Nomination of Todd Wallace Robinson to the United States District Court for the Southern District of California
Questions for the Record
Submitted June 24, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   a. **When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

      It is never appropriate for lower courts to depart from Supreme Court precedent.

   b. **Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

      No, it is not proper for a district court judge to question Supreme Court precedent.

   c. **When, in your view, is it appropriate for a district court to overturn its own precedent?**

      A district court's decision has no binding force as precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). Rules 59(e) and 60 of the Federal Rules of Civil Procedure provide the standards under which a district court may reconsider a prior ruling.

   d. **When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

      The Supreme Court has held that its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998). Further, the Court has made clear that "it is this Court's prerogative alone to overrule one of its own precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). As a nominee to the district court, it would be inappropriate for me to give an opinion about when the Supreme Court should overrule its own precedent.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or

induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. **Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?**

   All Supreme Court decisions are binding on all district courts. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Roe v. Wade*.

b. **Is it settled law?**

   Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

   Yes.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. **Do you agree with Justice Stevens? Why or why not?**

   Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges make it inappropriate for me, as a judicial nominee, to comment on the merits of Justice Stevens' dissent. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

b. **Did *Heller* leave room for common-sense gun regulation?**

   The Supreme Court stated in *Heller*, 544 U.S. at 626-27, that "the right secured by the Second Amendment is not unlimited" and that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms." As a judicial nominee, it would not be appropriate for me to opine as to how *Heller* might apply in future cases that may come before the courts.

c. **Did *Heller*, in finding an individual right to bear arms, depart from decades**

of Supreme Court precedent?

Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges make it inappropriate for me, as a judicial nominee, to comment on the merits of binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all binding authority regardless of my personal views.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

   a. **Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

   In *Citizens United v. FEC*, 558 U.S. 310, 342 (2010), the Supreme Court "recognized that First Amendment protection extends to corporations." If confirmed, I will fully and faithfully apply the holding in *Citizens United*. Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges make it inappropriate for me, as a judicial nominee, to comment on the merits of binding Supreme Court precedent.

   b. **Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

   Please see my response to Question 5a above.

   c. **Do you believe corporations also have a right to freedom of religion under the First Amendment?**

   In *Burwell v. Hobby Lobby Stores Inc.,* 573 U.S. 682, 707-08 (2014), the Supreme Court held that a closely held corporation is a "person" under the Religious Freedom Restoration Act. If confirmed, I will fully and faithfully follow the holding in *Hobby Lobby* and all other applicable binding precedent on the subject. *Hobby Lobby* did not, however, decide whether the Free Exercise Clause of the First Amendment applies to corporations. Canon 3(A)(6) of the Code of Conduct for United States Judges makes it inappropriate for me, as a judicial nominee, to comment on how *Hobby Lobby* and its progeny may apply to future cases.

6. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

   The Constitution guarantees both the equal protection of the laws and the right to the free exercise of religion. If presented with a case where those two fundamental rights were in conflict, I would carefully analyze all relevant facts and then fully and faithfully apply binding Supreme Court and Ninth Circuit precedent to those facts in order to render a decision. Canon 3(A)(6) of the Code of Conduct for United States Judges makes it

inappropriate for me, as a judicial nominee, to comment further on how I may resolve such a matter.

7. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

   If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Also, please see my answer to Question 6 above.

8. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

   Please see my answer to Questions 6 and 7 above.

9. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

   a. **Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?**

      I had not previously read that webpage. I do know what specific concept or meaning the drafter of that particular phrase intended to convey.

   b. **How exactly does the Federalist Society seek to "reorder priorities within the legal system"?**

      Please see my response to Question 9a above.

   c. **What "traditional values" does the Federalist society seek to place a premium on?**

      Please see my response to Question 9a above.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No, I have not had any contact with anyone at the Federalist Society regarding my nomination.

e. Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No, I was never told that membership in the Federalist Society would make my judicial nomination more likely.

f. Why did you decide to join the Federalist Society in 2017, more than 20 years after you began practicing law?

I joined both the Federalist Society and the Federal Bar Association in 2017 because I believed that membership in those organizations would afford me an opportunity to attend lectures, seminars and debates on legal issues and procedures outside my area of expertise – criminal law.

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that "membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct]." (*Draft Ethics Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

g. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

I am aware that the Committee released an "exposure draft for review and comment" of Ethics Opinion No. 117 in January 2020. It is my understanding that the opinion is still in draft form and that the draft opinion is currently the subject of robust public debate. It is unclear if the Committee will release a formal opinion on the matter and, if so, what the specific guidance in that opinion will be.

h. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

If confirmed, I will strongly consider terminating my membership in all law-related organizations, to include the National Association of Assistant United States Attorneys, the Federalist Society and the Federal Bar Association.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

    a. **Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

       No.

    b. **Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

       No.

    c. **What are your "views on administrative law"?**

       I have spent my entire twenty-six year legal career litigating criminal cases and I do not have any specific "views on administrative law." If confirmed, I will fully and faithfully apply Supreme Court and Ninth Circuit precedent regarding administrative law, including *Chevron v. Nat. Resources Def. Council*, 467 U.S. 837 (1984).

11. Do you believe that human activity is contributing to or causing climate change?

    As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper for me to discuss my personal views on climate change because that issue may be litigated in federal court. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.")

12. When is it appropriate for judges to consider legislative history in construing a statute?

    The Supreme Court has held that courts may consider legislative history in construing a statute when the text of the statute is ambiguous, and that resort to legislative history is unnecessary when the statute is unambiguous. *Milner v. Dep't. of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I will fully and faithfully apply Supreme Court and Ninth Circuit precedent

concerning statutory interpretation and the use of legislative history.

13. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

    No.

14. Please describe with particularity the process by which you answered these questions.

    I received the questions via email on June 24, 2020. On June 25 and 26, 2020, I reviewed the questions, conducted research, and drafted my answers. I then sought comments and feedback on my draft answers from persons at the Office of Legal Policy at the United States Department of Justice. After receiving those comments and feedback, I finalized my answers and authorized them to be submitted to the Committee. My answers are my own.

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QUESTIONS FROM SENATOR WHITEHOUSE

1. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

   Yes. I commit to following applicable ethical rules before participating or maintaining membership in law-related organizations and, pursuant to Commentary to Canon 4 and ethical rules related to Canon 4, to regularly reassess whether involvement in extrajudicial activities related to the law is proper under the Code.

2. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
   a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

      I have per your request. I had not previously read or reviewed that material.

   b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

      I am aware that the judicial nomination process, particularly with respect to the nomination of Supreme Court Justices, has generated tremendous publicity and public debate. As a judicial nominee, it is not appropriate for me to comment on the legislature's task of evaluating whether or not to enact laws governing spending limits or financial disclosure requirements related to judicial nominations.

      I do agree that "[a]n independent and honorable judiciary is indispensable to justice in our society" and that all judges must "maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." *See* Code of

Conduct for United States Judges, Canon 1. Further, it is incumbent upon both judges and judicial nominees to "not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment." *See* Code of Conduct for United States Judges, Canon 2(B). If confirmed, I will strictly adhere to those tenets of independence and integrity.

c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

   I am unfamiliar with the facts and circumstances related to that statement. Thus, I do know what specific concept or meaning he meant to convey. Also, please see my response to Question 2b above.

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

   No.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

   I am unfamiliar with the facts and circumstances related to that statement. Thus, I do know what specific concept or meaning he meant to convey. Also, please see my response to Question 2b above.

f. Why did you become a member of the Federalist Society in 2017?

   I joined both the Federalist Society and the Federal Bar Association in 2017 because I believed that membership in those organizations would afford me an opportunity to attend lectures, seminars and debates on legal issues and procedures outside my area of expertise – criminal law.

3. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

   a. Do you agree with Justice Roberts' metaphor? Why or why not?

I agree to the extent that the Chief Justice was implying that judges should be neutral arbiters in disputes and treat both sides fairly and equally.

b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

A judge has an absolute duty to follow and apply the law in a fair and neutral manner. Thus, as a general matter, judges should not consider the potential consequences of a particular ruling and should do what the law requires. However, in some instances the law empowers a judge to consider and take into account the practical impact of a decision. For example, a judge considering a motion for a preliminary injunction must consider the irreparable harm to the moving party. In the criminal context, a judge may properly consider practical consequences, such as general and specific deterrence under 18 U.S.C. § 3553(a)(2)(B) and (C), in fashioning an appropriate sentence.

4. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

In applying Rule 56 and determining whether there is a "genuine dispute as to any material fact," a judge must consider the parties' factual assertions based on the evidentiary record before the court, construed in the light most favorable to the non-moving party. That decision, which is fact-based and requires the application of sound judgement and reason, is an objective one. A Rule 56 determination should not be subjective in the sense that a judge should refrain from injecting his or her personal views or feelings into the decision-making process.

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

a. What role, if any, should empathy play in a judge's decision-making process?

Empathy is an important quality for a judge to possess. A judge's ability to understand and relate to the individuals who appear in his or her court serves to promote public confidence in the judicial system. Litigants who feel that a judge has heard and understood their arguments will more likely view the judicial process favorably, even if the court does not ultimately rule in their favor. However, a judge's decisions must be based on applicable law and relevant facts, not on personal feelings.

b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

We are all products of our cumulative life experiences, and judges are no exception to that rule. However, a judge has a solemn duty to acknowledge and set aside those life experiences and to administer justice impartially and fairly to all. A judge's decisions must be based on applicable law and relevant facts, not on personal experiences.

6. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

   No.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

   It is not appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of binding precedent.

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

   It is not appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs.

9. The Seventh Amendment ensures the right to a jury "in suits at common law."

   a. What role does the jury play in our constitutional system?

      Juries play an integral role in protecting the right of civil litigants to have facts decided by a jury of one's peers. As such, the jury plays a fundamental and critical role in our constitutional system.

   b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

      Questions related to the enforcement of arbitration clauses frequently arise in litigation, and Canon 3A(6) of the Code of Conduct for United States Judges requires me to refrain from commenting on matters that may arise in potential litigation.

   c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

      Please see my answer to Question 9b above.

10. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

    The Supreme Court has issued several opinions analyzing the level of deference that should be given to fact-findings by Congress in situations where they support expanding or limiting individual rights. If confirmed, I will fully and faithfully follow Supreme Court and Ninth Circuit precedent with respect to this issue.

11. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

    a. Have you read Advisory Opinion #116?

       I have per your request.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

       i. Determining whether the seminar or conference specifically targets judges or judicial employees.
       ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
       iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
       iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
       v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

          Advisory Opinion #116 appears to summarize and emphasize particular aspects of the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees with respect to educational seminars. I will abide by the Code of Conduct for United States Judges in all respects, including with regard to educational seminars and training.

    c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

       Please see my answer to Question 11b above.

12. In your view, what is the evidentiary significance of Congress's failure to enact a proposed amendment to a previously enacted statute for how you would interpret the

previously enacted statute? In general, what significance do you attach to evidence of Congress's failure to enact any piece of proposed legislation?

Congress's failure to amend a previously enacted statute would not impact my interpretation of the previously enacted statute. In general, Congress's failure to enact any piece of proposed legislation would have little, if any, evidentiary significance.

Questions for the Record for Todd Wallace Robinson
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?**

      No.

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

      No.

2. According to your Senate Judiciary Questionnaire, you inquired about being nominated for a district court judge position in January 2017. That same year, you joined the Federalist Society.

   a. **Did anyone tell you that you would increase your chances of being nominated to the federal bench if you joined the Federalist Society?**

      No, I was never told that membership in the Federalist Society would make my judicial nomination more likely.

   b. **Why did you join the Federalist Society when you did?**

      I joined both the Federalist Society and the Federal Bar Association in 2017 because I believed that membership in those organizations would afford me an opportunity to attend lectures, seminars and debates on legal issues and procedures outside my area of expertise – criminal law.

3. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

   a. **Do you agree that training on implicit bias is important for judges to have?**

      Yes, all judges should endeavor to render decisions without bias or prejudice. Training to help identify and eliminate implicit bias is both important and necessary.

   b. **Have you ever taken such training?**

      Yes, I have attended implicit bias training offered by the United States Department of Justice.

   c. **If confirmed, do you commit to taking training on implicit bias?**

Yes, if confirmed, I will attend training on implicit bias if such training is offered to federal judges by the Administrative Office of the Courts.

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QUESTIONS FROM SENATOR BOOKER

1. You have been a member of the United States Attorney's Death Penalty Review Committee since 2005.[1] In this capacity, you evaluate cases and make recommendations on whether or not to seek the death penalty in particular cases.[2]

   a. Did you seek appointment to this committee or were you asked to join it?

      I was asked to become a member of the committee by the United States Attorney in 2005. Subsequent United States Attorneys have asked me to remain on the committee.

   b. How many cases have you recommended charging a death eligible offense?

      In my role as a committee member I have not been tasked with making recommendations regarding death eligible charging decisions. Rather, the committee members evaluate death eligible cases brought in the Southern District of California and make recommendations to the United States Attorney on whether or not seeking the death penalty is appropriate.

      The provisions of the United States Department of Justice Manual (previously called the United States Attorney's Manual) govern my ability to disclose the deliberative process in any death penalty matter. Specifically, Justice Manual Section 9-10.050 titled, "Confidentiality of Process," provides in relevant part that: "the Attorney General will make the final decision whether to seek the death penalty . . . The decision-making process preliminary to the Attorney General's final decision is confidential. Information concerning the deliberative process may only be disclosed within the Department and its investigative agencies as necessary to assist the review and decisionmaking process . . . The scope of confidentiality includes, but is not limited to: . . . (4) the views held by anyone at any level of review within the Department." However, because it is a matter of public record, I do note that the United States Attorney's Office for the Southern District of California has never sought the death penalty.

   c. What is your process for determining whether or not to recommend charging a death eligible offense?

      Please see my answer to Question 1b above.

2. You became a member of the Federalist Society in 2017.[3]

[1] SJQ at 51.
[2] *Id.*
[3] *Id.* at 5.

a. Why did you decide to join the Federalist Society?

   I joined both the Federalist Society and the Federal Bar Association in 2017 because I believed that membership in those organizations would afford me an opportunity to attend lectures, seminars and debates on legal issues and procedures outside my area of expertise – criminal law.

b. Is there any connection between your interest in becoming a member of the Federalist Society and your interest in becoming a federal judge?

   Please see my answer to Question 2a above.

3. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

   I am uncomfortable adopting a label such as "originalist" or "textualist" because those terms mean different things to different people. I believe the role of a judge is to decide the case or controversy before the court, and to do so with fidelity to precedent and, in the absence of binding precedent, with adherence to the plain text and original understanding of the statutory or constitutional provision at issue.

   I understand the term "originalism" to be an approach to constitutional interpretation based on the original public meaning of its terms at the time of ratification. The Supreme Court has recognized the importance of the Constitution's text, structure and original understanding in interpreting a constitutional provision. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were based on their respective understandings of the original public meaning of the Second Amendment.

   With respect to statutory interpretation, the Supreme Court has held that "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Marketing Institute v. Argus Leader Media,* 139 S.Ct. 2356, 2364 (2019). If "that examination yields a clear answer, judges must stop." *Id*. I understand "textualism" to be the method of statutory interpretation consistent with the Supreme Court's directive in *Food Marketing Institute*.

4. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

   Please see my answer to Question 3 above.

5. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

Yes, I would be willing to consider legislative history in appropriate cases. The Supreme Court has held that courts may consider legislative history in construing a statute when the text of the statute is ambiguous, and that resort to legislative history is unnecessary when the statute is unambiguous. *Milner v. Dep't. of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I will fully and faithfully apply Supreme Court and Ninth Circuit precedent concerning statutory interpretation and the use of legislative history.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my answer to Question 5a above.

6. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes, judicial restraint is an important value for an appellate judge to consider in deciding a case. Federal judges have a limited role under the Constitution and the principle of judicial restraint recognizes that those individuals who are more accountable to the people, such as members of the legislative and executive branches of government, should be the ones making policy decisions and enacting laws. I understand judicial restraint to mean that the limited role of a judge is to apply the law to the facts of the specific case before the court and to do so in a fair and impartial manner without regard to the judge's personal policy or outcome preferences.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[4] Was that decision guided by the principle of judicial restraint?

Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges make it inappropriate for me, as a judicial nominee, to comment on the merits of binding Supreme Court precedent, including *Heller*. If confirmed, I will fully and faithfully apply all binding authority regardless of my personal views.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[5] Was that decision guided by the principle of judicial restraint?

[4] 554 U.S. 570 (2008).
[5] 558 U.S. 310 (2010).

Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges make it inappropriate for me, as a judicial nominee, to comment on the merits of binding Supreme Court precedent, including *Citizens United*. If confirmed, I will fully and faithfully apply all binding authority regardless of my personal views.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[6] Was that decision guided by the principle of judicial restraint?

   Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges make it inappropriate for me, as a judicial nominee, to comment on the merits of binding Supreme Court precedent, including *Shelby County*. If confirmed, I will fully and faithfully apply all binding authority regardless of my personal views.

7. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[7] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[8]

   a. Do you believe that in-person voter fraud is a widespread problem in American elections?

      As a judicial nominee bound by the Code of Conduct for United States Judges, it would be improper for me to discuss my personal views on the prevalence (or lack thereof) of in-person voter fraud because that issue may be litigated in federal court. See Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

   b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

      Please see my answer to Question 7a above.

   c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

      Please see my answer to Question 7a above.

8. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5

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[6] 570 U.S. 529 (2013).
[7] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org /analysis/debunking-voter-fraud-myth.
[8] *Id.*

times more likely to be arrested for possessing drugs than their white peers.[9] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[10] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[11] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[12]

a. Do you believe there is implicit racial bias in our criminal justice system?

   Implicit racial bias exists throughout society, including in our criminal justice system.

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

   Yes. I am familiar with reputable studies which show that some racial minorities are disproportionately arrested, prosecuted and incarcerated in the United States.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

   Yes, I have attended implicit bias training offered by the United States Department of Justice.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[13] Why do you think that is the case?

   I have not studied the underlying data for the referenced report and I therefore do not have sufficient information to offer a fully informed view on the question. However, as someone who has been involved in the federal criminal justice system for over twenty-five years, I suspect that the former 100:1 crack-to-powder cocaine ratio and attendant mandatory minimum drug sentences may have played a significant role in creating the above-noted disparities.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh

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[9] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[10] *Id.*
[11] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[12] *Id.*
[13] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

mandatory minimum sentences.[14] Why do you think that is the case?

Please see my answer to Question 8d above.

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

All judges have a responsibility to ensure that bias does not have a place their courtrooms and that every litigant is treated fairly, respectfully and with dignity. A trial judge has the duty to correct racial bias exhibited by the parties (e.g., the exercise of a peremptory strike in violation of *Batson*) and an appellate judge must scrutinize the record to ensure the trial judge presided over fair and just proceedings.

9. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[15] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[16]

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue closely enough to form an opinion on this question.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this issue closely enough to form an opinion on this question.

10. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

11. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

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[14] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

[15] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates -continue-to-fall.

[16] *Id.*

12. Do you believe that *Brown v. Board of Education*[17] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Yes.

13. Do you believe that *Plessy v. Ferguson*[18] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    No.

14. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    No.

15. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[19] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    A judge's race or ethnicity is not a basis for disqualification. *See* Title 28, United States Code, Section 455.

16. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[20] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." If confirmed as a district court judge, I would fully and faithfully follow Supreme Court and Ninth Circuit precedent on this issue.

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[17] 347 U.S. 483 (1954).
[18] 163 U.S. 537 (1896).
[19] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[20] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted June 24, 2020
For the Nomination of:

Todd Wallace Robinson, to be United States District Judge for the Southern District of California

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

   a. **What is the process you would follow before you sentenced a defendant?**

      I would begin by reviewing the charging document(s) and, if the case was resolved by entry of a guilty plea, I would review the factual admissions contained in the plea agreement. If the case was resolved by a guilty verdict following trial, I would review the notes I took during the trial. I would then review the presentence report and the sentencing-related submissions of the parties, to include the parties' sentencing memoranda and supporting materials, any victim impact statement(s) and the parties' sentencing summary charts. If the parties lodged factual and/or legal objections to the presentence report, I would perform the necessary research to resolve those objections. After ascertaining that the defendant and the defendant's attorney had read and discussed the presentence report and any addendum to that report, I would conduct the sentencing hearing in accord with requirements of Rule 32(i) of the Federal Rules of Criminal Procedure. I would carefully and thoughtfully consider the arguments of counsel for the defendant and the government, any statements made by the defendant, and any other evidence offered by the parties in connection with the sentencing hearing. I would rule on any objections the parties made to the presentence report, or determine under Rule 31(i)(3)(B) that such a ruling would be unnecessary. I would then calculate the advisory Sentencing Guidelines and impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in Title 18, United States Code, Section 3553(a).

   b. **As a new judge, how would you plan to determine what constitutes a fair and proportional sentence?**

      In addition to following the process described above in Question 1a, I would draw upon my twenty-six years of experience handling criminal cases in federal court. I am keenly aware that the sentencing of criminal defendants is one of the most significant and consequential responsibilities entrusted to a district court judge. If confirmed, I will carry out that responsibility always mindful of the need for each sentence to be fair and just.

   c. **When is it appropriate to depart from the Sentencing Guidelines?**

A departure from the applicable Sentencing Guideline range is appropriate when necessary to impose a sentence which is sufficient, but not greater than necessary, to comply with the purposes set forth in Title 18, United States Code, Section 3553(a).

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

i. **Do you agree with Judge Reeves?**

If confirmed, I will follow the law without regard to any personal feelings I may have regarding the efficacy of any particular criminal statutory scheme. Further, as a judicial nominee, it would be improper for me to offer an opinion on what laws should or shouldn't be passed by the legislative branch, or which laws should be utilized by the executive branch.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my answer to Question 1di above.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

I am not personally aware of any instance where a mandatory minimum sentence was unjustly applied to a defendant.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

Yes.

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[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf.

[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   It has been my experience that the individual serving as the United States Attorney for the Southern District of California regularly meets with the judges in the district to discuss various issues, including charging decisions. Provided that it would not violate any ethical or statutory rule, I would not hesitate to share my thoughts during such a meeting. For example, "a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Code of Conduct for U.S. Judges, Canon 3.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   Department of Justice policy requires prosecutors to seek the input of the sentencing judge when evaluating an inmate's petition for executive clemency. If confirmed, I would participate in the clemency evaluation process.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

   As a federal prosecutor, I have diverted defendants to drug treatment and/or mental health programs as an alternative to incarceration. If confirmed, I will continue to consider alternatives to incarceration in appropriate cases.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

      Yes, judges play a critical role in ensuring the fairness of our justice system.

   b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

      Yes. I am familiar with reputable studies which show that some racial minorities are disproportionately arrested, prosecuted and incarcerated in the United States.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

I will give serious consideration to all qualified applicants, regardless of race or sex.

Senator Josh Hawley
Questions for the Record

Todd Wallace Robinson
Nominee, U.S. District Court for the Southern District of California

1. **In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set out the precedent of judicial deference that federal courts must afford to administrative actions.**

    a. **Please explain your understanding of the Supreme Court's holding in *Chevron.***

    In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., the Supreme Court held that when statutory ambiguity leaves "a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. 837, 843-44 (1984).

    b. **Please describe how you would determine whether a statute enacted by Congress is ambiguous.**

    The Supreme Court stated in *Chevron* that a court should conduct the step one analysis by "employing traditional tools of statutory construction." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). After using the traditional tools of statutory construction, if the statutory provision's best reading is apparent, it is not ambiguous. However, if it is still unclear which interpretation of two or more competing meanings is the best reading, then the statute is ambiguous.

    c. **In your view, is it relevant to the *Chevron* analysis whether the agency that took the regulatory action in question recognized that the statute is ambiguous?**

    Although a court may properly consider the agency's reasoning during step two of the *Chevron* analysis, it is never proper for a court to abdicate its constitutional duty to say what the law is.

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

The free exercise clause of the First Amendment states that the government “shall make no law . . . prohibiting the free exercise of religion.” That clause protects a citizens’ right to practice their religion as they please, so long as the practice does not run afoul of “public morals” or a “compelling” governmental interest. State and local government actions that are facially neutral toward religion are judged by the standard set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990). However, according to the Supreme Court’s ruling in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the “compelling interest” standard remains applicable to federal statutes. The “compelling interest” test is set forth in the Religious Freedom and Restoration Act (RFRA), which was passed by Congress in 1993. *See also Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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

No, they are not synonymous and coextensive. The Supreme Court has held that “[a]lthough a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (internal citations omitted).

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

A statute burdens the free exercise of religion if it “puts substantial pressure on an adherent to modify his behavior and to violate his beliefs,” *Thomas v. Review Bd. Of Ind. Employment Sec. Div.,* 450 U.S. 707, 718 (1981), including when, if enforced, it “results in the choice to the individual of either abandoning his religious principles or facing criminal prosecution.” *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

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

In *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008) the Court found that the “sincerity test set forth in *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) and *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) determines whether the Free Exercise Clause applies” to an asserted claim. The focus of the inquiry is on whether an individual’s belief is both sincerely held and religious in nature. *Id*. at 885.

d. **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?**

Congress enacted the Religious Freedom Restoration Act (RFRA) "in order to provide very broad protections for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (citing *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 693 (2014). RFRA was enacted in response to the Supreme Court's decision in *Employment Div., Dept. of Human Resources or Ore. v. Smith* 494 U.S. 872 (1990), which held that neutral, generally applicable laws that incidentally burden the exercise of religion do not violate the Free Exercise Clause of the First Amendment. However, in *City of Boerne v. Flores*, 521 U.S. 507, 532-536 (1997), the Supreme Court held that Congress had exceeded its authority by making RFRA applicable to the States and their subdivisions under Section 5 of the Fourteenth Amendment. Thus, unlike other federal laws governing areas like employment and education, the provisions of RFRA remain applicable to federal legislation but not to States and their subdivisions.

3. **What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?***

In *Heller*, the Supreme Court ruled that the Second Amendment protects an individual's right to keep and bear arms, unconnected with service in a militia, for traditionally lawful purposes, such as self-defense within the home.

4. **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?**

Article III of the Constitution empowers judges to decide "cases" and "controversies," which are disputes between specific parties. Judges are obligated to apply the law to the facts before them and, when appropriate, to fashion a remedy to address the harm suffered by the litigants before the court. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (a court's injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). Whether a district court judge has to power to enter a nationwide or universal injunction is an unsettled area of law. *See, e.g., Trump v. Hawaii*, 138 S.Ct. 2392, 2424-2429 (2018) ("In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.") (Justice Thomas, concurring). Canon 3(A)(6) of the Code of Conduct for United States Judges makes it

inappropriate for me, as a judicial nominee, to comment further on how I may resolve such matters.

5. **Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."**

   The original public meaning is how a textual provision was reasonably understood by a well-informed reader at the time of the provision's enactment. It does not rely on the subjective intent of the people who wrote the text. The Supreme Court has looked to the original public meaning of words at the time they were adopted when interpreting constitutional and statutory provisions, and the quotation above accurately reflects that approach. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will fully and faithfully apply all Supreme Court and Ninth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

6. **Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes Jr. wrote that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."**

   a. **What do you believe Justice Holmes meant by that statement, and do you agree with it?**

      Sociologist Herbert Spencer used statistics to support his evolutionary theory that societies begin simple and then progress to a more complex form. I believe that Justice Holmes referenced Mr. Spencer's "social statistics" to emphasize his belief that the due process clause did give the Court the right to second-guess the wisdom of legislative policies which may or may not further the progress of society. I agree that a judge should never allow his or her personal feelings regarding the efficacy or wisdom of a particular law to influence the outcome in a case.

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

      Constitutional jurisprudence during the so-called "*Lochner* era" was dominated by the use of substantive due process to invalidate legislation found to infringe on what were deemed fundamental economic liberties, particularly the freedom of contract. Currently, the Supreme Court requires that implied fundamental rights be "objectively, deeply rooted in the Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist

if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed, I will fully and faithfully follow all binding Supreme Court and Ninth Circuit precedent, including *Glucksberg*.