Court has consulted foreign laws that provide relevant historical background for particular constitutional provisions. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (considering rights that "had become fundamental for English subjects" by the time of the founding); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249 (2022) (considering pre-founding English common law). The Supreme Court has also considered whether the laws of foreign nations confirm its independent conclusions about the scope of the Eighth Amendment's prohibition on cruel and unusual punishment. *Roper*, 543 U.S. at 575–78.

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: "[W]here … the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Prisoners 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.'" *Atwood v. Shinn*, 36 F.4th 901, 904 (9th Cir. 2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)) (emphasis in original).

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

Response: In *Glossip v. Gross*, 576 U.S. 863 (2015), the Supreme Court held that a plaintiff challenging an execution protocol under the Eighth Amendment and 42 U.S.C. § 1983 on the ground that the protocol creates a substantial risk of severe pain must "establish[] that any risk of harm was substantial when compared to a known and available alternative method of execution." *Id.* at 878.

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

Response: The Supreme Court has held that state law may provide prisoners with "a liberty interest in demonstrating [their] innocence" such that the state's procedures for vindicating that right, including by seeking access to DNA evidence, must comply with procedural due process. *Dist. Atty's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68–70 (2009). In *Osborne*, the Court concluded that Alaska's procedures satisfied that constitutional requirement. *Id.* The Court rejected the argument that prisoners have "a freestanding right to DNA evidence untethered from the liberty interest [they] hope[] to vindicate with it." *Id.* at 72. The Ninth Circuit has applied a similar procedural due process analysis, and reached the same result, in upholding a California law governing post-conviction DNA testing. *See Morrison v. Peterson*, 809 F.3d 1059 (9th Cir. 2015).

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

Response: No.

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

Response: Although the First Amendment's religion clauses permit laws that "incidentally burden[] religion … so long as they are neutral and generally applicable," "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021). Government conduct is also non-neutral if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Laws that burden religious exercise and that fail to exhibit neutrality and general applicability are permissible only if they are narrowly tailored to government "interests of the highest order." *Fulton*, 141 S. Ct. at 1881.

In addition to these constitutional restrictions, the Religious Freedom Restoration Act of 1993 prohibits the federal government from burdening any person's "exercise of religion even if the burden results from a rule of general applicability," unless that burden furthers a compelling government interest and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Likewise, the Religious Land Use and Institutionalized Persons Act of 2000 establishes a similar test for certain government land use decisions or prison/jail policies that burden religious exercise. 42 U.S.C. § 2000cc *et seq.*; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695–96 (2014); *Johnson v. Baker*, 23 F.4th 1209 (9th Cir. 2022) (applying Religious Land Use and Institutionalized Persons Act).

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: See my response to Question 13.

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: In determining whether a person's religious belief is held sincerely, courts in the Ninth Circuit do not "'question the centrality of particular beliefs or practices to a faith.'" *Jones v. Slade*, 23 F.4th 1124, 1145 (9th Cir. 2022) (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989)). The only question is whether the record establishes that the plaintiff has an "honest conviction" regarding the requirements of his or her religion. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (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: *Heller* held that the Second Amendment confers "an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), and, under that understanding of the Second Amendment, found unconstitutional a District of Columbia law that prohibited handgun possession in the home and required lawfully possessed guns to be disassembled or bound by a trigger lock, *id.* at 628–31.

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: In his dissent, Justice Holmes elaborated that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). I agree that judges

should approach each case on its merits and apply the law faithfully, objectively, and impartially, regardless of their own personal economic theories or other views.

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

Response: As a judicial nominee, it is generally inappropriate for me to comment on the "correctness" of a particular judicial decision. I note, however, that the United States Supreme Court abrogated *Lochner*'s holding in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

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: The Supreme Court has instructed lower courts to follow on-point Supreme Court precedents, even if those precedents have been criticized in other Supreme Court decisions. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Accordingly, it is not within the role of lower courts to consider whether particular opinions that have not been formally overruled are no longer good law. There may be opinions construing statutes that have been superseded by subsequent statutory enactments.

a. If so, what are they?

Response: 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: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: According to the Supreme Court, "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law"; the Court instead "has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record" and "the economic reality of the market at issue."

Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451, 466–67 (1992) (citation omitted). While not establishing a specific minimum market share requirement, the Ninth Circuit has observed "that numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power" for purposes of an unlawful monopolization claim. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995); *see also Eastman Kodak*, 504 U.S. at 481 (citing cases in which market share ranged from "over two-thirds" to "nearly 100% of the parts market and 80% to 95% of the service market"). The Supreme Court has also held that monopoly power in a market, standing alone, is not enough to establish unlawful monopolization; instead, there must also be "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

If confirmed, I will faithfully apply binding Supreme Court and Ninth Circuit precedent regarding the requirements of any monopolization or attempted monopolization claim.

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

Response: See my response to Question 19a.

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

Response: See my response to Question 19a.

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

Response: The Supreme Court held in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), that "[t]here is no federal general common law," *id.* at 78. The instances in which the federal courts are empowered to formulate "federal common law" are "few and restricted" and generally involve circumstances where either "a federal rule of decision is necessary to protect uniquely federal interests" or "Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted). Areas of law falling within the first category include "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 (citations omitted). Areas of law falling within the second category include certain

aspects of labor-management relations and certain aspects of the regulation of competition under the Sherman Act. *Id.* at 642–43.

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

Response: I would faithfully and objectively apply the state law precedents establishing the manner in which the scope of that state constitutional right should be determined.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on particular issues that might come before me. If confirmed, I will faithfully and objectively apply the relevant precedents establishing the manner in which the scope of a particular text should be determined, including whether identical text should be interpreted identically.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on particular issues that might come before me. If confirmed, I will faithfully and objectively apply the state law precedents establishing the manner in which the scope of that state constitutional right should be determined, including whether the state provision provides greater protections than the federal provision.

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

Response: Yes. As a judicial nominee, it is generally inappropriate for me to comment on the "correctness" of a particular judicial decision. But because *Brown* is so widely accepted, and because issues of de jure racial segregation in education are almost certainly not going to arise in future cases before me, I believe that I can state my view that *Brown* was decided correctly without violating the Code of Judicial Conduct.

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

Response: Federal Rule of Civil Procedure 65 gives federal courts the authority to issue injunctions and restraining orders where the requirements for injunctive relief

are satisfied. *See* Fed. R. Civ. P. 65; *Winter v. NRDC*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). In the Ninth Circuit, a court generally "cannot grant relief on a class-wide basis" "without a properly certified class." *M.R. v. Dreyfus*, 697 F.3d 706, 738 (9th Cir. 2012) (citation omitted).

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

Response: Federal Rule of Civil Procedure 65 gives federal courts the authority to issue injunctions and restraining orders where the requirements for injunctive relief are satisfied. See Fed. R. Civ. P. 65; *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

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

Response: 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: See my response to Question 23.

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

Response: The federal system established by the Constitution both "preserves the integrity, dignity, and residual sovereignty of the States …. to ensure that States function as political entities in their own right," and "'secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

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

Response: See my response to Question 5.

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

Response: Injunctive relief is provided to prevent future injury. *See, e.g.*, *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Damages, by contrast, generally provide a remedy for past injuries or punish past wrongdoing. Plaintiffs are usually entitled to determine what remedies they will seek, but must establish their entitlement to any requested remedy. *See, e.g.*, *Winter*, 555 U.S. at 32 (plaintiff seeking injunctive relief must demonstrate that the balance of the equities and the public interest favor such relief).

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

Response: The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects certain unenumerated rights that are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

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

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

Response: Although the First Amendment's religion clauses permit laws that "incidentally burden[] religion … so long as they are neutral and generally applicable," "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021). Laws that are not neutral and generally applicable are permissible only if they are narrowly tailored to government "interests of the highest order." *Id.* at 1881. The First Amendment also "protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

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

Response: No. See my response to Question 29a.

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

Response: The Supreme Court has held that, for purposes of both the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq., "it is not for [the courts] to say that [a plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). Instead, the courts' job is simply to determine whether the belief reflects "honest conviction." *Id.* (citation omitted).

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: See my response to Question 29c.

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: As a judicial nominee, it would be inappropriate for me to comment on particular issues that might come before me. If confirmed, I will faithfully and objectively apply the Supreme Court and Ninth Circuit precedents governing the relationship between the Religious Freedom Restoration Act and other federal laws.

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 do not know what Justice Scalia intended for his statement to mean. A judge's role is to apply the law faithfully and objectively, regardless of the judge's personal views. If confirmed, I will do so.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: *See* Brief of Amicus Curiae Mark P. Strasser in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd*, *Obergefell v. Hodges*, 576 U.S. 644 (2015); *UFCW Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013); *SEIU Healthcare Mich. v. Snyder*, 875 F. Supp. 2d 710 (E.D. Mich. 2012); *UFCW Local 99 v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz. 2011).

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: Whether racial discrimination exists in the United States and what should be done to address any discrimination that does exist are important policy questions. As a judicial nominee, it would be inappropriate for me to comment on those issues. If confirmed, I will faithfully and objectively apply the law to the facts of each individual case that comes before me, and will ensure that all parties are treated fairly and equally regardless of their race.

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

Response: Yes.

35. How did you handle the situation?

Response: I represented my client's interests zealously, in accordance with my ethical obligations.

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

Response: Yes.

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

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on particular issues that might come before me. If confirmed, I will faithfully and objectively apply any Supreme Court and Ninth Circuit precedents regarding this issue.

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

Response: No.

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

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

Response: In the court of considering my candidacy for this position, no one at the White House or the Department of Justice asked me to provide my views on any currently pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

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

Response: See my response to Question 40a.

c. Systemic racism?

Response: See my response to Question 40a.

d. Critical race theory?

Response: See my response to Question 40a.

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

a. Apple?

Response: Yes.

b. Amazon?

Response: Not to my knowledge.

c. Google?

Response: Not to my knowledge.

d. Facebook?

Response: Not to my knowledge.

e. Twitter?

Response: Not to my knowledge.

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

Response: Yes.

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

Response: My colleague Michael Rubin and I provided appellant's counsel with assistance in preparing the merits briefing in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). We separately filed an amicus brief in that case on behalf of various unions representing professional athletes. My colleague Michael Rubin subsequently argued the appeal on behalf of the appellant.

I provided the County of Santa Clara with assistance in preparing its merits brief in *Allen v. Santa Clara County Correctional Peace Officers Association*, 38 F.4th 68 (9th Cir. 2022). I subsequently argued the appeal on behalf of the County of Santa Clara.

In addition to these matters, I have frequently been asked by my colleagues at Altshuler Berzon LLP, by attorneys at other law firms, or by clients to provide feedback on their draft briefs.

When I have assisted others with their briefs as noted above, I have taken the necessary steps to ensure compliance with my own ethical obligations, and have refrained from providing any form of assistance in any matter where my

participation, if public, could raise concerns about the impartiality of any judge assigned to decide the matter.

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

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: I understand that the Constitution provides that the Senate must provide its "advice and consent" to the President with respect to the appointment of any Article III judge. *See* U.S. Const. art. II, § 2, cl. 2. I also understand that nominees have an obligation to be truthful and forthcoming in their testimony to the Senate Judiciary Committee. In order to protect the integrity of the judiciary, judicial nominees must also abide by the Code of Conduct for United States Judges, including by refraining from making any statements "on the merits of a matter pending or impending in any court." Code of Conduct for United States Judges Canon 3(A)(6).

Questions from Senator Thom Tillis
for Patrick Casey Pitts
Nominee to be United States District Judge for the Northern District of California

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines judicial activism as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary (11th ed. 2019). It is inappropriate for judges to decide cases on the basis of personal, political, or policy preferences instead of by applying the law faithfully, objectively, and impartially.

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

   Response: Impartiality is a requirement for every judge. All judges should aspire to be impartial, and we should expect them to exercise their authority impartially.

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

   Response: No.

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

   Response: Yes. Federal judges must recognize that their job is to interpret and apply the law, rather than to make the law.

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: I will faithfully apply the Second Amendment precedents of the United States Supreme Court and the Ninth Circuit, 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 Ass'n 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 judicial nominee, it would be inappropriate for me to comment upon questions that might come before me. If presented with these questions, I will faithfully, objectively, and impartially apply the law, including binding Supreme Court and Ninth Circuit precedents. Those precedents include, but are not limited to, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

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

Response: If confirmed, I will apply the law governing qualified immunity, including binding Supreme Court and Ninth Circuit precedents, faithfully, objectively, and impartially. Under current binding precedent, qualified immunity "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (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: As a judicial nominee, it would be inappropriate for me to comment on the sufficiency of existing law or jurisprudence. If confirmed, I will apply the law governing qualified immunity, including binding Supreme Court and Ninth Circuit precedents, faithfully, objectively, and impartially.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the propriety of existing law or jurisprudence. If confirmed, I will apply the law governing qualified immunity, including binding Supreme Court and Ninth Circuit precedents, faithfully, objectively, and impartially.

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 judicial nominee, it would be inappropriate for me to comment on the state of existing law or jurisprudence. If confirmed, I will apply the law governing patent eligibility and ineligibility, including binding Supreme Court and Ninth Circuit precedents, faithfully, objectively, and impartially. *See, e.g.*, *Alice Corp. Pty. Ltd. V. CLS Bank Int'l*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010).

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: See my response to Question 12.

    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: See my response to Question 12.

    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: See my response to Question 12.

    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: See my response to Question 12.

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: See my response to Question 12.

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: See my response to Question 12.

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: See my response to Question 12.

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: See my response to Question 12.

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: See my response to Question 12.

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: See my response to Question 12.

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: See my response to Question 12.

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: For more than a decade, I have advised a number of unions representing professional athletes on issues relating to intellectual property and represented those unions in litigation involving such issues. In that role, I have provided the unions with advice on copyright law issues, and have at times briefed issues of copyright law. *See, e.g.*, Amicus Curiae Brief of National Football League Players Association et al., 2015 WL 8988501, in *Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. 2017). I have also filed numerous briefs addressing the "transformative use" test that is used to balance right-of-publicity and First Amendment interests, which is drawn in part from copyright law's "fair use" test. *See, e.g.*, Supplemental Amicus Curiae Brief of the National Football League Players Association et al., 2012 WL 1855669, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

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

Response: For more than a decade, I have advised a number of unions representing professional athletes on issues relating to intellectual property and represented those unions in litigation involving such issues. In that role, I have at

times provided the unions with advice on issues relating to 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: For more than a decade, I have advised a number of unions representing professional athletes on issues relating to intellectual property and represented those unions in litigation involving such issues. In that role, I have at times provided the unions with advice on issues relating to intermediary liability for online service providers that host unlawful content posted by users. In addition, in 2021, I authored and filed a brief on behalf of amici curiae As You Sow and Center for Food Safety in *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200 (2002). One issue presented in that case was whether the Communications Decency Act, 47 U.S.C. § 230, preempted the plaintiffs' claims against Amazon.com under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code § 25249.5 *et seq.* The amicus brief argued, and the California Court of Appeal subsequently held, that the Communications Decency Act did not preempt the claims in that case. *Lee*, 76 Cal. App. 5th at 260.

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: I have substantial experience addressing First Amendment and free speech issues, including the intersection of free speech and intellectual property issues. I have litigated numerous cases involving First Amendment and free speech issues, including representing plaintiffs challenging state laws that infringed First Amendment speech rights, *see, e.g.*, *UFCW Local 99 v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz. 2011); representing plaintiffs challenging federal agency decisions that posed serious First Amendment concerns, *see, e.g.*, *SEIU Local 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021); *California v. Azar*, 501 F. Supp. 3d 830 (N.D. Cal. 2020); and representing defendants sued for alleged violations of the First Amendment, *see, e.g.*, *Hoekman v. Education Minnesota*, 41 F.4th 969 (8th Cir. 2022); *Brown v. AFSCME*, 41 F.4th 963 (8th Cir. 2022); *Allen v. Santa Clara County Correctional Peace Officers Ass'n*, 38 F.4th 68 (9th Cir. 2022); *Kolkowski v. Ashtabula Area Teachers Association*, 2022-Ohio-3112, 2022 WL 4076852; *Diamond v. Penn. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. Aug. 28, 2020); *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019); *Clark v. City of Seattle*, 899 F.3d 802 (9th Cir. 2018). In addition, for more than a decade, I have advised a number of unions representing professional athletes on issues relating to intellectual property, including its intersection with the First Amendment. In that

role, I have filed numerous briefs addressing that intersection. *See, e.g.*, Supplemental Amicus Curiae Brief of the National Football League Players Association et al., 2012 WL 1855669, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

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: Statutory interpretation starts with the text and structure of the statute. *Milner v. Navy*, 562 U.S. 562, 570 (2011); *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Where the text of a statute is ambiguous, legislative history may sometimes help "clear up ambiguity" but cannot "create it." *Milner*, 562 U.S. at 574; *see also Food Marketing Inst.*, 139 S. Ct. at 2364. Different forms of legislative history must be accorded different weight. Statements contained in official Senate and House Reports are most helpful, while comments made in hearings or on the floor generally have little or no significance. *See, e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *Advocate Health Carea Network v. Stapleton*, 581 U.S. 468, 137 S. Ct. 1652, 1661 (2017). Post-enactment legislative history is not relevant. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

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

Response: The Supreme Court has instructed that courts should defer to an agency's reasonable "administrative implementation of a particular [ambiguous] statutory provision … when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Even if these conditions are not satisfied, an agency's interpretation may merit some degree of deference based on its

"power to persuade," including "the merit of its writer's thoroughness, logic, and expertness, its fits with prior interpretations, and any other sources of weight." *Id.* at 235 (citation omitted). The Ninth Circuit has held that the latter form of deference applies to "the Copyright Office's views expressed in such materials" as "internal agency manuals or opinion letters." *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1042 (9th Cir. 2014).

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 judicial nominee, it would be inappropriate for me to comment on issues that could come before me. If confirmed, I will apply the law governing online service providers' obligations to address copyright infringement, including binding Supreme Court and Ninth Circuit precedents, faithfully, objectively, and impartially.

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: The Supreme Court has instructed judges to interpret statutes "in accord with the ordinary public meaning of [their] terms at the time of [their] enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, [they] would risk amending statutes outside the legislative process reserved for the people's representatives." *Id.*

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: District court judges are obligated to apply binding and on-point precedent whether or not the technological landscape has changed since that precedent was issued. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

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: As a judicial nominee, it would be inappropriate for me to comment upon whether "judge shopping" or "forum shopping" affects the outcome in any case. Pursuant to General Order No. 44 of the United States District Court for the Northern District of California, the Clerk assigns new cases to one of the multiple judges holding chambers in the courthouse or courthouses serving the county in which the action arises, and this assignment is done blindly and at random by means of an automated system. If confirmed, I intend to approach each case on its merits and apply the law, including the law governing case assignment, faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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

See my response to Question 18a.

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?

No.

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

Yes.

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?

As a judicial nominee, it would be inappropriate for me to comment on how any circuit court or other body should deal with a district court judge who fails to follow binding case law. If confirmed, I intend to approach each case on its merits and apply the law, including binding Supreme Court and Ninth Circuit precedent,

faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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

See my response to Question 19a.

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

Response: As a judicial nominee, it would inappropriate for me to comment on whether particular case-filing patterns undermine the perception of the judiciary's fairness and evenhanded administration of justice. If confirmed, I intend to approach each case on its merits and apply the law faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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: See my response to Question 20.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: See my response to Question 20.

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether another judge is behaving lawlessly. If confirmed, I intend to approach each

case on its merits and apply the law, including binding Supreme Court and Ninth Circuit precedent, faithfully, objectively, and impartially, consistent with my judicial oath. *See* 28 U.S.C. § 453.

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

Response: See my response to Question 21a.