Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Gabriel Sanchez
Nominee to the Court of Appeals for the Ninth Circuit
November 10, 2021

1. **At your hearing, you were asked about your time serving as Deputy Legal Affairs Secretary to then-California Governor Jerry Brown and your work on Proposition 57, California's Public Safety and Rehabilitation Act.**

   a. What was your role in Governor Brown's office? Did it involve supporting Governor Brown's agenda?

   Response: I served as a deputy legal affairs secretary and legal advisor to Governor Brown. My work broadly involved three areas of responsibility: (1) managing state and federal prison class actions, appeals, and other significant litigation; (2) providing confidential legal advice to the Governor and senior staff on legislation, appointments, executive clemency and parole, and criminal justice policy reforms; and (3) overseeing the adoption of regulations implementing the Public Safety and Rehabilitation Act of 2016 (Proposition 57) and other policy reforms within the California Department of Corrections and Rehabilitation. As a staff member to Governor Brown, my work involved carrying out and supporting the Governor's policy vision and agenda.

   b. Please briefly discuss the context surrounding Proposition 57 and how that ballot measure related to the Supreme Court's decision in *Brown v. Plata*.

   Response: Proposition 57 was enacted in response to a federal court order requiring the State of California to reduce its prison population to 137.5 percent of design capacity. At the time the federal court order was entered, the three-judge district court found that the State's prison system had operated at 200 percent of design capacity for at least eleven years. *See Brown v. Plata*, 563 U.S. 493, 502 (2011). The federal court found that unconstitutionally overcrowded prison conditions were preventing the State from providing constitutionally adequate medical and mental health care to inmates. The federal court's prison reduction order was affirmed by the United States Supreme Court, the only time the Supreme Court has affirmed a prisoner release order under the Prison Litigation Reform Act. *Id.* at 545.

   Governor Brown faced the risk that the three-judge federal district court would order the indiscriminate release of thousands of state prison inmates unless the State established a more systematic way to determine how to safely lower the prison population. As a result, he developed a parole consideration process for non-violent offenders and a system of sentencing credits for inmates who complete rehabilitative and educational programs, believing this would enhance public safety by requiring state prisoners to earn their release from prison, comply with the federal court order, and incentivize inmates to rehabilitate themselves to become law abiding members of society.

No inmate was automatically released under Proposition 57. The law offered parole consideration for non-violent offenders and the opportunity for most inmates to earn a reduction in sentence by completing rehabilitative and education programs. In November 2016, Proposition 57 was approved by 64 percent of California voters, and California achieved compliance with the prison population reduction order one year ahead of schedule. The state prison population has remained below the federal court-ordered population cap ever since.

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Senator Chuck Grassley, Ranking Member
Questions for the Record
Justice Gabriel Sanchez
Judicial Nominee to the United States Circuit Court of Appeals for the Ninth Circuit

1. **You can answer the following questions yes or no:**
    a. **Was *Brown v. Board of Education* correctly decided?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Gonzales v. Carhart* correctly decided?**
    f. **Was *District of Columbia v. Heller* correctly decided?**
    g. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    h. **Was *Sturgeon v. Frost* correctly decided?**
    i. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

    Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, I generally refrain from commenting on the correctness of any United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all applicable Supreme Court precedents and would continue to do so if confirmed to the Ninth Circuit.

    Prior judicial nominees have made an exception with respect to *Brown v. Board of Education* and *Loving v. Virginia*. *Brown* overruled *Plessy v. Ferguson*, ending legally enforced racial segregation in public education. *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). In *Loving*, the Supreme Court struck down a state law banning interracial marriage, holding that "the Equal Protection Clause demands that racial classifications … be subjected to the 'most rigid scrutiny,'" and concluding there was "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Loving v. Virginia*, 388 U.S. 1, 11 (1963). Because it is unlikely that *de jure* racial segregation in schools or anti-miscegenation laws would ever be reimposed in this country, I join other judicial nominees in agreeing that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

2. **During your confirmation hearing, you noted that answering a question regarding your personal opinion as to a variety of straightforward questions would constitute prejudging a case. You were unwilling to state when you believe life begins because you did not want to prejudge the issue. You were unwilling to state the number of biological sexes there are because you did not want to prejudge the issue. In that vein:**

If you acknowledge the existence of gravity, does that mean that you will prejudge a slip and fall case if you are confirmed to the Ninth Circuit and such a case appears before you?

Response: Certain factual matters are so broadly accepted and not subject to reasonable debate that acknowledging these facts reaches beyond mere personal opinion. *See, e.g*., Fed. R. Civ. Proc. Rule 201 (a court may take judicial notice of facts that are not subject to reasonable dispute because they are either generally known or capable of accurate and ready determination). The existence of gravity is one such indisputable fact, and my acceptance of this scientific principle would not call into question whether I have formed an opinion as to slip and fall cases. Other topics, such as when life begins or the number of biological sexes, are matters of significant philosophical, religious, political, and public debate, and the subject of ongoing litigation in federal and state courts. As a sitting judge, I am bound by canons of judicial ethics that do not permit me to opine on pending litigation or to voice an opinion publicly that may cast doubt on my ability to be impartial. For those reasons, it would be inappropriate for me to share my personal views as to those topics and in doing so give the impression that I have prejudged an issue that may come before me.

3. **Under Supreme Court and Ninth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: "Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard." *Rand v. Rowland*, 154 F.3d 952, 957 n. 4 (9th Cir. 1998) (en banc); see Fed. R. Civ. Proc. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.") A trial court, sitting as factfinder, weighs the evidence, makes credibility findings, and draws reasonable inferences from the evidence, and a reviewing court must generally accept such factual findings unless they are clearly erroneous. *See Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123 (1969). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985).

A question of law is generally understood to be an issue left for the court to decide, such as the interpretation of a statute, contract, or rule of procedure. *See, e.g.*, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) ("Contract interpretation is a question of law that we review de novo"). The Supreme Court has also defined a "question of law" as "the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020).

4. **Do you believe in a "living constitution"?**

   Response: My understanding is that different meanings have been ascribed to the term "living constitution." If it is meant to support the view that the Constitution's meaning is not fixed and evolves through generations, then I disagree with that notion. The Supreme Court has held that the Constitution protects fundamental rights that are enumerated in the Bill of Rights, rooted in our nation's history and traditions, *Washington v Glucksberg*, 521 U.S. 702, 719-721 (1997), or are central to our views of individual liberty and autonomy, *Obergefell v. Hodges*, 576 U.S. 644 663-665 (2015), and these concepts have an enduring quality.

5. **Please discuss your criminal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, and how many times you have argued before the court in a criminal matter.**

   Response: Approximately eleven years of my legal and judicial career have involved criminal legal experience. As an associate at Munger, Tolles & Olson LLP, I represented a defendant in a white-collar criminal matter through client investigation and the pre-trial phase. In my seven years as the California Governor's Office, I oversaw the Governor's review of parole grants to inmates sentenced to indeterminate life sentences, and advised the Governor on executive clemency decisions, criminal laws, sentencing enhancements and punishments, statutory and regulatory provisions concerning credit-earning and parole review of state prisoners, and various other criminal law and corrections matters.

   In my three years as an associate justice on the California Court of Appeal, I have authored or joined in approximately 250 opinions addressing criminal appeals, writs, and habeas corpus petitions. I did not argue criminal law matters in court as an attorney, but I have participated in 35 oral arguments, many of which involved criminal appeals.

6. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**
   a. **How often have you cited to either of these tomes during the course of your work?**
   b. **How often have you had an opportunity to work within these constructs during the course of your career?**

   Response: I have some familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. I cited and consulted these works as a law clerk for the Honorable Richard A. Paez on the Ninth Circuit, and I consulted the United States Sentencing Commission's Advisory Sentencing Guidelines as a legal advisor at the California Governor's Office. As a justice on the California Court of Appeal, I am regularly confronted with new and challenging legal questions, and I enjoy delving into different areas of law, researching pertinent authorities, and being guided by the applicable standards of review. To the extent the passage of time has dimmed my recollection of these works, I am confident I

could diligently reengage in these materials and apply the law to the facts of a particular case.

7. **Please explain whether you agree or disagree with the following statement and explain why: "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: In resolving constitutional issues, courts should be guided by the methods of interpretation called upon by United States Supreme Court and circuit precedent. If confirmed to the Ninth Circuit, I would faithfully follow such precedent.

8. **Do you believe that "[t]here is no such thing as a non-racist or race-neutral policy"?**

   Response: I am not familiar with the source of this quotation or the context in which it was made. As a general matter, I believe that policies can be designed to be race-neutral.

9. **Do you believe that "[a]nti-racism requires acknowledging that racist beliefs and structures are pervasive in education"?**

   Response: I am not familiar with the source of this quotation or the context in which it was made and therefore have no basis for determining what "anti-racism" is or requires.

10. **Please explain the current standard for issuing a nationwide injunction in the Ninth Circuit and discuss the Ninth Circuit's explanation for how a nationwide injunction is consistent with a court's role under Article III of the United States Constitution.**

    Response: The United States Supreme Court cautions that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). However, the Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant complete relief to the parties. *See, e.g, Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017). Injunctions are an equitable remedy that "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

    The Ninth Circuit similarly explains that the scope of injunctive relief "must be no broader and no narrower than necessary to redress the injury shown by the [plaintiff]." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). "The scope of an injunction is 'dependent as much on the equities of a given case as the substance of the legal issues it presents,' and courts must tailor the scope 'to meet the exigencies of the particular case.'" *Id.*, *quoting Int'l Refugee Assistance Project*, 137 S. Ct. at 2087. In *Azar*, the Ninth Circuit concluded that the district court abused its discretion in ordering a nationwide injunction. *Id.* at 585; *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (vacating nationwide portion of injunction barring enforcement of executive order).

11. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

Response: If confirmed to the Ninth Circuit, my judicial philosophy regarding sentencing would be guided by the penological goals that have been set forth by Congress. According to the U.S. Code, punishment is understood to serve four penological goals: retribution, deterrence, incapacitation, and rehabilitation. The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a), and included in these factors are the four penological goals. A sentencing court is directed to consider the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" (retribution); "to afford adequate deterrence to criminal conduct" (deterrence); "to protect the public from further crimes of the defendant" (incapacitation); and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" (rehabilitation). § 3553(a)(2)(A)-(D). The sentencing court is also guided by other statutory factors, including advisory sentencing guidelines and policy statements issued by the United States Sentencing Commission. See §§ 3553(a)(4)-(5), (b).

Since Congress has not directed that one goal be mechanically emphasized over another, federal judges should not do so either. A sentencing court "must make an individualized assessment based on the facts presented and the other statutory factors." *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (quotation marks and citation omitted); *see also* § 3553(a)(1) (a sentence should be determined by the particular facts of each case based on the "nature and circumstances of the offense and the history and characteristics of the defendant").

Because the United States Sentencing Commission's Guidelines are now advisory, appellate review of sentencing decisions is limited to determining whether they are "reasonable," *United States v. Booker*, 543 U.S. 220 (2005), and an abuse-of-discretion standard applies to appellate review of sentencing decisions. *Gall v. United States*, 552 U.S. 38, 46 (2007). The Supreme Court instructs that "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are … the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Ibid*.

Under Ninth Circuit precedent, an appellate court reviews a criminal sentence under a two-step analysis. First, the court "'consider[s] whether the district court committed significant procedural error'" and second, the court considers "the substantive

reasonableness of the sentence" under an abuse of discretion standard. *U.S. v. Rosales-Gonzales*, 801 F.3d 1177, 1179-1180 (9th Cir. 2015).

If confirmed to the Ninth Circuit, my review of the substantive reasonableness of a criminal sentence would be guided by the foregoing precedent, the statutory sentencing factors, the sentencing guidelines, and any applicable policy statements of the United States Sentencing Commission.

12. Is second-degree murder a crime of violence under 18 U.S.C. § 924(c)(1)(A)?

Response: 18 U.S.C. § 924(c)(3) defines the term "crime of violence" as a felony offense that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Subsection (A) is commonly known as the "elements clause" and subsection (B) is commonly known as the "residual clause" of section 924(c)(3). In *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the United States Supreme Court declared subsection (B) unconstitutionally vague. Whether second-degree murder constitutes a crime of violence under the "elements clause" of subsection (A) is currently being considered by an *en banc* panel of the Ninth Circuit. *See United States v. Begay*, 15 F.4th 1254 (9th Cir. 2021), *vacating* 934 F.3d 1033 (9th Cir. 2019). If confirmed, I would be bound by the Supreme Court's decision in *Davis* and the Ninth Circuit's *en banc* decision in *Begay* and would apply such precedent should this question come before me.

13. Does 8 C.F.R. § 1003.14(a), the regulation concerning an immigration court's jurisdiction, set out a limit on the immigration court's subject matter jurisdiction, a claim-processing rule, or something else?

Response: 8. C.F.R. § 1003.14(a) provides as follows: "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter." In *Karingithi v. Whitaker*, 913 F.3d 1158, 1159-1160 (9th Cir. 2019), the Ninth Circuit held that this regulation defines when jurisdiction vests with the immigration court. The Ninth Circuit concluded that jurisdiction has vested in the immigration court even if the notice to appear does not include the time and date of the initial proceeding. (*Id.*)

14. How are scientific disputes about questions of fact resolved in federal courts?

Response: Scientific disputes are resolved in federal court like other factual disputes, through the presentation of relevant, admissible evidence. On occasion, scientific evidence is aided by the presentation of expert testimony if the qualified expert's scientific or specialized knowledge "will help the trier of fact to understand the evidence

or to determine a fact in issue" and the testimony offered "is based on sufficient facts or data" and is the "product of reliable principles and methods." Fed. R. Civ. Proc. 702; see *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

15. Is whether a specific substance causes cancer in humans a factual question?

Response: Yes. Whether a specific substance causes cancer in humans is a factual question. "Causation in toxic tort cases is typically discussed in terms of generic and specific causation." *In re Hanford Nuclear Reservation Litig*., 292 F.3d 1124, 1133 (9th Cir. 2002). "General, or 'generic' causation has been defined by courts to mean whether the substance at issue had the capacity to cause the harm alleged, while 'individual causation' refers to whether a particular individual suffers from a particular ailment as a result of exposure to a substance." *Id.*

16. Is when a "fetus is viable" a factual question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court observed that "advances in neonatal care have advanced viability to a point somewhat earlier" than in 1973. *Id.* at 860. The Court also noted that viability occurred at approximately 28 weeks at the time of *Roe v. Wade*, occurred at approximately 23 to 24 weeks at the time of *Casey*, and may occur "at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future." *Ibid.* The *Casey* Court characterized these advances in fetal viability as "factual" underpinnings to these cases. *Ibid.*.

17. Is when a human life begins a factual question?

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), the United States Supreme Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

18. What is the legal standard for true threats in the Ninth Circuit?

Response: The United States Supreme Court has held that the First Amendment "permits a State to ban a true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003). "'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." *Id.* Applying *Black*, the Ninth Circuit has held that "a conviction under any threat statute that criminalizes pure speech" requires finding "sufficient evidence that the speech at issue constitutes a 'true threat.'" *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). Thus, "the subjective test set forth in *Black* must be read into all statutes that criminalize pure speech," *id.*, and the speaker must subjectively intend for the statement to be taken as a threat. *Id.* at 1122.

19. Do you think the Supreme Court should be expanded?

Response: As a sitting justice on the California Court of Appeal and judicial nominee, I am bound by the United States Supreme Court's precedent regardless of the Court's size

or composition, and it would not be appropriate for me to comment on whether the size of the Court should change.

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

Response: Questions regarding the appropriate allocation of resources to law enforcement agencies or support service agencies are important ones for policymakers to consider. As a sitting judge, I do not involve myself in policymaking, and it would be inappropriate for me to comment on matters of ongoing public debate. My role is to decide the legal claims presented on appeal in individual cases by carefully reviewing the record and applying governing law and precedent to the facts of each case.

21. In an article written about your judging style, you stated that you view oral argument as a chance "to test my own views against those of counsel and see if they can help either strengthen my opinion or other opinions or expose some weakness that we can address." If confirmed, do you intend to continue this practice on the Ninth Circuit?

Response: In the interview I gave, I spoke about welcoming the opportunity at oral argument for counsel to challenge my reasoning about a case and to persuade me to a different point of view. As a judge, I strive to be a fair and neutral decisionmaker by approaching each case the same way. I avoid prejudging a matter before I have had an opportunity to read the parties' briefs and examine the record, I base my decision by applying the relevant law to the facts of each case, and I interrogate my own reasoning and remain open and willing to be persuaded to other points of view, including at oral argument. If confirmed to the Ninth Circuit, I would continue these practices to ensure that I apply the law fairly and impartially.

22. Is the federal judiciary systemically racist?

Response**:** As a judge, I have not had the occasion to consider whether any judicial system is systemically racist, including the federal judiciary. When questions of race or racism have come before me, it has generally been in the context of discrimination claims, such as purposeful discrimination or disparate impact claims, which are guided by specific legal standards under statutory law and Supreme Court precedent. Whether the federal judiciary suffers from systemic racism is an important question for policymakers to consider.

23. Is the federal judiciary affected by implicit bias?

Response: My understanding of implicit bias is that individuals can make unconscious assumptions or generalizations about people or groups of people. Whether the federal judiciary is affected by implicit bias is an important question for policymakers to address.

24. Do you have implicit bias?

Response: My understanding of implicit bias is that it can affect every profession, from doctors, to lawyers, to judges. I do not believe I am immune from making unconscious assumptions about individuals or circumstances. While I am not aware of any particular implicit biases I may have, as a sitting judge I strive to be a fair and neutral decisionmaker by approaching each case the same way. I avoid prejudging a matter before I have had an opportunity to read the parties' briefs and the lower court's decision, I carefully examine the record and research the applicable law and precedent, I base my decision by applying the relevant law to the facts of each case, and I interrogate my own reasoning throughout this process and remain open and willing to be persuaded to other points of view.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the United States Supreme Court held that the Second Amendment secures "an individual right to keep and bear arms" without regard to service in a militia. The core right recognized is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635. The Supreme Court clarified that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided three examples of presumptively valid firearm regulations: (1) "prohibitions on the possession of firearms by felons and the mentally ill," (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-627. The *Heller* court declined to adopt a single standard for review of such claims.

Applying *Heller*, the Ninth Circuit has adopted a two-step framework to evaluate whether a government regulation infringes on a Second Amendment right. *See Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). The Ninth Circuit first determines if the "challenged law affects conduct that is protected by the Second Amendment" based on the "historical understanding of the scope of the right." *Ibid.* "Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis." *Ibid.* If, however, the government regulation is within the historical scope of the Second Amendment, or is not presumptively lawful as identified by *Heller*, the Ninth Circuit then determines at the second step what level of scrutiny should apply to the challenged regulation. As the Ninth Circuit explained in *Young*, it has understood "*Heller* to require one of three levels of scrutiny: If a regulation 'amounts to a destruction of the Second Amendment right,' it is unconstitutional under any level of scrutiny; a law that 'implicates the core of the Second Amendment right and severely burdens that right' receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny." *Id.* at p. 784. Unless the Supreme Court or the Ninth Circuit sitting *en banc* adopts a different standard, if confirmed I would apply the foregoing precedents.

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

Response: I am not aware of any United States Supreme Court or Ninth Circuit precedent that addresses this issue, nor has such question been presented to me while serving on the California Court of Appeal. If I were confirmed to the Ninth Circuit and a case came before me that presented this issue, I would resolve it by researching the governing law and precedent and applying the law to the facts as presented in the record.

27. Over the course of your career, how many times have you spoken at events sponsored or hosted by the following liberal, "dark money" groups?

a. American Constitution Society
b. Arabella Advisors
c. Demand Justice
d. Fix the Court
e. Open Society Foundation

Response: I have not spoken at events sponsored or hosted by any of the groups listed above.

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

Response: I have not had such an issue presented to me while serving on the California Court of Appeal. If I were confirmed to the Ninth Circuit and a case came before me that presented this issue, I would resolve it by researching the governing law and precedent and applying the law to the facts as presented in the record.

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

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

Response: The Religious Freedom Restoration Act (RFRA) provides that government cannot substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government has demonstrated that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. Under *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), whether a burden exists on the exercise of religion is a determination made by the courts. *See id.* at 726 (concluding that a contraceptive mandate that "forces [plaintiffs] to pay an enormous sum of money" clearly imposed a substantial burden on their sincerely held religious beliefs). The Supreme Court has cautioned, however, that in analyzing such a claim under the RFRA, courts must not presume to determine the plausibility or reasonableness of a religious belief. *Id.* at 724.

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

Response: In *Hobby Lobby*, the Supreme Court emphasized two factors to find that the plaintiffs' religious exercise was substantially burdened: (1) non-compliance with the contraceptive mandate would cause "severe" economic consequences for the plaintiffs; and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. 573 U.S. at 720, 723.

30. 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: Federal judges swear an oath 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." This obligation includes faithfully and impartially applying binding United States Supreme Court and circuit court precedent.

31. Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?

Response: As a justice on the California Court of Appeal, I review each case individually, guided by the arguments and particular facts as presented in the record. If a First Amendment claim is presented to me, I would review such claim based on established law and precedent, not by reference to whether any party is "powerful" or "oppressed."

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

Response: On May 14, 2021, I was contacted by a lawyer from the White House Counsel's Office to discuss my interest in being considered as a candidate for the Ninth Circuit. On May 27, 2021, I was interviewed by the statewide chairs of the bipartisan Judicial Evaluation Commissions established by Senators Dianne Feinstein and Alex Padilla. Since June 8, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 2, 2021, I was interviewed by Senator Padilla. On August 2, 2021, I spoke with an attorney from the White House Counsel's Office. On September 8, 2021, the President announced his intent to nominate me. On September 20, 2021, President Biden submitted my nomination to the Senate.

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

Response: The United States Supreme Court has held that parents have the right to direct the education and upbringing of one's children. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[Plaintiff's] right thus to teach, and the right of parents to engage [Plaintiff] so to instruct their children, we think, are within the liberty" interest of the Due Process Clause of the Fourteenth Amendment); *accord Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

34. **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.

35. **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.

36. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: I have had no contact with anyone associated with this organization or its subsidiaries.

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

Response: No.

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

Response: No.

37. **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.

38. **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.

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

Response: Please see my response to Question 32 above.

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

Response: I did not talk with anyone associated with Demand Justice and am not aware of anyone speaking to the organization on my behalf.

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

Response: I did not talk with anyone associated with the American Constitution Society and am not aware of anyone speaking to the organization on my behalf.

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

Response: I did not talk with anyone associated with Arabella Advisors or its subsidiaries and am not aware of anyone speaking to the organization or its subsidiaries on my behalf.

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

Response: I did not talk with anyone associated with Open Society Foundation and am not aware of anyone speaking to the organization on my behalf.

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

Response: I did not talk with anyone associated with Fix the Court and am not aware of anyone speaking to the organization on my behalf.

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

Response: On May 14, 2021, I was contacted by a lawyer from the White House Counsel's Office to discuss my interest in being considered as a candidate for the Ninth Circuit. Since June 8, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On August 2, 2021, I spoke with an attorney from the White House Counsel's Office. On September 8, 2021, the President announced his intent to nominate me. On September 20, 2021, President Biden submitted my nomination to the Senate. Since my nomination, I have had several meetings and communications with staff from the White House and OLP concerning scheduling associated with the confirmation hearing, what to expect at the hearing, and submission of responses to written questions.

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

Response: On November 10, 2021, I received these questions from the Office of Legal Policy (OLP). After reviewing the questions, I conducted relevant legal research, reviewed my records, and drafted my responses. OLP provided feedback on my draft, which I considered, before submitting my final answers to the Committee.

Senator Marsha Blackburn
Questions for the Record to Justice Gabriel Sanchez
Nominee for the Ninth Circuit

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

   Response: I strive to be a fair and impartial decisionmaker by approaching each case the same way. I avoid prejudging a matter before I have had an opportunity to carefully consider the parties' briefs and examine the record on appeal, I base my decision by applying the relevant law to the facts of each case, and I interrogate my own reasoning and remain open and willing to be persuaded to other points of view. As an appellate judge, I am mindful that we are presented with limited records and should avoid deciding matters that have not been properly presented or developed on appeal. In my written opinions, I try to provide a clear and well-reasoned explanation that offers predictability in future cases and clarity to the lower courts.

2. **During your time working for Gov. Brown's office, you helped draft the bill that would become California Proposition 57, which changed policies related to parole for certain felons, juvenile prosecution, and sentence credits in California's prisons. Voters passed the ballot measure in 2016, but opponents of the measure were concerned it would lead to violent criminals being released. Considering your work on this matter, what guides your judicial philosophy on sentencing? For you, what is the purpose behind incarceration and/or punishment?**

   Response: If confirmed to the Ninth Circuit, my judicial philosophy regarding sentencing would be guided by the penological goals that have been set forth by Congress. According to the U.S. Code, punishment is understood to serve four penological goals: retribution, deterrence, incapacitation, and rehabilitation. The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a), and included in these factors are the four penological goals. A sentencing court is directed to consider the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" (retribution); "to afford adequate deterrence to criminal conduct" (deterrence); "to protect the public from further crimes of the defendant" (incapacitation); and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" (rehabilitation). § 3553(a)(2)(A)-(D). The sentencing court is also guided by other statutory factors, including advisory sentencing guidelines and policy statements issued by the United States Sentencing Commission. See §§ 3553(a)(4)-(5), (b).

   Since Congress has not directed that one goal be mechanically emphasized over another, federal judges should not do so either. A sentencing court "must make an individualized assessment based on the facts presented and the other statutory factors." *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (quotation marks and citation omitted); *see also* § 3553(a)(1) (a sentence should be determined by the particular facts of each case based on the "nature and circumstances of the offense and the history and characteristics of the defendant").

Because the United States Sentencing Commission's Guidelines are now advisory, appellate review of sentencing decisions is limited to determining whether they are "reasonable," *United States v. Booker*, 543 U.S. 220 (2005), and an abuse-of-discretion standard applies to appellate review of sentencing decisions. *Gall v. United States*, 552 U.S. 38, 46 (2007). The Supreme Court instructs that "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are … the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Ibid*.

Under Ninth Circuit precedent, an appellate court reviews a criminal sentence under a two-step analysis. First, the court "'consider[s] whether the district court committed significant procedural error'" and second, the court considers "the substantive reasonableness of the sentence" under an abuse of discretion standard. *U.S. v. Rosales-Gonzales*, 801 F.3d 1177, 1179-1180 (9th Cir. 2015).

If confirmed to the Ninth Circuit, my review of the substantive reasonableness of a criminal sentence would be guided by the foregoing precedent, the statutory sentencing factors, the sentencing guidelines, and any applicable policy statements of the United States Sentencing Commission.

Nomination of Gabriel P. Sanchez
to be United States Circuit Judge for the Ninth Circuit Questions
for the Record
Submitted November 10, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Please describe what you believe to be the scope of the right or rights protected by the Second Amendment.**

   Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the United States Supreme Court held that the Second Amendment secures "an individual right to keep and bear arms" without regard to service in a militia. The core right recognized is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635. The Supreme Court clarified that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided three examples of presumptively valid firearm regulations: (1) "prohibitions on the possession of firearms by felons and the mentally ill," (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-627.

4. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).**

   Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that a government regulation is not neutral and generally applicable, and therefore triggers strict scrutiny, if it treats *any* comparable secular activity more favorably than a religious exercise. *Id.* at 1296. The Supreme Court further clarified that where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny only when the government can "show that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id.* at 1297. "The State cannot 'assume the worst when people go to a place of worship but assume the best when the people go to work.'" *Ibid.*

5. **Please describe what you believe to be the Supreme Court's holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).**

   Response: In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), a plurality of the Supreme Court held that three provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c), could not plausibly be interpreted to limit the detention of aliens to a period of no more than six months before receiving an initial or periodic bond hearing. The Supreme Court rejected the Ninth Circuit's reading of an implicit six-month limit grounded in the canon of constitutional avoidance, explaining that raising a constitutional issue does not give the court license to rewrite the statutes in question. *Id.* at 843.

6. **Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).**

   Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held that President Donald Trump's Presidential Proclamation 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), did not violate the Immigration and Nationality Act or the Establishment Clause by suspending the entry of aliens from several nations. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. *Id.* at 2404. The Supreme Court concluded that substantial deference is owed to the Executive in the conduct of foreign affairs and the exclusion of aliens, including under 8 U.S.C. § 1182(f), which "entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest)." *Id.* at 2408.

7. **Please describe what you believe to be the Supreme Court's holding in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).**

   Response: In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), a class of 8,185 plaintiffs sued a credit reporting agency alleging that their names were incorrectly flagged as being individuals deemed potential threats to America's national security. Plaintiffs alleged that TransUnion's failure to use reasonable precautions to ensure the accuracy of credit files violated federal statute and created a risk of future harm for these improperly flagged individuals. The Supreme Court held that Article III standing requires that a plaintiff have suffered a "concrete harm," not simply an "injury in law" based on the defendant's violation of federal statute. *Id.* at 2205. The Court added that "every class member" is required to establish a concrete injury in order to recover individual damages. *Id.* at 2208. The Court therefore reversed the judgment as to the claims of 6,332 class members whose internal credit reports contained an inaccuracy but were never published to any third party, concluding these class members did not establish a concrete harm sufficient to support standing. *Id.* at 2010.

8. **What is your view of arbitration as a litigation alternative in civil cases?**

   Response: I have no opinion regarding the use of arbitration as a litigation alternative in civil cases. As an appellate judge, I am called upon to review the enforceability of arbitration clauses, and in doing so I apply relevant federal and state law and precedent to the facts of each particular case.

9. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

   Response: On November 10, 2021, I received these questions from the Office of Legal Policy (OLP). After reviewing the questions, I conducted relevant legal research, reviewed my records, and drafted my responses. OLP provided feedback on my draft, which I considered before submitting my final answers to the Committee.

10. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

    Response: No.

Senator Josh Hawley
Questions for the Record

Justice Gabriel Sanchez
Nominee, U.S. Court of Appeals for the Ninth Circuit

1. **Justice Thurgood 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?**

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

    Response**:** Federal judges swear an oath 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." I took a similar oath when I was elevated to the California Court of Appeal. I do my best to fulfill my oath of office by fairly and impartially applying the law to the facts of each case.

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

    Response: The *Younger* abstention doctrine requires federal courts to abstain from hearing cases involving federal issues being litigated in pending state court proceedings. *See Younger v. Harris*, 401 U.S. 37, 54 (1971). In the Ninth Circuit, the *Younger* abstention doctrine applies to three categories of state court proceedings: "(1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 735 (9th Cir. 2020), *quoting Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 78-79 (2013) (internal quotation marks omitted).

    Under the *Pullman* abstention doctrine, "federal courts have the power to refrain from hearing cases ... in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 716–17, (1996) (citing *R.R. Comm'n of Tex. V. Pullman Co*., 312 U.S. 496, 498 (1941). The Ninth Circuit has held that "*Pullman* requires that the federal court abstain from deciding the *federal* question while it awaits the state court's decision on the state law issues." *United States v. State Water Res. Control Bd.*, 988 F3d 1194, 1209 (9th Cir. 2021).

    The *Rooker-Feldman* abstention doctrine bars federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.*, 544 U.S.

280, 284 (2005). The Ninth Circuit has "developed 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." *Lundstrom v. Young*, 857 F. App'x 952, 955 (9th Cir. 2021), *citing Kougasian v. TMSL, Inc*., 359 F.3d 1136, 1140 (9th Cir. 2004).

Under the *Burford* abstention doctrine, "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In the Ninth Circuit, the following factors must generally be present for the *Burford* doctrine to apply: "(1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

The *Colorado River* doctrine permits federal courts to stay an action when there are concurrent state and federal suits addressing the same subject matter. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Because of the federal courts' obligation to exercise the jurisdiction given to them, "[o]nly the clearest of justifications will warrant [a] dismissal" or stay under *Colorado River*. *Id.* at 819. The Ninth Circuit applies an eight-factor analysis for determining whether a *Colorado River* stay is appropriate: "(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *United States v. State Water Res. Control Bd.*, 988 F3d 1194, 1203 (9th Cir. 2021).

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: I have not.

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 (2008), the Supreme Court examined the original understanding of the Second Amendment by analyzing the text of the provision and reviewing historical materials at the time of the founding as well post-ratification commentaries and legislative enactments. *Id.* at 584-618. If Supreme Court precedent indicates that lower courts should examine the original public meaning of a constitutional provision, as it did in *Heller* for Second Amendment claims, then I will apply that precedent to such claims.

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

Response: As the Supreme Court explains, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 56 (1987). If the text of a statute is clear, then courts must enforce it according to its terms. *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 251 (2010), and there is no need to consult external sources such as legislative history. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 458 (2012). If the plain language of the statute does not resolve the question, I would employ other interpretative methods, such as by considering analogous language in statutory provisions within the same statutory scheme, analogous language in other statutes, consideration of how other courts have interpreted the text at issue, consideration of dictionary definitions if the meaning of a word is disputed, the context of the provision in relation to the overall statutory scheme and the purpose for which the law was enacted, and various canons of statutory interpretation. If legislative history is consulted, the Supreme Court instructs that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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 explains: "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates. … Committee Reports are 'more authoritative' than comments from the floor …." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal citations omitted).

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 law of foreign nations is generally not relevant 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 *Baze v. Rees*, 553 U.S. 35, (2008), the Supreme Court held that to establish an Eighth Amendment violation, a prisoner must first demonstrate that the proposed method of execution creates a "substantial risk of harm," meaning an "objectively intolerable intolerable risk of harm that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50. Second, the prisoner must demonstrate there is a feasible and readily implemented alternative method of execution that would significantly reduce the substantial risk of harm. *Id.* at 52. *Glossip* clarified that the *Baze* standard governs all Eighth Amendment method of execution claims. *Glossip v. Gross*, 576 U.S. 863, 876-77 (2015). In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Supreme Court held that only those methods of executions that "cruelly superadds pain to the death sentence" run afoul of the Eighth Amendment. *Id.* at 1123-1124. The Ninth Circuit is bound by these controlling precedents. *See Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (citing *Baze*, 553 U.S. at 50.)

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: Yes. *See Glossip v. Gross*, 576 U.S. 863, 878 (2015).

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: In *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Supreme Court recognized that a habeas corpus petitioner has a liberty interest in demonstrating his innocence when state law provides the petitioner access to evidence for purposes of DNA testing. *Id.* at 68. However, the Court rejected the argument that there was a freestanding substantive due process right to DNA evidence "untethered from the liberty interests [a claimant] hopes to vindicate with it." *Id*. at 72. The Ninth Circuit has observed that *Osborne* "severely limits the federal action a state prisoner may bring for DNA testing" and rejects a substantive due process basis for seeking access to DNA testing. *Morrison v. Peterson*, 809 F.3d 1059, 1065 (9th Cir. 2015). Rather, the source of a claimant's liberty interest must be found in state law. *Id.*

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: When evaluating claims involving a governmental burden on religious exercise, the Supreme Court has looked to the Establishment and Free Exercise Clauses of the First Amendment; the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (for federal laws); and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a). The RFRA applies with respect to federal laws and does not apply to state governments. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1; *Boerne v. Flores*, 521 U.S. 507 (1997).

The RFRA provides that government cannot substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government demonstrates that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 723 (2014) (holding that contraceptive mandate was a substantial burden on religious views of for-profit corporation and individual owners because noncompliance would cause "severe" economic consequences for the plaintiffs).

With respect to a constitutional free exercise claim, the Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " 494 U.S. 872, 879. If a law is neutral and generally applicable, rational basis scrutiny applies. *Id.* at 878-882. Where the challenged law is not neutral and generally applicable, however, the defendant must show that the policy is narrowly tailored to serve a compelling state interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Facial neutrality is not necessarily determinative of the question whether a law is neutral. *Id*. at 534.

A government regulation is not neutral and generally applicable, and therefore triggers strict scrutiny, if it treats *any* comparable secular activity more favorably than a religious exercise. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny only when the government can "show that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id.* at 1297. In addition, a government regulation is not neutral if it demonstrates hostility to a religious viewpoint or on the basis of religious status. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018); *Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. 2246, 2254 (2020) ("The Free Exercise Clause … 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'") Likewise, a restriction that burdens religious liberty is not generally applicable, and thus is subject to strict scrutiny, when it permits government to exempt individuals on a discretionary basis and therefore invites

government to consider the particular reasons for the exercise of a religious tenet. *Fulton v.City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

Finally, in the context of 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. *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012); *Our Lady of Guadalupe Sch. V. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

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 above.

12. 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: The United States Supreme Court cautions that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). However, the Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant complete relief to the parties. *See, e.g., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017). Injunctions are an equitable remedy that "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

13. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: A religious belief is "sincere" if it is not "obviously" a "sham" or an "absurdit[y]." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). The Supreme Court has explained, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 887 (1990); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) ("[I]t is not for [the court] to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, [the court's] 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction'" (citation omitted)). A sincerely held religious belief need not be based on a "tenet, belief or teaching of an established religious body" and may instead derive from personal religious conviction. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 831-833 (1989).

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: In his dissent, Justice Holmes explained that the majority's opinion in *Lochner v. New York* was based upon an economic theory about the inviolability of the right to contract that much of the country did not share. His point was that it is not the role of the courts to preference their views about the way commercial activities should be regulated over that of democratically elected legislators and the will of the majority. "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting).

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

Response: The United States Supreme Court abrogated *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *accord Day-Brite Lighting Inc. v. State of Mo*., 342 U.S. 421, 423 (1952). It is no longer good law and I would not apply that decision.

15. 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 should not allow their personal views or preferences to play any role in the adjudication of cases. Judges should decide matters fairly and impartially based upon the arguments, the factual record, and the governing law and precedent, not a preferred outcome. As a sitting judge, that is how I approach each of my cases, and would continue to do so if confirmed.

16. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

b. Do you agree or disagree with this statement?

Response: I understand this statement to mean that the role of Congress and state legislative bodies is to enact laws and formulate policy. The role of the courts is to interpret and apply the law, not to make law. As a sitting judge, I strive to apply the law in a fair and impartial manner in each of my cases.

17. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

b. Do you agree or disagree with Justice Holmes? Please explain.

Response**:** I understand this statement to mean that the role of judges is to apply the law as written in a fair and impartial manner, irrespective of their personal views about the law in question or the equities of a case. I take my oath of judicial office seriously and do my best to fairly and impartially apply the law to the facts of each case.

18. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected a comparison between the facts in *Korematsu v. United States*, 323 U.S. 214 (1944) to the Presidential executive order under challenge, explaining that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission." *Id.* at 2423. Because the Supreme Court had not formally repudiated the holding in *Korematsu*, it took the opportunity to do so, explaining that *Korematsu* was "gravely wrong the day it was decided [and] has been overruled in the court of history." *Ibid.* Elsewhere, the Supreme Court has explained that when considering whether to overrule prior precedent, the Court must look to prudential factors such as "'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (internal citation omitted).

19. 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?

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

Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, it would not be appropriate for me to comment on the correctness of any United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all Supreme Court precedents, and if confirmed, I will continue to faithfully and impartially apply all Supreme Court precedents as decided.

20. 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?

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

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: In *Eastman Kodak Co. v. Image Tech. Serv*s., Inc., 504 U.S. 451, 481 (1992), the United States Supreme Court held that evidence that a defendant holds more than 80% share of the product market "with no readily available substitutes" is sufficient to support a finding of monopoly power. The Ninth Circuit explains that "[a] dominant share of the market often carries with it the power to control output across the market, and thereby control prices. Courts generally require a 65% market share to establish a prima facie case of market power." *Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1206 (9th Cir. 1997) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). On the other hand, "numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power." *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1438 (9th Cir. 1995). That presumption may be overcome, and a company with less than 50% market share may be found to have monopoly power, "if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." *Id*. at 1438. If confirmed, I would be bound by United States Supreme Court and Ninth Circuit precedent rather than Second Circuit precedent..

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

Response: Federal common law is understood to mean law derived from judicial decisions rather than statutes. While common law development is frequent in state courts, the United States Supreme Court has indicated that "federal common law plays a necessarily modest role." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). There is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Rather, federal common law exists in "only limited areas . . . in which federal judges may appropriately craft the rule of decision," such as "admiralty disputes, and certain controversies between States." *Rodriguez*, *supra*, 140 S. Ct. at 717.

22. 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?

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

Response: State constitutional provisions are interpreted in accordance with state law. Federal courts must defer to the decisions of the highest court in the state whose constitution the federal court is interpreting. *See Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state

shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

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

Response: State constitutional provisions can provide greater protections than similarly or identically worded federal constitutional provisions.

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

Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, I generally refrain from commenting on the correctness of any United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all applicable Supreme Court precedents and would continue to do so if confirmed to the Ninth Circuit.

Prior judicial nominees have made an exception with respect to *Brown v. Board of Education*. *Brown* overruled *Plessy v. Ferguson*, ending legally enforced racial segregation in public education. *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). Because it is unlikely that *de jure* racial segregation in schools would ever be reimposed in this country, I join other judicial nominees in agreeing that *Brown v. Board of Education* was correctly decided.

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

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

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

Response: Injunctions are an equitable remedy that "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The United States Supreme Court cautions that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Court has upheld nationwide injunctions granted by federal courts when those injunctions are necessary to grant complete relief to the parties. *See, e.g., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017).

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

Response**:** In *Bond v. United States*, 564 U.S. 211, 221 (2011), the United States Supreme Court explained that our federal structure "preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that

States function as political entities in their own right." Federalism also "secures to citizens the liberties that derive from the diffusion of sovereign power.' " *Id.*, *quoting New York v. United States*, 505 U.S. 144, 181 (1992). Federalism thus "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Id.* at 222 (internal citation omitted).

26. What case or legal representation are you most proud of?

Response: I am proud of my work effectuating criminal justice and corrections policy reforms on behalf of California Governor Edmund G. Brown Jr. from 2012 to 2018, and in particular our work addressing prison conditions that federal courts had held were unconstitutionally overcrowded with the implementation of a parole consideration process for non-violent offenders and a system of sentencing credits for inmates who completed rehabilitative and educational programs.

27. 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.

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

Response: Generally, damages are awarded to remedy past harm, while injunctive relief is awarded to prevent future harm. The availability of such relief depends upon the particular facts and circumstances of each case.

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

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

Response: Please see my response to Question 10 above.

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 United States Supreme Court treats the right to worship and the right to exercise one's religious beliefs as coextensive. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"); see *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (applying strict scrutiny to government regulation restricting at-home religious

worship); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (concluding that Colorado Civil Rights Commission's hostility toward plaintiff's sincerely held religious beliefs violated the Free Exercise Clause).

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

Response: The Religious Freedom Restoration Act (RFRA) provides that government cannot substantially burden a person's free exercise of religion, even if that burden results from a rule of general applicability, unless the government has demonstrated that application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. Under *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), the Supreme Court emphasized two factors to find that the plaintiffs' religious exercise was substantially burdened: (1) non-compliance with the contraceptive mandate would cause "severe" economic consequences for the plaintiffs; and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. *Id*. at 723.

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

Response: Please see my response to Question 13.

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

Response: The Religious Freedom Restoration Act applies only to federal laws and does not apply to state governments. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424 n.1; *Boerne v. Flores*, 521 U.S. 507 (1997). In the context of 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. *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C*., 565 U.S. 171, 188 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

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

Response: *Valley Baptist Church v. City of San Rafael*, 61 Cal.App.5th 401 (2021).

30. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: I am unaware of United States Supreme Court precedent that quantifies the standard for finding a criminal defendant guilty beyond a reasonable doubt. In other contexts, the Supreme Court has observed that "an effort to fix some general, numerically precise degree of certainty" to legal standards "may not be helpful". *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (discussing probable cause). The Ninth Circuit has approved a reasonable doubt instruction that informs the jury that the jury must be "firmly convinced" of the defendant's guilt. *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir.1992); *accord United States v. Soto-Zuniga*, 837 F.3d 992, 1004 (9th Cir.2016).

31. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

c. If you disagree with either of these statements, please explain why and provide examples.

Response: In *Harrington v. Richter*, 562 U.S. 86 (2011), the United States Supreme Court explained that "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Id.* at 101. In *Dunn v. Reeves*, 141 S. Ct. 2405 (2021), the Supreme Court further clarified: "A federal court may grant habeas relief only if a state court violated '*clearly established* Federal law, as determined by *the Supreme Court* of the United States.' (citing 28 U.S.C. § 2254(d)(1)). This 'wide latitude' means that federal courts can correct only 'extreme malfunctions in the state criminal justice syste[m].' And in reviewing the work of their peers, federal judges must begin with the "presumption that state courts know and follow the law.' Or, in more concrete terms, a federal court may grant relief only if *every* ' " 'fairminded juris[t]' " ' would agree that every reasonable lawyer would have made a different decision." *Id.* at 2410-2411 (internal citations omitted; emphasis in original). If confirmed, I would follow the foregoing binding Supreme Court precedent.

32. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

c. If confirmed, would you treat unpublished decisions as precedential?

d. If not, how is this consistent with the rule of law?

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: Ninth Circuit Rules 36-1, 36-2, and 36-3 establish the rules for publication or nonpublication of circuit decisions. Rule 36-2 establish the criteria for publication. Rule 36-3(a) provides that "[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." However, unpublished dispositions and orders issued on or after January 1, 2007 may be cited in the Ninth Circuit, consistent with Federal Rule of Appellate Procedure 32.1. Under Rule 36-4, parties may seek publication of an unpublished disposition, and if such a request is granted, the disposition "will be redesignated an opinion." If confirmed, I would by guided by the Federal Rules of Appellate Procedure and Ninth Circuit Rules.

33. In your legal career:

a. How many cases have you tried as first chair?

b. How many have you tried as second chair?

c. How many depositions have you taken?

d. How many depositions have you defended?

e. How many cases have you argued before a federal appellate court?

f. How many cases have you argued before a state appellate court?

g. How many times have you appeared before a federal agency, and in what capacity?

h. How many dispositive motions have you argued before trial courts?

i. How many evidentiary motions have you argued before trial courts?

Response: I tried an administrative bench hearing before the Social Security Administration as a certified law student. I was sole counsel. As an associate at Munger, Tolles & Olson LLP, I was associate counsel in a civil jury trial that reached verdict in the Superior Court of San Francisco. I was second chair in a criminal defense matter through the preliminary hearing in Los Angeles Superior Court. To the best of my recollection, I have taken or defended approximately a dozen depositions and argued motions in several state law matters, including discovery matters, jury instructions, and dispositive motions. I have filed or supervised the filing of appellate briefs in approximately 10 appeals before the Ninth Circuit and 10 appeals before state appellate courts or the California Supreme Court. I have not argued in federal or state appellate court. As an associate justice on the California Court of Appeal, I have issued or joined in over 490 written appellate opinions and participated in 35 oral argument calendars.

34. If any of your previous jobs required you to track billable hours:

a. What is the maximum number of hours that you billed in a single year?

b. What portion of these were dedicated to pro bono work?

Response: To the best of my recollection, I billed between 2000 to 2100 hours. I devoted a significant portion of my work to pro bono matters each year, but I could not say how many hours were attributable to that work.

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

a. If yes, please provide appropriate citations.

Response: No.

36. 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.

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

Response: The Supreme Court has explained that the Due Process Clause of the Fourteenth Amendment guarantees more than just a fair process; it protects those "fundamental rights and liberties which are 'deeply rooted in our Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Washington v Glucksberg*,

521 U.S. 702, 719-721 (1997). In addition to the specific rights protected under the Bill of Rights, the "liberty" specially protected under the Due Process Clause has included the right to marry, *Loving v. Virginia*, 388 U.S. 1, 87 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, (1952); and to abortion, *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833 (1992). *See also Obergefell v. Hodges*, 576 U.S. 644 663-665 (2015) (fundamental liberties protected under the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" such as the right of same-sex partners to marry).

38. What were the last three books you read?

Response: *The Cycles of Constitutional Time*, by Jack M. Balkin, *Sapiens*, by Yuval Noah Harari, and *Diplomacy*, by Henry Kissinger.

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

Response: As a justice on the California Court of Appeal, the issue of systemic racism has not come before me. When questions of race or racism have arisen, it has generally been in the context of discrimination claims, such as purposeful discrimination or disparate impact claims, which are guided by specific legal standards under statutory law and Supreme Court precedent. If confirmed, I would address specific discrimination claims based on established precedents as applied to the particular facts of each case.

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

a. How did you handle the situation?

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

Response: Although I cannot recall a particular instance, I am sure that I have. As an advocate, I made arguments and took positions in service of my client's interests, consistent with my ethical and professional obligations. As a sitting judge, my duty is to discharge my oath of office to fairly and impartially apply the law. Whatever positions or policy views I may have advocated for in the past, they do not play any role in my decision-making. If confirmed to the Ninth Circuit, I will continue to apply the law as written regardless of my personal beliefs.

41. What three law professors' works do you read most often?

Response: There is no particular law professor whose work I consistently follow. I read different scholarly articles or works based on my interest on the topic.

42. 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 one particular Federalist Paper.

43. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: I have read many persuasive judicial opinions. I do not regularly read law review articles or treatises.

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

Response: As a sitting judge and judicial nominee to a federal circuit, it would not be appropriate for me to respond to this question because it may create the impression that I have prejudged a future case that may come before me that raises this issue.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the United States Supreme Court held that the Second Amendment secures "an individual right to keep and bear arms" without regard to service in a militia. The core right recognized is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635. The Supreme Court clarified that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and provided three examples of presumptively valid firearm regulations: (1) "prohibitions on the possession of firearms by felons and the mentally ill," (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-627. The *Heller* court declined to adopt a single standard for review of such claims.

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.

46. 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: To the best of my recollection, I have testified one other time under oath when I was deposed in a civil lawsuit. Plaintiffs, the co-owners of a four-unit apartment building where my mother had resided for 30 years, filed an action for partition and judicial sale of the property against me and my mother. The matter was dismissed

following a settlement in 2019. *Khngikyan v. Sanchez*, No. LC 106313 (L.A. Cty. Sup. Ct.) (Keeny, J.).

47. 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.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: I do not hold shares in any of the companies listed above.

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

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

Response: In my seven years as Deputy Legal Affairs Secretary for Governor Brown, I reviewed and edited a substantial number of briefs that were filed in federal and state courts without my name on the brief, including in the following listed matters:

1. *Hines v. Yousef*, No. 1:13-CV-0357 AWI-JLT, 2015 WL 2385095 (E.D. Cal. May 19, 2015); *Jackson v. Brown*, 134 F. Supp. 3d 1237 (E.D. Cal. 2015); *Smith v. Schwarzenegger*, 137 F. Supp. 3d 1233 (E.D. Cal. 2015); *Gregge v. Cate*, No. 1:15-cv-00176-LJO-SAB, 2015 WL 2448679 (E.D. Cal. May 20, 2015); *Hines v. Yousef*,

914 F.3d 1218 (9th Cir. 2019)

2. *In re Butler*, 236 Cal.App.4th 1222 (2015), *rev'd*, 413 P.3d 1178 (Cal. 2018)

3. *Brown v. Sup. Ct.*, 371 P.3d 223 (Cal. 2016)

4. *Mitchell v. Cate*, No. 2:08-CV-01196-TLN-EFB, 2015 WL 5920755 (E.D. Cal. Oct. 8, 2015)

5. *Plata v. Brown*, 570 U.S. 938 (2013) (application for stay denied); 571 U.S. 948 (2013) (dismissed for want of jurisdiction); 922 F. Supp. 2d 1004 (E.D. Cal. & N.D. Cal. 2013); 952 F. Supp. 2d 901 (E.D. Cal. & N.D. Cal. 2013); 960 F. Supp. 2d 1057 (E.D. Cal. & N.D. Cal. 2013)

6. *Coleman v. Brown*, 938 F. Supp. 2d 955 (E.D. Cal. 2013); 28 F. Supp. 3d 1068 (E.D. Cal. 2014); No. 2:90-cv-0520, 2017 WL 1398828 (E.D. Cal. Apr. 19, 2017); 756 F. App'x 677 (9th Cir. Nov. 28, 2018)

7. *Plata v. Brown*, 427 F. Supp. 3d 1211 (N.D. Cal. 2013); No. 3:01-cv-01351, 2013 WL 654996 (N.D. Cal. Feb. 21, 2013); 754 F.3d 1070 (9th Cir. 2013); No. 3:01-cv-01351, 2018 WL 4262290 (N.D. Cal. Sept. 6, 2018)

8. *In re Lira*, 317 P.3d 619 (Cal. 2014)

9. *Gilman v. Brown*, 814 F.3d 1007 (9th Cir. 2016)

10. *Ashker v. Brown*, No. 09–cv–05796–CW (NJV), 2013 WL 4026971 (N.D. Cal. July 12, 2013); 2017 WL 1065007 (N.D. Cal. Mar. 20, 2017); No. 09-cv-05796-CW, 2018 WL 11300426 (N.D. Cal. Dec. 7, 2018)

11. *Armstrong v. Brown*, 103 F.Supp.3d 1070 (N.D Cal. 2015)

50. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: To the best of my recollection, no.

51. 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: All nominees take the oath before testifying at their confirmation hearing to provide truthful information, so that the United States Senate can fulfill its advice and consent role under the Constitution.

Questions for the Record for Gabriel Patrick Sanchez
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 Ben Sasse
Questions for the Record for Gabriel P. Sanchez
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 03, 2021

Questions for Gabriel P. Sanchez:

1. **When asked about your approach to statutory interpretation, you stated that judges may go beyond the text of the statute if the text itself is ambiguous or if the "context of the purpose and overall structure of the statute" creates ambiguity.**

   i. **How would you determine the purpose of a statute?**

   Response: As the United States Supreme Court explained in *King v. Burwell*: "If the statutory language is plain, we must enforce it according to its terms. But oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal citations omitted).

   Courts have employed several interpretive methods to determine the purpose or object of a statutory enactment. Statutory purpose may be clear from the plain language of the statutory text itself. *See, e.g.*, *Griggs v. Duke Power Co*., 401 U.S. 424, 429-430 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.") Statutory purpose can also be discerned from a statute's statement of findings and purpose. *See, e.g.,* 42 U.S.C. § 2000bb(b)(1) (stating the Religious Freedom Restoration Act was enacted "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014) (citing and discussing the RFRA's statement of findings).

   ii. **What sources would you rely on to make that determination?**

   Response: Please see my response to Question 1, subpart (i) above.

   iii. **When, if ever, is it appropriate for judges to rely on Congress's subjective intent to answer questions that arise in federal litigation?**

   Response: Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the United States Supreme Court set forth a two-step test for judicial review of administrative agency interpretations of federal law. Under the first step: "If the intent of Congress is clear, that is the end of the matter; for the

court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. Federal courts must also be guided by Congress's intent when undertaking federal preemption analysis. *See*, *e.g.*, *Bond v. United States*, 572 U.S. 844, 866 ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers.") (internal citation and quotation marks omitted).

iv. In what circumstances would it be appropriate to override the clear text of the statute based on the "context of the purpose" or "overall structure" of the statute?

Response: "It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 56 (1987). If the text of a statute is clear, then courts must enforce it according to its terms. *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 251 (2010). The Supreme Court has also explained: "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole,'" *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (internal citations omitted). Statutory interpretation is therefore a "holistic endeavor" that involves review of the statutory provision in light of the overall statutory scheme. *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

v. In cases where the text is clear, what, if any, external sources would inform your view on whether the context or purpose of the statute causes the clear text to be ambiguous?

In cases where the statutory text is clear, external sources such as legislative history need not be consulted. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 458 (2012) ("[R]eliance on legislative history is unnecessary in light of the statute's unambiguous language.")

Questions for all nominees:

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

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

Response: I strive to be a fair and impartial decisionmaker by approaching each case the same way. I avoid prejudging a matter before I have had an opportunity to carefully consider the parties' briefs and examine the record on appeal, I base my decision by applying the relevant law to the facts of each case, and I interrogate my own reasoning and remain open and willing to be persuaded to other points of view. As an appellate justice, I am mindful that we are presented with limited records and should avoid deciding matters that have not been properly presented or developed on appeal. In my written opinions, I try to provide a clear and well-reasoned explanation that offers predictability in future cases and clarity to the lower courts.

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

Response: I would look to United States Supreme Court and Ninth Circuit precedent to guide my own analysis of the particular question presented. In *District of Columbia v. Heller*, for example, the Supreme Court examined the original understanding of the Second Amendment by reviewing historical materials at the time of the founding as well post-ratification commentary and legislative enactments. *See District of Columbia v. Heller*, 554 U.S. 570, 584-618 (2008). In matters of statutory interpretation, Supreme Court precedent directs lower courts to begin with the plain language of the provision, and in the absence of any ambiguity in the statutory text, to enforce its terms. *King v. Burwell*, 576 U.S. 473, 486 (2015). The meaning of statutory language should also be construed in the context of the statutory scheme as a whole. *Ibid*. My mode of interpretation is therefore guided by what Supreme Court precedent calls for.

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

Response: Please see my response to Question 4 above.

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

Response: My understanding is that different meanings have been ascribed to the term "living constitution." If it is meant to support the view that the Constitution's meaning is not fixed and evolves through generations, then I disagree with that notion. The Supreme Court has held that the Constitution protects fundamental rights that are enumerated in the Bill of Rights, rooted in our nation's history and traditions, *Washington v Glucksberg*, 521 U.S. 702, 719-721 (1997), or are central to our views of individual liberty and autonomy, *Obergefell v. Hodges*, 576 U.S. 644 663-665 (2015), and these concepts have an enduring quality.

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

Response: There is no individual Justice whose jurisprudence I most particularly admire.

8. **Was Marbury v. Madison correctly decided?**

Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, I generally refrain from commenting on the correctness of any

United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all applicable Supreme Court precedents and would continue to do so if confirmed to the Ninth Circuit.

Prior judicial nominees have made an exception with respect to *Marbury v. Madison.* Because the principle of judicial review established under *Marbury v. Madison* is a foundational one central to our Constitution, it is unlikely that such holding would ever be revisited. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is"). Therefore, like other judicial nominees, I can agree that *Marbury v. Madison* was correctly decided.

9. Was Lochner v. New York correctly decided?

Response: The United States Supreme Court abrogated *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *accord Day-Brite Lighting Inc. v. State of Mo*., 342 U.S. 421, 423 (1952). It is no longer good law and I would not apply that decision.

10. Was Brown v. Board of Education correctly decided?

Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, I generally refrain from commenting on the correctness of any United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all applicable Supreme Court precedents and would continue to do so if confirmed to the Ninth Circuit.

Prior judicial nominees have made an exception with respect to *Brown v. Board of Education. Brown* overruled *Plessy v. Ferguson*, ending legally enforced racial segregation in public education. *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). Because it is unlikely that *de jure* racial segregation in schools would ever be reimposed in this country, I join other judicial nominees in agreeing that *Brown v. Board of Education* was correctly decided.

11. Was Bolling v. Sharpe correctly decided?

Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, I generally refrain from commenting on the correctness of any United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all applicable Supreme Court precedents and would continue to do so if confirmed to the Ninth Circuit.

12. Was Cooper v. Aaron correctly decided?

Response: My response to Question 11 applies to this question.

13. Was Mapp v. Ohio correctly decided?

Response: My response to Question 11 applies to this question.

14. Was Gideon v. Wainwright correctly decided?

Response: My response to Question 11 applies to this question.

15. Was Griswold v. Connecticut correctly decided?

Response: My response to Question 11 applies to this question.

16. Was South Carolina v. Katzenbach correctly decided?

Response: My response to Question 11 applies to this question.

17. Was Miranda v. Arizona correctly decided?

Response: My response to Question 11 applies to this question.

18. Was Katzenbach v. Morgan correctly decided?

Response: My response to Question 11 applies to this question.

19. Was Loving v. Virginia correctly decided?

Response: As a sitting justice on the California Court of Appeal and a judicial nominee to a federal circuit, I generally refrain from commenting on the correctness of any United States Supreme Court decision out of respect for the high court's binding precedents and to avoid the impression that I have prejudged any legal issues that might come before me. I am duty bound to follow all applicable Supreme Court precedents and would continue to do so if confirmed to the Ninth Circuit.

Prior judicial nominees have made an exception with respect to *Loving v. Virginia*. In *Loving*, the Supreme Court struck down a state law banning interracial marriage, holding that "the Equal Protection Clause demands that racial classifications … be subjected to the 'most rigid scrutiny,'" and concluding there was "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Loving v. Virginia*, 388 U.S. 1, 11 (1963). Because it is unlikely that anti-miscegenation laws would ever be reimposed in this country, I join other judicial nominees in agreeing that *Loving v. Virginia* was correctly decided.

20. Was Katz v. United States correctly decided?

Response: My response to Question 11 applies to this question.

21. Was Roe v. Wade correctly decided?

Response: My response to Question 11 applies to this question.

22. Was Romer v. Evans correctly decided?

Response: My response to Question 11 applies to this question.

23. Was United States v. Virginia correctly decided?

Response: My response to Question 11 applies to this question.

24. Was Bush v. Gore correctly decided?

Response: My response to Question 11 applies to this question.

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

Response: My response to Question 11 applies to this question.

26. Was Crawford v. Marion County Election Board correctly decided?

Response: My response to Question 11 applies to this question.

27. Was Boumediene v. Bush correctly decided?

Response: My response to Question 11 applies to this question.

28. Was Citizens United v. Federal Election Commission correctly decided?

Response: My response to Question 11 applies to this question.

29. Was Shelby County v. Holder correctly decided?

Response: My response to Question 11 applies to this question.

30. Was United States v. Windsor correctly decided?

Response: My response to Question 11 applies to this question.

31. Was Obergefell v. Hodges correctly decided?

Response: My response to Question 11 applies to this question.

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

Response: Ninth Circuit precedent makes clear that "a panel not sitting en banc may not overturn Ninth Circuit precedent." *Nichols v. McCormick*, 929 F.2d 507, 510 n. 5 (9th Cir.1991). Federal Rule of Appellate Procedure 35(a) governs en banc review, which "is not favored." The rule states that *en banc review* "ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2).

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

Response: My response to Question 32 applies to this question.

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

Response: United States Supreme Court precedent directs lower courts to begin with the plain language of the provision, and in the absence of any ambiguity in the statutory text, to enforce its terms. The meaning of a statutory provision should also be construed in the context of the statutory scheme as a whole. If the text is clear, external sources such as legislative history need not be consulted. If the plain language of the statute does not resolve the question, I would employ other interpretative methods, such as considering analogous language in statutory provisions within the same statutory scheme, analogous language in other statutes, consideration of how other courts have interpreted the text at issue, consideration of dictionary definitions if the meaning of a word is disputed, and various canons of statutory interpretation. If legislative history is consulted, the Supreme Court instructs that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted). I am not aware of "general principles of justice" being an accepted method of statutory interpretation.

35. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: A sentencing court "must make an individualized assessment based on the facts presented and the other statutory factors." *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (quotation marks and citation omitted). The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a), and include "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id*. § 3553(a)(6). In reviewing a trial court's criminal sentence, I would be guided by these statutory factors, the sentencing guidelines, and any applicable policy statements of the United States Sentencing Commission.

Questions from Senator Thom Tillis
for Gabriel Patrick Sanchez
Nominee to be United States Circuit Judge for the Ninth Circuit

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

   Response: I do.

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

   Response: Judicial activism is when a judge injects their own personal preferences into a case and allows their personal views to color their decision-making. It is not appropriate, and as a sitting judge, I review each case fairly and impartially, allowing the parties' arguments, the factual record before me, and the governing law and precedent determine the outcome of the appeal.

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

   Response: It is an expectation. Federal judges swear an oath 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." I took a similar oath when I was elevated to the California Court of Appeal.

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

   Response: No. The role of Congress and state legislative bodies is to enact laws and formulate policy. The role of courts is to interpret and apply the law, not to make law.

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

   Response: Yes. As an appellate judge, I have had to decide difficult cases involving the termination of parental rights and other family matters because I determined that the governing law dictated a certain outcome based on the record before me. I reconciled myself to this outcome because I understood that my personal views or sympathies are irrelevant to my role as an adjudicator, and our judicial system and public confidence in the rule of law depend upon a fair and impartial judiciary.

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

   Response: No.

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

   Response: If confirmed, I would faithfully apply the United States Supreme Court's precedent in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), 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: I would evaluate such a lawsuit as I would with any other issue that came before me, by carefully researching and applying the governing law and precedent to the facts of each case. My evaluation of such claim would include consideration of the Second Amendment jurisprudence mentioned above, applicable statutes and regulations concerning the issuance of permits, and any applicable emergency orders arising out of the COVID-19 pandemic.

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: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 580 U.S. ___ , 137 S. Ct. 548, 551 (2017) (per curiam). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305 (2015) (per curiam). Although the Supreme Court's qualified immunity jurisprudence "'does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'" *Rivas-Villegas v. Cortesluna*, __ S. Ct. ___, 2021 WL 4822662 (Oct. 18, 2021) (per curium). "This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* If confirmed, I would faithfully apply the foregoing Supreme Court precedent.

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

    Response: The scope and application of qualified immunity involves important questions of policy that are best addressed by policymakers from the executive and legislative branches of government.

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

    Response: The legal standards set forth above in my response to Question 9 is the governing standard under United States Supreme Court precedent and the standard I will apply unless Congress or the Supreme Court alters that standard.

12. **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: I have limited experience in copyright law.

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 judge on the California Court of Appeal, I have authored several opinions addressing First Amendment and free speech issues, but none of those opinions involved intellectual property rights issues.

13. 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: As the United States Supreme Court explained in *King v. Burwell*: "If the statutory language is plain, we must enforce it according to its terms. But oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal citations omitted).

If the plain language of the text does not resolve the question, there are several methods of interpretation that courts may utilize before relying on external sources such as legislative history. Courts may consider, for example, analogous language in statutory provisions within the same statutory scheme, analogous language in other statutes, consideration of how other circuit courts

have interpreted the text at issue, consideration of dictionary definitions if the meaning of a word is disputed, and various canons of statutory interpretation. If legislative history is consulted, the Supreme Court instructs that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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, 587 (2000), the Supreme Court held that when a court is confronted with an interpretation contained in an agency opinion letter, policy statement, agency manual, or enforcement guideline – all of which lack the force of law – it does not warrant *Chevron*-style deference. Instead, interpretations contained in such formats are entitled to respect, but only to the extent they have the power to persuade. This is known as *Skidmore* deference, as set forth in *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

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

Response: If I am confirmed and such an issue were to be presented to me, I would research the applicable law, including the Digital Millennium Copyright Act (DMCA) of 1998 and any other relevant precedent, to determine what duties an online service provider has to act in the face of apparent copyright infringement.

14. 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: I do not have sufficient familiarity with the issue to provide a response about the limitations of existing law to address widespread copyright infringement.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: If confirmed to the Ninth Circuit, I would be bound to follow United States Supreme Court precedent unless and until the Court chose to overrule its prior precedent or Congress passed a superseding statute. The Supreme Court has identified changed factual circumstances as a factor that it may consider when deciding whether to depart from or overrule its own precedents. *See, e.g., South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2096-97 (2018).