Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Ruth Bermudez Montenegro
Nominee to be United States District Judge for the Southern District of California

1. **In what situation(s) does qualified immunity not apply to a law enforcement officer in California?**

   Response: In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that held that government officials performing discretionary functions are shielded from liability unless the plaintiff shows that the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. As a sitting federal magistrate judge and if confirmed to be a federal district court judge, I will continue to faithfully apply existing Supreme Court precedent and Ninth Circuit precedent to the facts before me.

2. **What is the legal basis for a nationwide injunction?**

   Response: Rule 65 of the Federal Rules of Civil Procedure governs injunctions. A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

   The Supreme Court has held that injunctive relief is most appropriate when there is "irreparable injury and inadequacy of legal remedies," including damages. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), the Supreme Court instructed that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." The Supreme Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant relief to the parties. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

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

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

4. **In a False Claims Act case, what is the standard used by the Ninth Circuit for determining whether a false claim is material?**

   Response: A claim under the False Claims Act (FCA) requires: (1) a false statement or fraudulent course of conduct, (2) made with the requisite scienter (or knowledge that it was false), (3) that was material, causing (4) the government to pay out money. Materiality, for purposes of determining whether a misrepresentation is actionable under the FCA, looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation. *Universal Health Servs., Inc. v. U. S. ex rel. Escobar*, 579 U.S. 176

(2016). The FCA defines the term "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Although the requirement is "demanding," the Supreme Court has held that there is not a bright-line test for determining whether the FCA's materiality requirement has been met. *See Escobar*, 579 U.S. at 194. In *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201 (9th Cir. 2019), the Ninth Circuit instructed that the Supreme Court has given a list of relevant, but not necessarily dispositive, factors in determining whether the false claims were material. These factors include "whether the government decided to expressly identify a provision as a condition of payment. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." *Godecke*, 937 F.3d at 1213 (internal citation and quotations omitted).

5. **What legal standard and circuit precedents would you apply in evaluating whether a regulation or statute infringes on Second Amendment rights?**

   Response: The Second Amendment protects an individual right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that is fully applicable to the states and municipalities, *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

   Applying *Heller*, the Ninth Circuit has adopted a two-step framework to evaluate Second Amendment challenges. At the first step, the court asks if the challenged law affects conduct that is protected by the Second Amendment, and it bases that determination on the historical understanding of the scope of the right, by considering whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood. If the challenged restriction burdens conduct protected by the Second Amendment—either because the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful—the court moves to the second step of the two-step analysis and determines the appropriate level of scrutiny: if a regulation amounts to a destruction of the Second Amendment right, it is unconstitutional under any level of scrutiny, while 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, the court applies intermediate scrutiny. *See Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021); *see also Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021).

6. **What is the legal standard for "threats" in the Ninth Circuit?**

Response: In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court held that the First Amendment permits a State to ban a true threat. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia*, 538 U.S. at 359 (internal citations omitted). The Ninth Circuit has held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *United States v. Cassel*, 408 F.3d 622, 633 (2005); *see also United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011).

7. **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: Judges should faithfully apply Supreme Court precedent and precedent in their respective Circuit. If no controlling precedent, the court should look to Supreme Court precedent and their respective Circuit precedent for the interpretative method to be applied to the subject constitutional provision, as well as considering persuasive authority from other Circuits, if any.

8. **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: All federal judges are obligated to fulfill their judicial oaths to administer justice without respect to persons and do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all the duties incumbent upon them under the Constitution and laws of the United States. *See* 28 U.S.C. § 453.

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

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

      Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment on the correctness of any Supreme Court decision involving issues that may come before me. However, I make an exception for a small number of cases involving issues that are not likely to be relitigated such as *Brown v. Board of Education*, 347 U.S. 483 (1954) (de jure racial segregation) and *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry). As a sitting judge and if confirmed, I will continue to faithfully follow all Supreme Court precedent.

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

      Response: Please see my response to Queston 9a.

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

Response: Please see my response to Question 9a.

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

Response: Please see my response to Question 9a.

e. Was Planned Parenthood v. Casey correctly decided?

Response: Please see my response to Question 9a.

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

Response: Please see my response to Question 9a.

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

Response: Please see my response to Question 9a.

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

Response: Please see my response to Question 9a.

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

Response: Please see my response to Question 9a.

10. Do you believe that we should defund police departments? Please explain.

Response: As a sitting judge and judicial nominee, it would be inappropriate to comment on this matter. Decisions regarding funding for police departments are made by policymakers, not judges.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate to comment on this matter. Decisions regarding funding for police departments are made by policymakers including municipalities, not judges.

12. 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.

13. **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.

14. **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.

15. **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.

16. 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.

17. 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: I submitted an application for the United States District Court for the Southern District of California to Senator Dianne Feinstein on January 30, 2021, and to Senator Alex Padilla on February 10, 2021. I was interviewed by the selection committees for Senator Feinstein on March 12, 2021, and Senator Padilla on April 13, 2021. After my initial interview with each of the selection committees, I interviewed with the statewide Chair of Senator Padilla's selection committee on April 30, 2021, and the statewide Chair of Senator Feinstein's selection committee on June 30, 2021. On May 28, 2021, I interviewed with Counsel for Senator Padilla. On June 17, 2021, I interviewed with Senator Padilla.

In July 2021, Counsel for Senator Padilla informed me that my name was being passed onto the White House for further consideration. On July 29, 2021, I interviewed with attorneys from the White House Counsel's Office. On August 3, 2021, I was advised that I had been selected for Justice Department vetting. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On November 3, 2021, President Biden submitted my nomination to the Senate.

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

Response: No.

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

Response: No.

20. 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: No.

21. 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: No.

22. 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: No.

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

Response: On July 28, 2021, I was contacted by an attorney at the Office of White House Counsel and I interviewed with attorneys from that Office the following day. On August 3, 2021, I was advised that I had been selected for Justice Department vetting. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On November 3, 2021, President Biden announced my nomination.

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

Response: On December 22, 2021, I received these questions from the Office of Legal Policy. I reviewed each question, conducted research, reviewed my records and opinions issued, and drafted my responses. I submitted my draft responses to the Office of Legal Policy for feedback, which I considered, before submitting my final responses to the Senate Judiciary Committee.

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

Questions for the Record for Ruth Bermudez Montenegro, Nominee for the District Court for the Southern District of California

I. Directions

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

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

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

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

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

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

II. Questions

1. You have spoken at multiple naturalization ceremonies in the past about your family's experience immigrating to the United States. What do the American dream and American government system mean to you?

Response: The United States serves as a beacon of light, freedom, and justice for the rest of the world. In our great country, we all have the opportunity through hard work and determination to achieve the American dream. This is what is truly inspiring and great about America.

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: My judicial philosophy is that the courts belong to the people. I work hard every day to ensure that people feel that they are being heard and treated with dignity and respect. I work diligently to decide all cases before me impartially, fairly, and promptly consistent with the applicable law. I have not studied the judicial philosophies of the Supreme Court Justices and therefore, I cannot speak as to which Supreme Court Justice's philosophy would be most analogous to my own.

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

Response: Originalism refers to the method of statutory and constitutional interpretation that focuses on the original public meaning of the text at the time of adoption. I do not categorize myself using any labels. As a sitting federal magistrate judge and if confirmed to be a federal district court judge, I would continue to faithfully follow Supreme Court precedent and Ninth Circuit precedent regardless of the interpretative method that the precedent employed.

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 (11th ed. 2019) defines "living constitutionalism" as the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values. I do not categorize myself using any labels. As a sitting judge and if confirmed, I would continue to faithfully follow Supreme Court precedent and Ninth Circuit precedent.

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 *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Supreme Court instructed that a textual analysis of the Constitution should be "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.'"

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, 576 (2008), the Supreme Court instructed that a textual analysis of the Constitution should be "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.'" (internal citations omitted).

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

Response: The Constitution is an enduring document with a fixed quality to it. The Constitution does not change unless amended pursuant to Article V. As a sitting judge and if confirmed, I will continue to faithfully follow Supreme Court precedent and Ninth Circuit precedent in applying the Constitution to the cases before me.

8. 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: The Supreme Court has held that there are limits as to what the government may impose or require of private institutions. Constitutional limits include the First Amendment's Free Exercise Clause, *see e.g.*, *Tandon v. Newsom*, 142 S. Ct. 1294 (2021), and additionally the federal government is subject to the Religious Freedom Restoration Act, *see e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

9. 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 (1993), the Supreme Court held that ordinances that are not neutral to religion must be justified by a compelling interest and must be narrowly tailored to advance that interest.

10. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order

violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: The Supreme Court held that the applicants met all of the requirements for a preliminary injunction and were entitled to such because they had shown (1) a likelihood of success on their First Amendment claims (applicants had made a "strong" showing that the restrictions violated a "minimum requirement of neutrality" by specifically naming religious entities while allowing the secular businesses to be categorized as "essential"); (2) denial of relief would lead to irreparable injury ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); and (3) granting relief would not harm the public (government had not demonstrated that the requested relief would harm the public, as it did not claim that attendance at the applicants' services resulted in the spread of the disease).

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

Response: The Supreme Court held that (1) governmental 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; (2) whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation; (3) the government has the burden to establish that the challenged law satisfies strict scrutiny; and (4) the withdrawal or modification of the COVID-19 restrictions does not moot a case challenging such restrictions.

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

Response: Yes.

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

Response: The Supreme Court held that the Colorado Civil Rights Commission acted in violation of the State's obligation of religious neutrality and was therefore inconsistent with the First Amendment's guarantee that laws be applied in a manner that is neutral toward religion. A government regulation is not neutral if it demonstrates hostility to a religious viewpoint or on the basis of religious status.

14. 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 Dep't. of Employment Sec.*, 489 U.S. 829 (1989), the Supreme Court has held that a person's sincerely held religious belief need not conform to

the commands of a particular religious organization. The operative question is whether the professed belief is sincerely held.

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

Response: In *Frazee v. Illinois Dep't. of Employment Sec*., 489 U.S. 829 (1989), the Supreme Court instructed that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without judicial evaluation of the validity of their interpretations.

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

Response: In *Frazee v. Illinois Dep't. of Employment Sec*., 489 U.S. 829 (1989), the Supreme Court instructed that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without judicial evaluation of the validity of their interpretations.

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to opine about the official positions of any church. As a sitting judge and if confirmed, I would continue to faithfully apply Supreme Court precedent and Ninth Circuit precedent.

15. 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: With respect to employment discrimination laws, the Supreme Court recognizes a "ministerial exception" to Title VII employment discrimination claims where enforcement of such laws would interfere with the employment relationship between a religious institution and its ministers or important lay teachers. The "ministerial exception," which derives from the religion clauses of the First Amendment, prevents civil courts from adjudicating employee discrimination claims.

16. 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: The Supreme Court held that the City's refusal to contract with the Catholic foster care provider unless the provider certified same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. The City's actions burdened the Catholic foster care provider's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents, in violation of its stated religious beliefs. The Court further held that the City's law was not neutral and generally applicable because it allowed for exceptions to the anti-discrimination requirement at the sole discretion of the Commissioner. The Supreme Court found that the City's requirement did not serve a compelling governmental interest and its certification requirement was not narrowly tailored.

17. 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 concurred that the case should be reconsidered in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021) and that the Minnesota Court of Appeal did not appropriately consider the Free Exercise Clause issue. Justice Gorsuch highlighted three aspects of *Fulton* that apply in strict scrutiny cases — the standard of review that governs Religious Land Use and Institutionalized Persons Act claims. Justice Gorsuch explained that (1) the government must establish its interest with specificity ("precise" rather than "broadly formulated") and with respect to the specific religious community; (2) with strict scrutiny, the government must show why it cannot provide the same exemption given to other groups and why it cannot follow the rules from other jurisdictions; and (3) the state must demonstrate that its policy is narrowly tailored "with evidence" and not "supposition."

18. If you are to join the district court, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

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

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

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

Response: To my knowledge, the district court judges in the Southern District of California are not involved in decisions as to which trainings are provided or the content of such trainings. In my experience, any trainings provided by the court are consistent with the law.

19. 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: To my knowledge, the district court judges in the Southern District of California are not involved in decisions as to which trainings are provided or the content of such trainings. In my experience, any trainings provided by the court are consistent with the law.

20. Is the criminal justice system systemically racist?

Response: The matter of whether the criminal justice system is systemically racist is one for policymakers to consider. As a sitting judge and if confirmed, I would decide any case involving racially disparate treatment fairly, impartially, and consistent with the law.

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

Response: I have not handled a case presenting this specific question. If a case involving such a matter came before me, I would apply Supreme Court precedent and Ninth Circuit precedent pertinent to the type of appointment at issue.

22. 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: Any questions related to the size of the Supreme Court are best addressed by Congress. As a sitting judge and if confirmed, I am bound by the United States Supreme Court's precedent irrespective of its size.

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

Response: The Second Amendment protects an individual right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that is fully applicable to the states and municipalities, *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: No.

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

Response: No.

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

Response: In general, the executive branch has broad authority to determine whether to prosecute a specific violation of the law. But if a case presenting this question involving a broader decision to decline to enforce a specific law came before me, I will carefully apply Supreme Court precedent and Ninth Circuit precedent to the facts of the case.

27. 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 of a prosecuting agency to decide where to focus its resources and whether or how to enforce, or not enforce, the law. Substantive administrative rule change refers to the change that may occur pursuant to the authority vested in the agency by Congress and pursuant to the procedures set forth by law. The Administrative Procedure Act which applies to all agencies of the federal government provides the general procedures for various types of rulemaking.

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

Response: Congress has the authority to abolish or amend the federal death penalty which is found at 18 U.S.C. § 3591. The President has the power to grant reprieves and pardons for federal offenses in individual cases.

29. Does a federal judge have authority to not apply the death penalty if it appropriately requested by a prosecutor?

Response: The duty of a judge is to uphold the law and do so, regardless of personal views about that law. In general, the U.S. Department of Justice makes an initial determination about whether it will seek the death penalty for a specific death-eligible crime. A death sentence must be imposed by a jury.

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

Response: The Supreme Court ruled that Centers for Disease Control and Prevention had exceeded its authority in issuing a nationwide ban on eviction. In vacating the stay, the Court held that the associations had substantial likelihood of success on the merits ("it is difficult to imagine them losing"), and the balance of equities weighed against a stay of judgment pending appeal. *Alabama Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2488.

Senator Josh Hawley
Questions for the Record

Ruth Montenegro
Nominee, U.S. District Court for the Southern District of California

1. **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 that statement or its context. Judges must impartially and fairly apply the law to the facts without consideration of their own personal desired outcome and that is what I have done since 2012 as a state trial court judge, state court commissioner, and a federal magistrate judge.

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

    Response: Please see my response to Question 1a.

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

Response: The *Younger* abstention doctrine cautions against federal court's interference with ongoing state criminal, civil, and administrative proceedings. Federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts. *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732 (9th Cir. 2020); *see also Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018).

The *Pullman* abstention doctrine counsels that federal courts avoid decisions of federal constitutional questions when the case may be disposed of on questions of state law. *United States v. State Water Res. Control Bd.*, 988 F.3d 1194 (9th Cir. 2021).

The *Burford* abstention doctrine is utilized to avoid needless conflict with the administration by a state of its own affairs. Abstention is appropriate where certain factors apply "(1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v.*

First Maryland Sav. & Loan, Inc., 942 F.2d 1401, 1405 (9th Cir. 1991); *see also Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982).

The *Colorado River* abstention doctrine is invoked to avoid duplicative litigation, either in two different federal courts or in parallel proceedings in state and federal courts. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

The *Rooker-Feldman* abstention doctrine limits federal court review of state court decisions. The Ninth Circuit has a two-part test to determine whether the *Rooker-Feldman* doctrine bars jurisdiction over a complaint filed in federal court. First, the federal complaint must assert that the plaintiff was injured by legal error or errors by the state court. Second, the federal complaint must seek relief from the state court judgment as the remedy. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004).

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

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

        Response: No.

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

    Response: In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Supreme Court instructed that a textual analysis of the Constitution should be "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.'" Where Supreme Court precedent instructs that the original meaning of a constitutional provision applies, I will apply precedent to those particular constitutional provisions.

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

    Response: I would begin by first looking to Supreme Court precedent and Ninth Circuit precedent that addressed the relevant statute. If there was no binding precedent, I would review the plain language of the statute. If the language of the statute is unambiguous, I would not look any further and apply the law to the facts and record before me. However, if ambiguity remains after examining the plain language, I would look to the canons of statutory construction, examine analogous statutes and binding or persuasive authority interpreting those statutes, and consider legislative history. The Supreme Court has instructed that legislative history should

be used to interpret only an ambiguous statute, not to create an ambiguity in clear statutory language. *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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 instructed that some types of legislative history are more probative of Congressional intent than others. For example, statements made and reports written after enactment are usually found to be the least persuasive and generally are not considered part of the legislative history, as well as floor debates in that it reflects at best the understanding of an individual Congress member.

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

Response: The laws of foreign nations are not applicable when interpreting provisions of the U.S. Constitution.

6. 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 *Glossip v. Gross*, 576 U.S. 863, 878 (2015), the Supreme Court held that a prisoner must first demonstrate the existence of a known and available method of execution that entails a lesser risk of pain and second, that the State's refusal to adopt the alternative method is not supported by a legitimate penological reason.

7. 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: Please see my response to Question 6.

8. 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 precedent or the Ninth Circuit precedent recognizing such constitutional right.

9. 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.

10. 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 held in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) that a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge under the Free Exercise Clause.

The Supreme Court has instructed that seemingly facially neutral and general applicable laws may not be subject to rational basis review. In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that governmental 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. "It is no answer that a State treats some comparable secular businesses or activities as poorly as or even less favorably than the religious exercise at issue." *Id.* at 1296 (internal citation omitted). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that laws that are not neutral to religion must be justified by a compelling interest and must be narrowly tailored to advance that interest.

The Supreme Court held in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) that the City of Philadelphia's law was not neutral and generally applicable because it allowed for exceptions to the anti-discrimination requirement at the sole discretion of the Commissioner and the City's requirement did not serve a compelling governmental interest and its certification requirement was not narrowly tailored. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court found that the Colorado Civil Rights Commission acted in violation of the State's obligation of religious neutrality and was therefore inconsistent with the First Amendment's guarantee that laws be applied in a manner that is neutral toward religion.

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 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 10.

12. 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 *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989), the Supreme Court instructed that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without judicial evaluation of the validity of their interpretations.

13. 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: The Second Amendment confers an individual right to keep and bear arms.

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.

14. 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: I am not familiar with the full context of Justice Holmes' statement and therefore, I have not formed an opinion as to what he meant.

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

Response: *Lochner* is no longer binding Supreme Court precedent and thus, I would not apply it.

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

a. If so, what are they?

Response: As a sitting judge and judicial nominee, it would not be appropriate to comment on my personal opinions, if any, regarding this question. As a sitting judge and if confirmed, I will continue to faithfully follow Supreme Court precedent.

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 15a.

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

a. Do you agree with Judge Learned Hand?

Response: As a sitting judge and a judicial nominee, it would not be appropriate to comment on the correctness of any particular Supreme Court opinion. If confirmed, I will faithfully follow all Supreme Court and Ninth Circuit precedent.

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

Response: Please see my response to Question 16a.

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: To date, I have not presided over any cases involving a monopoly. As a sitting judge and if confirmed, I will faithfully follow all Supreme Court and Ninth Circuit precedent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines federal common law as the 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. There is no longer a general federal common law applicable to all disputes heard in federal court. *Erie v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

18. 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: State constitutional provisions are to be interpreted pursuant to applicable state law. State constitutional provisions can confer greater protections than the U.S. Constitution.

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

Response: Please see my response to Question 18.

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

Response: State constitutional provisions can confer greater protections than the U.S. Constitution.

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment on the correctness of any Supreme Court decision involving issues that may come before me. However, I make an exception for a small number of cases involving issues that are not likely to be relitigated such as *Brown v. Board of Education*, 347 U.S. 483 (1954) (de jure racial segregation) and *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry).

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

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

Response: Rule 65 of the Federal Rules of Civil Procedure governs injunctions. A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

The Supreme Court has held that injunctive relief is most appropriate when there is "irreparable injury and inadequacy of legal remedies," including damages. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), the Supreme Court instructed that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." The Supreme Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to

grant relief to the parties. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

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

Response: Please see my response to Question 20a.

21. 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 20.

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

Response: Federalism is a system of government in which power is divided by a constitution between a national government and state governments. Generally, an overarching national government is responsible for broader governance of larger territorial areas, while the smaller subdivisions, states, and cities govern the issues of local concern. Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other. Federalism limits government by creating two sovereign powers—the national government and state governments—thereby restraining the influence of both.

23. 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 2.

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

Response: Courts issue injunctive relief in order to require or prevent a party from taking specific actions in instances where monetary damages are not adequate to compensate the party for their injuries. The advantages and disadvantages of awarding damages versus injunctive relief would be dependent on the facts and circumstances of the case.

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

Response: The Supreme Court has held that the Constitution protects unenumerated fundamental rights. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that due process protects those fundamental rights and liberties that are objectively, deeply rooted in this 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." *Glucksberg*, 521 U.S. at 721 (internal quotations and citation omitted). These rights include the right to privacy that encompasses the right to marital privacy and to use contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); the right to have children and to direct their education (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); and a right to terminate a pregnancy (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). The Supreme Court has identified that the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for recognition of such rights.

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

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

Response: The Free Exercise Clause protects citizens' right to practice their religion and is a foundational and fundamental right. Please also see my response to Question 10.

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 Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs

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 10.

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: In *Frazee v. Illinois Dep't of Employment Sec*., 489 U.S. 829 (1989), the Supreme Court instructed that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without judicial evaluation of the validity of their interpretations.

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 provides that the federal government cannot substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1.

With respect to employment discrimination laws, the Supreme Court recognizes a "ministerial exception" to Title VII employment discrimination claims where enforcement of such laws would interfere with the employment relationship between a religious institution and its ministers or important lay teachers. *Our Lady of Guadalupe v. Morrisey-Berru*, 140 S. Ct. 2049 (2020). In *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that a state-based scholarship program that provides public funds to allow students to attend private schools cannot discriminate against religious schools under the Free Exercise Clause.

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: Yes. *Nible v. Fink*, No. 16-cv-2849-BAS-RBM, 2019 WL 1547261 (S.D. Cal. Apr. 8, 2019).

27. 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 understand this statement to mean that judges must impartially and fairly apply the law to the facts without consideration of their own personal desired outcome. As a sitting federal magistrate judge and if confirmed to be a federal district court judge, I will continue to faithfully apply the law fairly and impartially.

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

Response: No.

a. If yes, please provide appropriate citations.

29. 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.

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

Response: The matter of whether America is systemically racist is one for policymakers to consider. As a sitting judge and if confirmed, I would decide any case involving allegations of racially disparate treatment fairly, impartially, and consistent with the law. As a federal magistrate judge, my courtroom is a place where every litigant is treated fairly and equally.

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

Response: I cannot recall any specific situation. However, in representing clients I zealously and ethically advocated for their positions.

32. How did you handle the situation?

Response: See my response to Question 31.

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

Response: As a sitting judge and if confirmed, I will continue to faithfully apply the law fairly and impartially.

34. 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 Federalist Paper.

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment as to my personal beliefs. As a sitting judge and if confirmed, I will continue to faithfully follow Supreme Court precedent and Ninth Circuit precedent.

36. 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: I appeared as a witness in two civil cases involving the El Centro Elementary School District. In *Bock v. El Centro Elementary Sch. Dist., et al.*, Case No.: ECU0584, Imperial County Superior Court, I testified regarding the District's policies, procedures, and initial investigation. Plaintiff, a teacher, alleged harassment by fellow teachers, hostile work environment, and constructive discharge. I also testified in *Sornia v. El Centro Elementary Sch. Dist., et al.*, Case No.: 04-CV-00332-JM (S.D. Cal. Feb. 18, 2004) regarding the District's policies, procedures, and initial investigation. Plaintiff, a bus driver, alleged sexual harassment, sex discrimination, and retaliation.

37. 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.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No, not to my recollection

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

40. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

41. 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: Nominees take an oath and must testify truthfully including stating their views on their judicial philosophy when appearing before the Senate Judiciary Committee.

Questions for the Record for Ruth Bermudez Montenegro
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
Ruth Montenegro, Nominee to the District Court for the Southern District of California

1. How would you describe your judicial philosophy?

Response: My judicial philosophy is that the courts belong to the people. I work hard every day to ensure that people feel that they are being heard and treated with dignity and respect. I work diligently to decide all cases before me impartially, fairly, and promptly consistent with the applicable law.

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

Response: I would begin by first looking to Supreme Court precedent and Ninth Circuit precedent that addressed the statute at issue. If there was no binding precedent, I would review the plain language of the statute. If the language of the statute is unambiguous, I would not look any further and apply the law to the facts and record before me. However, if ambiguity remains after examining the plain language, I would look to the canons of statutory construction, examine analogous statutes and binding or persuasive authority interpreting those statutes, and consider legislative history.

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

Response: I would look to Supreme Court precedent and Ninth Circuit precedent. If there was no controlling precedent, I would look to Supreme Court precedent and Ninth Circuit precedent for the interpretative method to be applied to the relevant constitutional provision. I would also consider persuasive authority from other Circuits, if any.

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

Response: When interpreting the Constitution, I am bound to follow Supreme Court precedent and Ninth Circuit precedent as to the role of the text and the original public meaning of the text of the relevant constitutional provision. For example, the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), looked to the original public meaning of the Second Amendment when it held that the Constitution protected an individual's right to keep and bear arms.

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

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: Please see my responses to Question 2 and Question 4. I would follow Supreme Court precedent and Ninth Circuit precedent as to the role of the text and the original public meaning of the text of the statute or constitutional provision at issue.

6. What are the constitutional requirements for standing?

Response: The Supreme Court provided a three-part test for establishing standing in federal court: (1) the plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

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

Response: In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that Congress has implied powers under the Necessary and Proper Clause (Article I, Section 8). As a sitting judge and if confirmed, I would faithfully follow Supreme Court precedent.

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

Response: As a sitting judge and if confirmed, I would faithfully follow Supreme Court precedent and Ninth Circuit precedent in evaluating the constitutionality of that law.

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

Response: The Supreme Court has held that the Constitution protects unenumerated fundamental rights. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that due process protects those fundamental rights and liberties that are objectively, deeply rooted in this 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." *Glucksberg*, 521 U.S. at 721 (internal quotations and citation omitted). These rights include the right to privacy that encompasses the right to marital privacy and to use contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); the right to have children and to direct their education (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); and

a right to terminate a pregnancy (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). The Supreme Court has identified that the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for recognition of such rights.

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9. Fundamental rights are protected under substantive due process. The Supreme Court has identified that the due process clauses of the Fifth and Fourteenth Amendments are the primary sources for recognition of such rights.

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: As a sitting judge and judicial nominee, any personal views that I might have, if any, regarding the scope of substantive due process are irrelevant. I will faithfully follow Supreme Court precedent and Ninth Circuit precedent. *Lochner* has been abrogated and therefore, is a precedent I would not apply.

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that Congress may only regulate three categories of activity pursuant to the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce and activities that threaten such instrumentalities, persons or things; and (3) activities that substantially affect interstate commerce. (internal citations omitted).

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 determined that race, national origin, alienage, and religion are suspect classes that are subject to strict scrutiny.

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

Response: Checks and balances are of fundamental importance in our constitutional structure. The checks and balances system provides each branch of government with individual powers to check the other branches and prevent any one branch from becoming too powerful.

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: As a sitting judge and if confirmed, I will continue to faithfully apply Supreme Court precedent and Ninth Circuit precedent.

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

Response: Empathy should not play a role in a judge's consideration of a case.

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

Response: Neither is worse than the other; both are not appropriate.

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 sitting judge and judicial nominee, it would be inappropriate for me to comment as to any personal opinions I might have, if any, as to any changes, increases, or trends regarding the invalidation of federal statutes by the Supreme Court. As a sitting judge and if confirmed, I will continue to faithfully follow Supreme Court precedent and Ninth Circuit precedent.

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

Response: Judicial review refers to the power of the Supreme Court to review the actions of the other branches of government and determine whether constitutional. Judicial supremacy refers to the idea that the Supreme Court is the final, authoritative interpreter and arbiter of constitutional issues.

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 are duty bound and take an oath to follow the Constitution.

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: It is the duty of a judge to impartially decide all cases consistent with the applicable law without consideration of personal opinions or views.

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

Response: A lower court judge must faithfully apply precedent without consideration as to whether in agreement with the decision or reasoning. As a sitting judge and if confirmed, I will continue to faithfully follow Supreme Court precedent and Ninth Circuit precedent.

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. The factors to be considered in sentencing are set forth in 18 U.S.C. § 3553(a) and does not include the above-referenced group identity(ies).

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment as to any personal views that I might have, if any, regarding such definition. As a sitting judge and if confirmed, I would continue to decide all cases before me impartially, fairly, and promptly consistent with the applicable law.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as fairness, impartiality and evenhanded dealing and "equality" as the quality, state, or condition of being equal; esp., likeness in power or political status.

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 "systemic racism." It is my understanding that the term has been used to refer to racial discrimination, racial disparities, and racial bias in the criminal justice system.

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

Response: Black's Law Dictionary (11th ed. 2019) 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. I do not have a personal definition of "critical race theory."

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

Response: I do not have a personal definition for either term. Therefore, I do not have any personal opinion or view as to distinguishing one term from another.

30. In a speech given at a United States Customs and Border Protections event in El Centro, California you said that empowering women "is especially important now when it appears that we are regressing in terms of women's rights." (emphasis in original) In what ways are we as a society regressing in terms of women's rights?

Response: In 2017, I was invited by the U.S. Customs and Border Protection – El Centro Sector to serve as the keynote speaker for the Women's Equality Day event. My remarks in question related to my sentiments that women should seek leadership positions in both the private and public sector.

Questions from Senator Thom Tillis for Ruth Bermudez Montenegro
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 (11th ed. 2019) 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. No, I do not consider judicial activism to be appropriate.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No, judges should not second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome. Judges must impartially and fairly apply the law to the facts without consideration of their own personal desired outcome.

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

   Response: Judges must impartially and fairly apply the law to the facts without consideration of their own personal desired outcome. In upholding my oath as a sitting judge and if confirmed, I will continue to impartially and fairly apply the law to the facts without consideration of my own personal desired outcome

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No. A judge must faithfully and impartially interpret and apply the law to the facts without consideration of their own politics or policy preferences.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: As a sitting judge and if confirmed, I will faithfully follow Supreme Court precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and its progeny, as well as applicable Ninth Circuit precedent.

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to comment on hypothetical legal scenarios that may come before me. If I was faced with such issue, I would research existing Supreme Court precedent and Ninth Circuit precedent and faithfully apply the law to the case before me.

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

Response: In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that held that government officials performing discretionary functions are shielded from liability unless the plaintiff shows that the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. As a sitting federal magistrate judge and if confirmed to be a federal district court judge, I will continue to faithfully apply existing Supreme Court precedent and Ninth Circuit precedent to the case before me.

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

Response: The matter would be one for policymakers to consider. As a sitting judge and if confirmed, I will continue to faithfully apply the law to the case before me.

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

Response: Please see my response to Question 9.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: I recognize the critical importance of patent eligibility cases. I cannot comment on Supreme Court jurisprudence, but I understand the importance of having judicial opinions that apply clear guidance and certainty to the litigants involved.

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

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

Response: As a sitting judge and judicial nominee, it would be inappropriate for me to comment on a hypothetical legal scenario that may give the impression that I have prejudged matters that may come before me. As a sitting judge and if confirmed, I will continue to follow Supreme Court precedent and Ninth Circuit precedent and faithfully apply the law to the case before me.

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 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally

occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTechCo* 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 13a.

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

Response: Please see my response to Question 13a.

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 13a.

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 13a.

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

Response: Please see my response to Question 12.

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

a. What experience do you have with copyright law?

Response: To the best of my recollection, I do not recall litigating such matters as an attorney or presiding over such matters as a judicial officer.

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

Response: None.

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

Response: None.

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

Response: As a former attorney representing public agencies, I cannot recall any specific cases involving such issues. As a sitting magistrate judge, I have presided over cases involving First Amendment issues but none in the context of intellectual property issues.

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: I would begin by first looking to Supreme Court precedent and Ninth Circuit precedent that addressed the relevant statute. If there was no binding precedent, I would review the plain language of the statute. If the language of the statute is unambiguous, I would not look any further and apply the law to the facts and record before me. However, if ambiguity remains after examining the plain language, I would look to the canons of statutory construction, examine analogous statutes and binding or persuasive authority interpreting those statutes, and consider legislative history. The Supreme Court has instructed that legislative history should be used to interpret only an ambiguous statute, not to create an ambiguity in clear statutory language. *See, e.g., Milner v. Dep't of the* Navy, 562 U.S. 562, 574 (2011).

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: In *Christensen v. Harris County*, 529 U.S. 576 (2000*),* the Supreme Court held that interpretative guidance issued by federal agencies is entitled to respect, but only to the extent that those interpretations have the power to persuade. The agency's interpretation does not warrant *Chevron*-style deference.

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: If that matter came before me as a sitting judge and if confirmed, I would research existing Supreme Court precedent and Ninth Circuit precedent and apply the law to the facts before me.

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: As a sitting judge and if confirmed, I will continue to faithfully and impartially apply all existing laws.

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: As a sitting judge and if confirmed, I will continue to faithfully and impartially apply all existing laws. I will continue to work diligently to handle the issues before me and apply Supreme Court precedent and Ninth Circuit precedent to the best of my ability.

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

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

Response: In my district, any patent cases would be randomly assigned so "judge shopping" and "forum shopping" are not an issue.

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

Response: It is the duty of a judge to be neutral and impartially and fairly decide all cases before them consistent with applicable law.

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: It is the duty of a judge to be neutral and impartially and fairly decide all cases before them consistent with applicable law.

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

Response: As a sitting judge and if confirmed, I would continue to decide all cases before me impartially, fairly, and promptly consistent with the applicable law.

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to

transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to comment as to any personal views that I might have, if any, on this topic. As a sitting judge and if confirmed, I would continue to decide all cases before me impartially, fairly, and promptly consistent with the applicable law.

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

Response: Please see my response to Question 19a.

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

Response: In my district, there is a random assignment process, and I am not aware of there being an issue with perception of fairness and 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: Please see my response to Question 20.

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

Response: Please see my response to Question 20.

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

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

Response: As a sitting judge and judicial nominee, it would not be appropriate for me to opine on such matter.

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

Response: Please see my response to Question 21a.