Senator Chuck Grassley, Ranking Member
Questions for the Record
Robert Steven Huie
Judicial Nominee to the United States District Court for the Southern District of California

1. **In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?**

   Response: I am not aware of the Supreme Court or the Ninth Circuit using the term "super precedent." If confirmed as a United States District Judge, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of each case.

2. **You can answer the following questions yes or no:**

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

      Response: As a judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 states, "A judge should not make public comment on the merits of a matter pending or impending in any court." Because the holding in *Brown v. Board of Education* is unlikely to be relitigated, I can state that I believe the case was correctly decided.

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

      Response: As a judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 states, "A judge should not make public comment on the merits of a matter pending or impending in any court." Because the holding in *Loving v. Virginia* is unlikely to be relitigated, I can state that I believe the case was correctly decided.

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

      Response: As a judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 states, "A judge should not make public comment on the merits of a matter pending or impending in any court." If confirmed as a United States District Judge, the issues raised in this case or related issues could come before me, and therefore it would be inappropriate for me to opine on the correctness of this Supreme Court decision. I would be bound to follow Supreme Court precedent regardless of any personal opinions about whether they were correctly decided in the first instance.

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

      Response: Please see my response to Question 2.c.

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

Response: Please see my response to Question 2.c.

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

Response: Please see my response to Question 2.c.

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

Response: Please see my response to Question 2.c.

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

Response: Please see my response to Question 2.c.

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

Response: Please see my response to Question 2.c.

j. Was *Sturgeon v. Frost* correctly decided?

Response: Please see my response to Question 2.c.

k. Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?

Response: Please see my response to Question 2.c.

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

Response: I am not familiar with the context of the quote. Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I do not describe my views in terms of belief in a "living constitution," or using similar labels. If confirmed as a United States District Judge, I would apply Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional interpretation.

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

Response: I am not aware of Supreme Court or Ninth Circuit precedent describing "social equity" as a basis for judicial decision making. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case.

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

   Response: I am not familiar with the context of the quote, but I disagree with it. A judge's personal values are not relevant to applying the law to the facts of each case.

6. **Is climate change real?**

   Response: As a judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 states, "A judge should not make public comment on the merits of a matter pending or impending in any court." If confirmed as a United States District Judge and a case involving questions relating to climate change came before me, I would follow Supreme Court and Ninth Circuit precedent, and faithfully and impartially apply the law to the facts of each case. To the extent a party sought to offer expert testimony on the issue of whether climate change is real, I would apply the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), other applicable Supreme Court and Ninth Circuit precedent, and Federal Rule of Evidence 702, to determine the admissibility of such testimony.

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

   Response: In *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), the Supreme Court held that parents have the right to direct their children's education.

8. **Is whether a specific substance causes cancer in humans a scientific question?**

   Response: Yes.

9. **Is when a "fetus is viable" a scientific question?**

   Response: Yes.

10. **Is when a human life begins a scientific question?**

    Response: I am not aware of any scientific consensus on when life begins, or even on whether the question of when life begins is a scientific question. Regardless of whether it is a scientific question, it is a philosophical question and for some a religious question.

11. **Can someone change his or her biological sex?**

    Response: As a judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 states, "A judge should not make public comment on the merits of a matter pending or impending in any court." If confirmed as a United States District Judge and a case involving questions relating to whether a person can change his or her

biological sex, I would follow Supreme Court and Ninth Circuit precedent, and faithfully and impartially apply the law to the facts of each case.

12. Is threatening Supreme Court justices right or wrong?

Response: It is unlawful to threaten a Supreme Court justice under certain circumstances, including those identified in 18 U.S.C. § 115 ("Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member").

13. Does the president have the power to remove senior officials at his pleasure?

Response: In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2197 (2020), the Supreme Court recognized that the President's power "generally includes the ability to remove executive officials." The Court has also recognized exceptions to this power. For one, Congress may give for-cause removal protection to "multimember bodies with 'quasi-judicial' or 'quasi-legislative' functions." *Id.* at 2199. Another exception applies to "inferior officers with limited duties and no policymaking or administrative authority." *Id.* at 2200.

14. Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.

Response: That is a question for policymakers to address. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case.

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

Response: That is a question for policymakers to address. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case.

16. 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: That is a question for policymakers to address. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case.

17. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the right to bear arms is an individual right. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that such right was fundamental and applies to the states. Interpreting those cases, the Ninth Circuit provides a two-step process for analyzing whether a regulation or statute infringes on Second Amendment rights. First, courts inquire "if the challenged law affects conduct that is protected by the Second Amendment." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (citing *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). If the challenged law "burdens conduct protected by the Second Amendment – either because 'the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful,'" courts "move to the second step of the analysis and determine the appropriate level of scrutiny." *Id.* (quoting *Silvester*, 843 F.3d at 821). Under Ninth Circuit precedent, if a regulation "amounts to a destruction of the Second Amendment right," it is unconstitutional under any level of scrutiny; a law that "implicates the core of the Second Amendment right and severely burdens that right" receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, courts apply intermediate scrutiny. *Id.*

18. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

Response: The Americans with Disabilities Act of 1990, Title II, imposes antidiscrimination requirements on "public entities." 42 U.S.C. § 12132. The statutory definition of "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B). If confirmed as a United States District Judge, and if the question came before me, I would apply Supreme Court and Ninth Circuit precedent to the facts of the case.

19. Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?

Response: If confirmed as a United States District Judge, and if the question came before me, I would apply Supreme Court and Ninth Circuit precedent to the facts of the case.

20. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: A court determines whether a law "substantially burdens the exercise of religion," *Burwell v. Hobby Lobby*, 573 U.S. 682, 691 (2014), based on the record before the court.

b. How is a burden deemed to be "substantial[]" under current caselaw?

Response: In *Burwell v. Hobby Lobby*, 573 U.S. 682, 720 (2014), the Supreme Court held that the burden imposed by HHS regulations was "substantial" where "the HHS mandate demands that [the respondents] engage in conduct that seriously violates their religious beliefs," and where failure to comply would impose "severe" economic consequences.

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

Response: I am not familiar with the context of the quote. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case.

22. As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?

Response: As a general matter, rules of professional conduct for lawyers do not distinguish between civil clients who "deserve" representation and those who do not. Any personal views on whether a litigant "deserves" representation would not be relevant to my role, if confirmed, as a United States District Judge. My role would be to faithfully and impartially apply the law to the facts of each case.

23. Do Blaine Amendments violate the Constitution?

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2257 (2020), the Supreme Court held that the "no-aid" provision in Montana's state constitution discriminated based on the "religious status" of schools, and therefore was subject to strict scrutiny. In that decision, the Court noted that many of the "no-aid" provisions passed by states in the late nineteenth century "belong to a more checkered tradition shared with the Blaine Amendment of the 1870s," and that "[t]he Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.'" *Id.* at 2259 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)).

24. Is the right to petition the government a constitutionally protected right?

Response: Yes.

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

Response: In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court stated that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently

likely to provoke violent reaction." *Id.* at 20 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

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

Response: In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court stated that "'[t]rue 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." *Id.* at 359 (citation omitted).

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On January 27, 2021 and February 9, 2021, I submitted an application to serve on the United States District Court for the Southern District of California to Senator Dianne Feinstein and Senator Alex Padilla, respectively. On March 5, 2021, I interviewed with Senator Feinstein's judicial selection committee. On March 31, 2021, I interviewed with Senator Padilla's judicial selection committee. On July 1, 2021, I interviewed with

the statewide chair of Senator Padilla's committee. On August 12, 2021, I interviewed with the statewide chair of Senator Feinstein's committee. On November 7, 2021, I interviewed with attorneys from the White House Counsel's Office. Since November 11, 2021, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On January 19, 2022, my nomination was submitted to the Senate.

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

Response: I did not, and I am not aware of anyone doing so on my behalf.

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

Response: I did not, and I am not aware of anyone doing so on my behalf.

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

Response: I did not, and I am not aware of anyone doing so on my behalf.

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

Response: I did not, and I am not aware of anyone doing so on my behalf.

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

Response: I did not, and I am not aware of anyone doing so on my behalf.

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

Response: Please see my response to Question 32. In addition, following my nomination on January 19, 2022, I was in contact with lawyers from the Office of Legal Policy and the White House Counsel's Office regarding preparation for my appearance before the Senate Judiciary Committee.

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

Response: I received these questions on March 9, 2022. I prepared draft answers, which I submitted to the Office of Legal Policy for feedback. After receiving feedback, I finalized my answers for submission on March 14, 2022.

Senator Marsha Blackburn
Questions for the Record to Mr. Robert Huie
Nominee to be United States District Judge for the Southern District of California

1. **I understand that, as recently as last fall, you co-taught portions of classes at Peking University Law School in Beijing. Peking University is a public institution. Is this correct?**

   Response: In June 2020, I joined the law firm of Jones Day as an employee, with the job title "Of Counsel." A few months after I joined, my employer asked me to co-teach a portion of a course on criminal procedure for Peking University Law School that fall. The course was taught remotely and I did not travel to China. I accepted my employer's request. The following year in 2021, I agreed to do the same, also remotely. As I understand it, the course was part of a longstanding teaching relationship that Jones Day has had with the law school. To the best of my understanding, Peking University is a public institution.

2. **Could you tell us about your affiliation with Peking University, your involvement in these classes, and what you taught?**

   Response: Please see my response to Question 1. I have no other affiliation or involvement with Peking University or Peking University Law School. The portions of the course I co-taught related to criminal procedure and criminal trial practice in the United States.

3. **Did you ever travel to the People's Republic of China for this business?**

   Response: No.

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

Questions for the Record for Robert Steven Huie, Nominee for the SouthernDistrict 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. You state in your questionnaire to this Committee that you co-taught courses on U.S. criminal procedure at Peking University Law School first in December 2020 and again in November 2021. You also state that you don't have syllabi for those courses. Peking University Law School is very closely aligned with the Chinese Communist Party and since 2018 has come under scrutiny for its repressive treatment of student activists. In December 2020, the month you started co-

teaching there, the university changed its charter to emphasize its loyalty to the Communist Party, and at a time that many Chinese universities were scrubbing their charters of any mention of academic freedom.

a. Why did you choose to teach at Peking University Law School?

Response: In June 2020, I joined the law firm of Jones Day as an employee, with the job title "Of Counsel." A few months after I joined, my employer asked me to co-teach a portion of a course on criminal procedure for Peking University Law School that fall. The course was taught remotely and I did not travel to China. I accepted my employer's request. The following year in 2021, I agreed to do the same, also remotely. As I understand it, the course was part of a longstanding teaching relationship that Jones Day has had with the law school.

b. In what ways did your time there impact your judicial philosophy?

Response: My remote teaching experience did not have any impact on my judicial philosophy. I did not spend any time in China or at Peking University Law School.

2. 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: If confirmed as a United States District Judge, I would take a judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States, as well as to "administer justice without respect to persons, and do equal right to the poor and to the rich." My philosophy as a judge would be to follow that oath. I have not attempted to synthesize or characterize the philosophies of the Supreme Court justices and, therefore, cannot identify which Supreme Court justice's philosophy is most analogous to mine.

3. Please briefly describe the interpretative method known as originalism. Wouldyou characterize yourself as an 'originalist'?

Response: Black's Law Dictionary defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). I do not categorize myself using this or similar labels. If confirmed as a United States District Judge, I would apply Supreme Court and Ninth Circuit precedent regarding interpretive methods of analysis.

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

Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I do not categorize myself using this or similar labels. If confirmed as a United States District Judge, I would apply

Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional interpretation.

5. 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: In certain cases, the Supreme Court has adopted an interpretive method that looks to the original public meaning of the Constitution. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that its textual analysis of the Constitution was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). If confirmed as a United States District Judge, I would be bound by Supreme Court and Ninth Circuit precedent interpreting the Constitution.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that its textual analysis of the Constitution was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Similarly, in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020), the Supreme Court stated, in a case interpreting Title VII of the Civil Rights Act of 1964, "this Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." If confirmed as a United States District Judge, I would be bound by Supreme Court and Ninth Circuit precedent interpreting the Constitution or relevant statutes.

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

Response: The Constitution can only be amended pursuant to Article V. If confirmed as a United States District Judge, I would be bound by Supreme Court and Ninth Circuit precedent interpreting the Constitution.

8. You currently lead your firm's Diversity and Inclusion Committee. And your writings, dating back to undergraduate and law school, demonstrate the value you place on inclusivity and empathy. In a law school article you co-authored, you criticized the Court's "seriously limited" view of privacy protections, crediting its view in part to "valu[ing] law enforcement's interests more highly than individuals' privacy interests." You went on to write that "the Justices appear to

draw on their own experiences when choosing which shoes to put themselves in."

a. Should a judge's personal background and experience determine orinfluence the outcome of a court proceeding?

Response: A judge's personal background and experience should not determine or influence the outcome of a court proceeding. The article quoted above was co-authored in law school before my almost two decades of practicing law, including criminal law. The article does not reflect my current views.

b. If you are confirmed, will your personal background and experience be relevant to the outcome of cases in your courtroom? If yes, how?

Response: If confirmed as a United States District Judge, my personal background or experience would not be relevant to the outcome of cases in my courtroom. I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent without regard to my personal background or experience.

9. How is empathy for litigants relevant to your philosophy of statutory and constitutional interpretation?

Response: Empathy for litigants is not relevant to statutory or constitutional interpretation.

a. If empathy is relevant to your judicial decisionmaking, which types of people or parties do you find most emphatic?

Response: Please see my response to Question 9.

b. Which types of people are parties should not expect empathy from you as a decisionmaker?

Response: Please see my response to Question 9. All parties appearing before a United States court are entitled to be treated fairly, and to expect the same.

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

Response: There are identifiable limits to what the government may impose on or require of private institutions. With respect to religion, constitutional limits include the First Amendment's Free Exercise Clause as discussed in *Tandon v. Newsom*, 142 S. Ct. 1294 (2021), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). Statutory limits include those imposed by the Religious Freedom Restoration Act, as well as by the Religious Land Use and Institutionalized Persons Act.

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

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), the Supreme Court stated "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." The Supreme Court has similarly held that the government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65 (2020), the Supreme Court held that the applicants were entitled to a preliminary injunction blocking enforcement of an executive order that restricted capacity at worship services. In addressing the likelihood of success on the merits, the Court held that the executive order violated a "minimum requirement of neutrality" to religion, and was not "narrowly tailored." *Id.* at 66-67. In determining that a preliminary injunction was appropriate, the Court ruled that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and that the government had not shown that granting the applications would "harm the public." *Id.* at 67-68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Supreme Court held that the applicants were entitled to an injunction blocking enforcement of restrictions as applied to at-home religious gatherings. The Court held that government regulations "are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," and that the comparability of activities should be analyzed with respect to "the risk various activities pose, not the reasons why people gather." *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated "the religious neutrality that the Constitution requires" where the

commission, in deciding to issue a cease-and-desist order, displayed hostility to a cake shop's refusal on religious grounds to sell a wedding cake to a same-sex couple.

16. 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: In *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833 (1989), the Supreme Court held that, in determining the applicability of the Free Exercise Clause, one issue is whether a person's religious beliefs are "sincerely held." The Court further explained, "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834.

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

Response: Please see my response to Question 16.

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

Response: Please see my response to Question 16.

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

Response: No.

17. 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, 2066 (2020), the Supreme Court held that the First Amendment's "ministerial exception" to employment discrimination depends on whether the employee is performing "vital religious duties." The Court clarified its earlier holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), which had applied the "ministerial exception" to an employee who held a clerical title.

18. 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, 1882 (2021), the Supreme

Court held that the City of Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless that party agreed to certify same-sex couples as foster parents, violated the Free Exercise Clause of the First Amendment. The Court explained that "[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," *id.* at 1877, and held that because the City's policy "incorporate[d] a system of individual exemptions" it was subject to strict scrutiny. *Id.* at 1878. The Court further determined that the City had offered "no compelling reason why it has a particular interest in denying an exception to CSS," and concluded that the City's decision violated the Free Exercise Clause. *Id.* at 1882.

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

Response: Justice Gorsuch's concurring opinion in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), addressed a state court's analysis of the Religious Land Use and Institutionalized Persons Act, and the application of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch opined that in strict scrutiny cases, courts "must scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants," and the government must demonstrate why it cannot provide the religious claimants with the same exemption the government gives to other groups. *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring).

20. 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: I am not aware of any trainings of the type described being offered by the federal courts.

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

Response: I am not aware of any trainings of the type described being offered by the federal courts.

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

Response: I am not aware of any trainings of the type described being offered by the federal courts.

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

Response: I am not aware of any trainings of the type described being offered by the federal courts.

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

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

22. Is the criminal justice system systemically racist?

Response: That is a question for policymakers to consider. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case.

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

Response: If confirmed as a United States District Judge, and if this issue came before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

24. President Biden has created a commission to advise him on reforming the 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 question of the appropriate size of the Supreme Court is a question for policymakers. If confirmed as a United States District Judge, I would be bound by Supreme Court precedent without regard to the Supreme Court's size.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010), the Supreme Court held that this was a fundamental right applicable to the states.

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

Response: No.

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

Response: No.

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

Response: If confirmed as a United States District Judge, and if this issue came before me, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of the case.

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

Response: Prosecutorial discretion refers to the authority vested in a prosecutorial agency or office to decide whether and how to enforce a particular body of laws. A substantive administrative rule change is a change that occurs pursuant to the rulemaking authority vested by Congress in an administrative agency.

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

Response: No; only Congress may abolish the death penalty. The Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq*., sets forth the relevant law regarding the federal death penalty.

31. 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. Department of Health and Human Services*, 141 S. Ct. 2485, 2486 (2021), the Supreme Court found that the plaintiffs were "virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority" in issuing a nationwide eviction moratorium. The Supreme Court vacated a stay of the district court's judgment, which had vacated as unlawful a nationwide eviction moratorium for certain residential properties. *Id.*

Senator Josh Hawley
Questions for the Record

Robert Huie
Nominee, U.S. District Court for the Southern District of California

1. **You wrote a 2009 article where you interviewed the chair of the Southern Poverty Law Center. During the interview, you encouraged readers to support that organization. When you wrote the article, were you aware that, two years earlier, progressive journalist Alexander Cockburn said, "I've long regarded Morris Dees and his Southern Poverty Law Center as collectively one of the greatest frauds in American life"?**

   Response: No. I was not, and am not, familiar with the journalist or the context of the quote.

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

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

      Response: I am not familiar with the context of the quote. A judge's role is to faithfully and impartially apply the law to the facts of each case, rather than to do what the judge "thinks is right" without reference to the law.

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

      Response: Judges take a judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." This means that they must subordinate any personal opinions to the judicial duty of following the law.

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

   Response: The Supreme Court has "acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). However, the Supreme Court has recognized exceptions to this principle in certain contexts.

   (a) *Pullman* abstention (based on the Supreme Court's opinion in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)) is appropriate where: "(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." *Courthouse News Service v. Planet*, 750 F.3d 776, 783-84 (9th Cir. 2014) (citation omitted).

(b) *Younger* abstention (based on the Supreme Court's opinion in *Younger v. Harris*, 401 U.S. 37 (1971)) "generally precludes federal courts from intervening in ongoing state criminal prosecutions." *Trump v. Vance*, 140 S. Ct. 2412, 2420-21 (2020) (citations omitted). The doctrine "applies to only three categories of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders … uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020) (citation and internal quotation marks omitted).

(c) *Burford* abstention (based on the Supreme Court's opinion in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)) allows federal courts "to abstain from exercising jurisdiction if the 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 decisions in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) (citations and internal quotation marks omitted). Closely related is *Thibodaux* abstention (based on the Supreme Court's opinion in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959)), "where the Supreme Court approved a district court's decision to abstain from hearing an eminent domain case where state law apportioning power between the city and the state was uncertain, and any decision by the federal district court would affect state sovereignty." *City of Tucson*, 284 F.3d at 1134.

(d) *Colorado River* abstention (based on the Supreme Court's opinion in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)) provides that in situations of concurrent state and federal jurisdiction over a controversy, "exceptional circumstances" may warrant abstention. *Seneca Insurance Company, Inc. v. Strange Land, Inc.*, 862 F.3d 835, 839 (9th Cir. 2017). To determine whether such "exceptional circumstances" exist, a federal court analyzes: "(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 841-842 (citation omitted).

(e) The *Rooker-Feldman* doctrine (based on the Supreme Court's opinions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)) generally "bars subject matter jurisdiction in federal district court" where a plaintiff "asserts as a legal wrong an allegedly erroneous decision by a state court." *Benavidez v. County of San Diego*, 993 F.3d 1134, 1142 (9th Cir. 2021) (citation and quotation marks omitted).

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

   Response: No.

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

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

   Response: If confirmed as a United States District Judge, I would be bound by the methods of interpretation set forth by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that its textual analysis of the Constitution was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). If confirmed as a United States District Judge, in cases where the Supreme Court has stated that the original meaning of the constitutional provision applies, I would be bound by such precedent.

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

   Response: The Supreme Court has stated that extrinsic materials such as legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Id.*

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

      Response: The Supreme Court has stated that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Court has noted, in contrast, that "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017). If confirmed as a United States District Judge, I would be bound by Supreme Court and Ninth Circuit precedent regarding the treatment and use of legislative history.

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

Response: In *Roper v. Simmons*, 543 U.S. 551, 575 (2005), the Supreme Court noted that "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" The Court stated in the same case that the law of foreign nations "does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility." *Id.*

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

   Response: In *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019), the Supreme Court held that a prisoner must show (1) a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain, and (2) that the State has refused to adopt without a legitimate penological reason.

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

   Response: Yes.

9. **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: I am not aware of any Supreme Court or Ninth Circuit precedent recognizing such a constitutional right.

10. **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.

11. **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: The Supreme Court has held that a law that burdens the free exercise of religion ordinarily is not subject to strict scrutiny under the Free Exercise Clause if the law is neutral and generally applicable. *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 878-82 (1990). In contrast, a law that is not

neutral must satisfy strict scrutiny. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 533-34 (1993). The Supreme Court has stated that a law is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Lukumi*, 508 U.S. at 533. The Supreme Court has also stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. The Supreme Court has also recognized a "ministerial exception" to antidiscrimination laws, including those that are neutral and generally applicable. *See, e.g.*, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

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

Response: Please see my response to Question 11.

13. 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 addressing whether a claimant's religious belief is sincerely held, the Ninth Circuit has held that "the First Amendment does not extend to so-called religions which … are obviously shams and absurdities and whose members are patently devoid of religion sincerity." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (citation and quotation marks omitted). At the same time, the Supreme Court has stated that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."

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.

15. 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: Based on my reading of Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45 (1905), I understand him to mean that the Fourteenth Amendment does not support any particular economic theory. As Justice Holmes explained, "[t]his case is decided upon an economic theory which a large part of the country does not entertain." *Id.* at 75 (Holmes, J., dissenting). The Fourteenth Amendment does not require the adoption of a particular economic theory.

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

Response: In *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Supreme Court stated that the "doctrine that prevailed in *Lochner* … and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." If confirmed as a United States District Judge, consistent with subsequent Supreme Court precedent, I would not apply *Lochner*.

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

Response: As a judicial nominee, it would be inappropriate for me to opine on the correctness of Supreme Court decisions. If confirmed as a United States District Judge, it would be my duty to faithfully and impartially follow Supreme Court precedent.

a. If so, what are they?

Response: Please see my response to Question 16.

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

Response: Please see my response to Question 16.

17. 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: If confirmed as a United States District Judge, I would faithfully and impartially follow Supreme Court and Ninth Circuit precedent on the issue of whether a defendant's market share in a given case was sufficient to sustain a claim under the Sherman Act.

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

Response: Please see my response to Question 17.a.

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

Response: The Ninth Circuit has stated that "[c]ourts generally require a 65% market share to establish a prima facie case of market power." *Image Tech. Servs, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

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

Response: Black's Law Dictionary defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." *Common Law*, Black's Law Dictionary (11th ed. 2019). The Supreme Court has stated that "there is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: The Supreme Court has explained that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, if confirmed as a United States District Judge, I would consult state law in determining the scope of a state constitutional right.

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

Response: Please see my response to Question 19.

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

Response: State constitutional provisions may confer greater protections than those provided in the United States Constitution, provided that in doing so they do not violate the United States Constitution.

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

Response: As a judicial nominee, I am bound by the Code of Conduct for United States Judges. Canon 3 states, "A judge should not make public comment on the merits of a matter pending or impending in any court." Because the holding in *Brown v. Board of Education* is unlikely to be relitigated, I can state that I believe the case was correctly decided.

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

Response: The Supreme Court has explained that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Ninth Circuit has held that "although there is no bar against … nationwide relief in federal district court or circuit court, such broad relief must be *necessary* to give prevailing parties the relief to which they are entitled." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (citation and quotation marks omitted). Federal Rule of Civil Procedure 65 governs injunctions.

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

Response: Please see my response to Question 21.

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

Response: Please see my response to Question 21.

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

Response: Please see my response to Question 21.

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

Response: Black's Law Dictionary defines "federalism" as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." *Federalism*, Black's Law Dictionary (11th ed. 2019). This relationship is fundamental to our Constitution.

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

Response: Please see my response to Question 3.

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

Response: The relative advantages and disadvantages of awarding damages versus injunctive relief depend upon the facts of each case. The Supreme Court has explained that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (internal quotation marks omitted). The Supreme Court has held that these include the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

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

Response: Please see my response to Question 11.

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

Response: The Supreme Court has recognized that the First Amendment protects "the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

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

Response: Please see my response to Question 11. In *Burwell v. Hobby Lobby*, 573 U.S. 682, 720 (2014), the Supreme Court held that the burden imposed by HHS regulations was "substantial" where "the HHS mandate demands that [the respondents] engage in conduct that seriously violates their religious beliefs," and where failure to comply would impose "severe" economic consequences.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 13.

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

Response: The Religious Freedom Restoration Act of 1993 (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). RFRA provides that "Government shall not substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability" unless it demonstrates "application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b).

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.

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

a. What do you understand this statement to mean?

Response: I am not familiar with the context of the quote, but I understand it to mean that a judge's role is to set aside any personal preferences and faithfully and impartially apply the law to the facts of each case.

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

Response: I do not recall having taken the position in litigation or a publication that a statute was unconstitutional.

a. If yes, please provide appropriate citations.

30. 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.

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

Response: The issue is one for policymakers to address. If confirmed as a United States District Judge, I would apply Supreme Court and Ninth Circuit precedent to the facts of the case before me when deciding any case involving allegations of race discrimination.

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

Response: As an attorney, the positions I take in litigation are guided by the law and by my ethical responsibilities, including my duty to serve as a zealous advocate on the client's behalf, rather than by my personal preferences.

33. How did you handle the situation?

Response: Please see my response to Question 32.

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

Response: Yes.

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

Response: My views of the law have not been shaped by any specific essay contained in *The Federalist Papers*.

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

Response: If confirmed as a United States District Judge, I would faithfully follow Supreme Court and Ninth Circuit precedent, including with respect to any matter involving this question, and regardless of any personal beliefs.

37. 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.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: Yes.

b. Amazon?

Response: Yes.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: To the best of my recollection, I have not authored a brief that was filed in court without my name on it.

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

41. Have you ever confessed error to a court?

Response: To the best of my recollection, I have not confessed error to a court.

a. If so, please describe the circumstances.

42. 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 I have a responsibility to answer truthfully the questions posed to me, in a manner consistent with the California Rules of Professional Conduct and the Code of Conduct for United States Judges.

Questions for the Record for Robert Steven Huie

From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee Questions
for the Record
Robert Huie, Nominee to the United States District Court for the SouthernDistrict of California

1. How would you describe your judicial philosophy?

Response: If confirmed as a United States District Judge, I would take a judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States, as well as to "administer justice without respect to persons, and do equal right to the poor and to the rich." My philosophy as a judge would be to follow that oath.

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

Response: In approaching statutory interpretation, I would first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text of the statute is ambiguous and there is no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and persuasive authority from circuit courts outside of the Ninth Circuit. I would also look to canons of statutory construction. The Supreme Court has stated that extrinsic materials such as legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Id.*

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

Response: I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent. Where there is no binding precedent, I would consider the text of the provision at issue, holdings and methods of interpretation employed by the Supreme Court and Ninth Circuit interpreting similar provisions, and persuasive authority from circuit courts outside of the Ninth Circuit.

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

Response: If confirmed as a United States District Judge, I would be bound by the methods of interpretation set forth by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that its textual analysis of the Constitution was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United*

States v. Sprague, 282 U.S. 716, 731 (1931)).

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: In approaching statutory interpretation, I would first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text is unambiguous, I would stop there.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that its textual analysis of the Constitution was "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Similarly, in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020), the Supreme Court stated, in a case interpreting Title VII of the Civil Rights Act of 1964, "this Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." If confirmed as a United States District Judge, I would be bound by Supreme Court and Ninth Circuit precedent interpreting the Constitution or relevant statutes.

6. What are the constitutional requirements for standing?

Response: The doctrine of standing requires a plaintiff to show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819), the Supreme Court interpreted the Necessary and Proper Clause as granting implied powers to carry out those powers specifically enumerated in the Constitution, stating, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

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

Response: If confirmed as a United States District Judge, I would faithfully and

impartially apply Supreme Court and Ninth Circuit precedent in evaluating the constitutionality of such a law.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* (internal quotation marks omitted). The Supreme Court has held that such rights include the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to marital privacy, *Griswold v.* Connecticut, 381 U.S. 479 (1965); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: Please see my response to Question 9. If confirmed as a United States District Judge, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent in interpreting the Due Process Clause.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the Supreme Court identified "three broad categories of activity that Congress may regulate under its commerce power," including: (1) regulating the use of the channels of interstate commerce; (2) regulating and protecting the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) regulating those activities substantially affecting interstate commerce. In that case, the Court held that the Gun–Free School Zones Act of 1990 exceeded Congress's authority under the Commerce Clause, where the statute "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Id.* at 551.

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

Response: The Supreme Court has identified classifications based on race, religion, national origin, and in some cases alienage, as suspect, such that laws making those

classifications must survive strict scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that "suspect distinctions such as race, religion, or alienage" are protected classes for equal protection purposes).

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

Response: The principle of separation of powers and the related checks and balances between the branches of government constitute the central organizing principle of the Constitution's first three articles. Principles of separation of powers and federalism are fundamental to the Constitution.

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

Response: If confirmed as a United States District Judge, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent in addressing such a case.

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

Response: Empathy for litigants is not relevant to statutory or constitutional interpretation. To the extent that empathy encompasses a person's capacity to understand what another person has experienced, empathy may play a role in a judge's ability to understand and evaluate a witness's testimony. Additionally, with regard to sentencing, 18 U.S.C. § 3553(a) instructs judges to consider, among other things, "the history and characteristics of the defendant."

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

Response: Both are improper and judges should seek to avoid either outcome.

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

Response: As a judicial nominee, it would be inappropriate for me to opine on the active or passive nature of Supreme Court decisions.

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

Response: Black's Law Dictionary defines "judicial review" as "(1) A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. (2) The

constitutional doctrine providing for this power. (3) A court's review of a lower court's or an administrative body's factual or legal findings." *Judicial Review*, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Judicial Supremacy*, Black's Law Dictionary (11th ed. 2019).

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

Response: Elected officials take an oath to support and defend the Constitution, and are likewise subject to duly rendered judicial decisions. If confirmed as a United States District Judge, I would similarly be bound by the judicial oath, and would be bound to follow Supreme Court and Ninth Circuit precedent.

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

Response: The role of a judge is to interpret and apply the law, rather than substituting the judge's own will or preferences for the law.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extendthe precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If confirmed as a United States District Judge, my role would be to faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of each case, without conditioning that application of precedent on my personal assessment of whether the precedent was itself correctly decided.

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

Response: None.

24. The Biden Administration has defined "equity" as: "the consistent and

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

Response: I am not aware of the context of the quote. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case; I would not substitute a definition of "equity" in place of the law to be applied.

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

Response: Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." *Equality*, Black's Law Dictionary (11th ed. 2019). If confirmed as a United States District Judge, my role would be to faithfully and impartially apply the law to the facts of each case; I would not substitute a definition of "equity" in place of the law to be applied.

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

Response: Please see my response to Question 24.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of the term "systemic racism." If a case involving this issue arose before me, I would faithfully and impartially apply the law to the facts of the case.

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

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

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

Response: Please see my responses to Questions 27 and 28. The former term purports to denote a movement or theory, while the latter term purports to characterize an institution.

Senator Ben Sasse
Questions for the Record for Robert Steven Huie
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
March 2, 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. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: If confirmed as a United States District Judge, I would take a judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States, as well as to "administer justice without respect to persons, and do equal right to the poor and to the rich." My philosophy as a judge would be to follow that oath.

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

   Response: I do not categorize myself using this or similar labels. If confirmed as a United States District Judge, I would apply Supreme Court and Ninth Circuit precedent regarding interpretive methods of analysis.

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

   Response: I do not categorize myself using this or similar labels. If confirmed as a United States District Judge, I would apply Supreme Court and Ninth Circuit precedent regarding interpretive methods of analysis.

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

   Response: Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I do not describe my views in terms of belief in a "living constitution," or using similar labels. If confirmed as a United States District

Judge, I would apply Supreme Court and Ninth Circuit precedent in analyzing issues of constitutional interpretation.

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

   Response: I have not attempted to synthesize or characterize the jurisprudence of the Supreme Court Justices and, therefore, cannot identify which Supreme Court Justice's jurisprudence I admire the most.

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

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

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

   Response: Please see my answer to Question 8.

10. **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: In approaching statutory interpretation, I would first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text of the statute is ambiguous and there is no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and persuasive authority from circuit courts outside of the Ninth Circuit. I would also look to canons of statutory construction. The Supreme Court has stated that extrinsic materials such as legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Id.*

11. **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: If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case, and would be bound by Supreme Court and Ninth Circuit precedent. With respect to sentencing, the law is set forth in 18

U.S.C. § 3553(a), which requires consideration of, among other things, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Questions from Senator Thom Tillis
for Robert S. Huie
Nominee to be United States District Judge for the Southern District of California

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." *Judicial Activism*, Black's Law Dictionary (11th ed. 2019). I consider judicial activism inappropriate.

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

   Response: The public is entitled to expect impartiality from a judge.

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

   Response: No.

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

   Response: Faithfully interpreting the law could result in an outcome that a judge personally finds undesirable, but a judge must set aside any personal views and faithfully and impartially apply the law to the facts of each case.

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 would faithfully and impartially apply Supreme Court precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as well as Ninth Circuit precedent including *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

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 contrary to the Code of Conduct for me to comment on a hypothetical legal scenario that may come before me as a case. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of the case.

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

Response: The doctrine of qualified immunity applies "when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 11, (2015)). Such an inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* at 8 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). If confirmed as a United States District Judge, in determining whether qualified immunity applies I would faithfully and impartially apply the law to the facts of each case.

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

Response: That is a question for policymakers to address. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply Supreme Court and Ninth Circuit precedent on qualified immunity.

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

Response: That is a question for policymakers to address. If confirmed as a United States District Judge, my role would be to faithfully and impartially apply Supreme Court and Ninth Circuit precedent on qualified immunity.

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: If confirmed as a United States District Judge, my role would be to faithfully and impartially apply Supreme Court and Ninth Circuit precedent to the facts of each case, including those involving patent eligibility.

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

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

Response: As a judicial nominee, it would be contrary to the Code of Conduct for me to comment on a hypothetical legal scenario that may come before me as a case. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of the case.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to

produce an effect that none of the constituents provide alone or in lesser combinations?

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

Response: Please see my response to Question 13.a.

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

What about the space applications of superconductivity that benefit from this effect?

Response: Please see my response to Question 13.a.

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

Response: Section 101 of the Patent Act defines the subject matter eligible for patent protection. 35 U.S.C. § 101. The Supreme Court has long held that this section contains an implicit exception for laws of nature, natural phenomena, and abstract ideas. *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013). In *Alice Corp. Pty. Ltd. v. CLS Bank International*, 573 U.S. 208, 217 (2014), the Supreme Court explained how to "distinguish[] patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." First, courts "determine whether the claims at issue are directed to one of those patent-ineligible concepts." *Id.* Second, courts "consider the elements of each claim both individually and 'as an ordered combination' to determine whether the additional elements 'transform the nature of the claim' into a patent-eligible application." *Id.* at 217-18. If confirmed as a United States District Judge, I would apply Supreme Court and Ninth Circuit precedent on the question of patent eligibility.

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

a. What experience do you have with copyright law?

Response: In my nearly two decades of practice, I have had limited experience with copyright law. I recall analyzing, while in private practice approximately fifteen years ago, whether a client had potential copyright claims arising from a third party's unauthorized sale of the client's merchandise.

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

Response: In my nearly two decades of practice, I have had not had occasion to work on matters involving the Digital Millennium Copyright Act.

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

Response: In my nearly two decades of practice, I have not had experience with addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: I investigated and prosecuted several cases involving criminal threats of violence. In such cases, the First Amendment "true threats" doctrine, as interpreted by the Supreme Court and the Ninth Circuit, limits the scope of conduct that Congress may proscribe. As a civil litigator in private practice, I had limited experience with copyrights, but litigated disputes involving trademarks, trade secrets, and patents.

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: In approaching statutory interpretation, I would first look to the text of the statute and any binding Supreme Court and Ninth Circuit precedent addressing the statute. If the text of the statute is ambiguous and there is no binding precedent, I would look to methods of interpretation applied by the Supreme Court and Ninth Circuit addressing analogous statutes and persuasive authority from circuit courts outside of the Ninth Circuit. I would also look to canons of statutory construction. The Supreme Court has stated that extrinsic materials such as legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Supreme Court has warned that "legislative history is itself often murky, ambiguous, and contradictory." *Id.*

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 Ninth Circuit has held that the Copyright Office's interpretations of copyright law are entitled to the deference applicable under *Skidmore v. Swift & Co.*,

323 U.S. 134, 140 (1944). *See Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 (9th Cir. 2014) ("Because *Chevron* deference does not apply to internal agency manuals or opinion letters, we defer to the Copyright Office's views expressed in such materials only to the extent that those interpretations have the 'power to persuade.'").

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 contrary to the Code of Conduct for United States Judges for me to comment on a hypothetical legal scenario that may come before me as a case. If this issue were presented in a case before me, I would faithfully and impartially apply the law to the facts of the case.

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: In addressing such questions, judges should be guided by relevant Supreme Court and circuit precedent.

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: In addressing such questions, judges should be guided by relevant Supreme Court and circuit precedent.

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 opine on this issue. If confirmed as a United States District Judge, I would faithfully and impartially apply all applicable Supreme Court and Ninth Circuit precedent.

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

Response: If confirmed as a United States District Judge, I would faithfully and impartially apply Supreme Court and Ninth Circuit precedent regarding venue.

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

Response: Under the Code of Conduct for United States Judges, it would be inappropriate to decide a case in a particular way in order to attract a particular type of case or litigant. If confirmed as a United States District Judge, I would faithfully and impartially apply and follow Supreme Court and Ninth Circuit precedent, the Federal Rules of Civil Procedure, and the Local Rules of the United States District Court for the Southern District of California.

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

Response: If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case consistent with applicable law and the Code of Conduct for United States Judges.

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

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

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case.

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

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case.

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

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

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case.

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

Response: In the Southern District of California, all of the district judges sit in San Diego, so there would be no occasion to address by local rule the assignment of patent cases across divisions.

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 opine on this issue. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case.

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

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. If confirmed as a United States District Judge, I would faithfully and impartially apply the law to the facts of each case.