Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Gordon Gallagher
Judicial Nominee to the U.S. District Court for the District of Colorado

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

   Response: As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

   Response: The term is defined as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019).

   The Constitution is an enduring document that sets forth the principles that govern our Nation and that has been interpreted by the Supreme Court over time. The Constitution does not change unless though the processes described in Article V.

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

   Response: I am unfamiliar with the quotation ascribed to Justice Jackson. Please see my response to Question 2.

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

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

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

   Response: Questions related to the allocation of funding to law enforcement or other support services are questions for policy makers not judges. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Furthermore, any personal opinion regarding local government policy is not relevant to my role as a judicial officer. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

6. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

   Response: Please see my response to Question 5.

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

   Response: If confirmed, I intend to sentence consistent with the dictates of 18 U.S.C. §3553(a) as applied to any statute to which a defendant pleads guilty or of which a defendant is found guilty. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

   Response: I am unfamiliar with the quotation. As to the second part of the statement, it is true that there is no requirement for a litigant to have representation in a civil action.

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

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

   Response: As a currently sitting United States Magistrate Judge and as a federal judicial nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. As the holding in this case is not likely to be relitigated, I can state that I believe the United States Supreme Court correctly decided it.

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

   Response: Please see my response to Question 9a.

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

   Response: *Roe v. Wade* was overturned by *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022).

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

Response: As a currently sitting United States magistrate and as a federal judicial nominee, it would be inappropriate for me to comment on the correctness of any United States Supreme Court decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. The issues or related issues raised in this case may come before me making it inappropriate for me to comment. If I am fortunate enough to be confirmed, I would faithfully apply applicable Supreme Court and Tenth Circuit precedent.

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

Response: Please see my response to Question 9d.

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

Response: Please see my response to Question 9d.

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

Response: Please see my response to Question 9d.

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

Response: Please see my response to Question 9d.

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

Response: Please see my response to Question 9d.

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

Response: Please see my response to Question 9d.

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

Response: 18 U.S.C. § 1507 prohibits conduct committed with "the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence."

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

    Response: I am unaware of any Supreme Court or Tenth Circuit precedent that has directly addressed the Constitutionality of 18 USC § 1507.

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

    Response: The fighting words doctrine was articulated by the United States Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court found that, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id*. at 571-72.

    In *Cohen v. California*, 403 U.S. 15, 20 (1971), the Supreme Court noted that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."

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

    Response: The United States Supreme Court has held that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

    Response: As a Magistrate Judge, I must decide the issues in each case fairly and impartially in accordance with precedent. If confirmed, I would start by viewing each case with an open mind. My approach, in every case, is to fully understand the facts, diligently research the applicable law, including binding United States Supreme Court and Tenth Circuit precedent, and faithfully apply the facts to the law without interjecting my personal preferences. In all cases, I would ensure that litigants are heard and respected in my courtroom, that my opinions are clear and well-reasoned, and that I exercise judicial restraint by only hearing the cases and controversies that are before me and not exceeding the authority granted to Article III judges.

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

Response: Please see my response to Question 14.

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

Response: A fact is "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." *Fact*, Black's Law Dictionary (11th ed. 2019). Regarding whether something is a question of fact or a question of law, the courts should examine "whether a given set of facts meets a particular legal standard as presenting a legal inquiry. Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard?" *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020).

17. **When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?**

Response: As a Magistrate Judge, I must decide the issues in each case fairly and impartially in accordance with precedent. If confirmed, I would start by viewing each case with an open mind. My approach, in every case, is to fully understand the facts, diligently research the applicable law, including binding United States Supreme Court and Tenth Circuit precedent, and faithfully apply the facts to the law without interjecting my personal preferences. In all cases, I would ensure that litigants are heard and respected in my courtroom, that my opinions are clear and well-reasoned, and that I exercise judicial restraint by only hearing the cases and controversies that are before me and not exceeding the authority granted to Article III judges.

18. **During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?**

Response: To the best of my knowledge, I have not spoken with anyone from that group.

19. **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: To the best of my knowledge, I have not spoken with anyone from that group.

20. **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: To the best of my knowledge, I have not spoken with anyone from that group.

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

    Response: To the best of my knowledge, I have not spoken with anyone from that group.

22. **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: To the best of my knowledge, I have not spoken with anyone from that group.

23. **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.

24. **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.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

27. **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.

28. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**
    a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response: No.

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

Response: I submitted an application, jointly with both Senators Bennet and Hickenlooper, in March 2022. I was interviewed by the Nominating Commission appointed by the Senators on April 19, 2022. I was interviewed by Senators Bennet and Hickenlooper on April 22, 2022. The following week I was informed that I, along with two other candidates, were being recommended to President Biden for possible nomination. I had previously been interviewed by White House Counsel in October 2021 for a prior vacancy, for which I was not nominated. Since May 26, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2022, my nomination was submitted to the Senate. On December 13, 2022, I was a witness before the Senate Judiciary Committee.

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

Response: I responded to these questions personally, to the best of my ability based on my personal knowledge and legal research. In some instances, my permanent law clerk assisted me in verifying legal research, cite-checking, formatting, and proofreading. I spoke with representatives of the Justice Department and, after receiving feedback, I then provided final responses.

Senator Mike Lee
Questions for the Record
Gordon P. Gallagher, Nominee to the United States District Court for the District of Colorado

1. How would you describe your judicial philosophy?

Response: As a Magistrate Judge, I must decide the issues in each case fairly and impartially in accordance with precedent. If confirmed, I would start by viewing each case with an open mind. My approach, in every case, is to fully understand the facts, diligently research the applicable law, including binding United States Supreme Court and Tenth Circuit precedent, and faithfully apply the facts to the law without interjecting my personal preferences. In all cases, I would ensure that litigants are heard and respected in my courtroom, that my opinions are clear and well-reasoned, and that I exercise judicial restraint by only hearing the cases and controversies that are before me and not exceeding the authority granted to Article III judges.

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

Response: If the United States Supreme Court or individual Circuit Court has interpreted a federal statutory provision, that interpretation must be binding precedent on all district judges in that Circuit. If there is no binding precedent, a lower court judge must first look at the statutory text because "the authoritative statement *is the statutory text*, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005) (emphasis supplied). If "the statutory language is unambiguous and the statutory scheme is coherent and consistent" the "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). If there is no binding precedent interpreting a text and the text is ambiguous, I would apply the "ordinary tools of statutory construction." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). "These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes." *Harbert v. Healthcare Servs. Grp., Inc*., 391 F.3d 1140, 1147 (10th Cir. 2004). I would also look to Supreme Court or Tenth Circuit decisions interpreting analogous legal texts. Only if, after consulting these tools, the statute remains ambiguous would I turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

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

Response: I would first examine the issue and research whether there was any binding precedent from the Supreme Court and Tenth Circuit. In the rare instance that the issue was still ambiguous and there was no controlling precedent, I would examine whether the Supreme Court had issued any guidance as to how the text should generally be interpreted along with any evidence of the original public meaning of the

provision. The Supreme Court has noted the importance of looking at the original public meaning in certain contexts. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: Please see my response to Question 3.

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

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

Response: Please see my response to Question 2.

6. What are the constitutional requirements for standing?

Response: There are three elements necessary to establish constitutional standing. To demonstrate standing, a party must establish: (1) they have suffered an injury in fact, which is concrete and particularized as well as actual or imminent, as opposed to hypothetical; (2) there is a causal connection between the injury and the challenged conduct, which is not the result of a third party's independent action; and (3) the injury is likely to be redressed by a favorable decision as opposed to merely speculative. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

Response: The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18.

The Supreme Court also held that the power of Congress to incorporate a federal Bank of the United States was "implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect." *McCullough v. Maryland*, 17 U.S. 316, 400 (1819).

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

Response: If confirmed as a district judge, I would follow Supreme Court and Tenth Circuit precedent concerning Congress's powers, including *Nat'l Fed'n of Indep. Bus.*

v. Sebelius, 567 U.S. 519, 535 (2012) (holding that if "no enumerated power authorizes Congress to pass a certain law, that law may not be enacted.").

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect those fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). *Glucksberg* identified cases in which the Court recognized certain Due Process rights not specifically enumerated in the Constitution's text: the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (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, to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to live with one's family, *Moore v. East Cleveland*, 431 U.S. 494 (1977). *See also* the right to engage in intimate relations in private, *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. What rights are protected under substantive due process?

Response: Please see my answer to Question 9.

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

Response: If confronted with a matter involving substantive due process, I would faithfully apply the analysis instructed by the United States Supreme Court and Tenth Circuit Court of Appeals. Any personal views I might have on the rights referenced in the question would be irrelevant. Further, the Supreme Court effectively overruled *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (finding "the doctrine that prevailed in *Lochner* . . . has long since been discarded."). The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022).

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

Response: Under the Commerce Clause, Congress has the authority to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Congress, however, lacks the power to "compel[] individuals to

become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: The Supreme Court has set forth various factors that may qualify a particular group as a "suspect class," which includes that they have "been subjected to discrimination;" that they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and that they are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The Court has recognized that race, religion, national origin, and alienage are suspect classifications. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-32 (1971).

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

Response: The system of checks and balances and separation of powers enshrined in the Constitution is one of the most brilliant and enduring implementations of our Founders because it ensures that no one branch in the United States becomes too powerful.

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

Response: I would handle this case the same way I would handle all other cases—by carefully reviewing the facts and the record, the arguments of the parties, the text of the Constitution, and any binding Supreme Court and Tenth Circuit precedent on this issue.

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

Response: A judge should carefully listen to all litigants and treat litigants with respect and dignity. However, a judge's personal feelings and views are irrelevant in discharging that judge's duties. I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent to the relevant facts of the case before me.

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

Response: Both outcomes are undesirable and a judge should seek to avoid either.

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

Response: I have not studied this issue. If confirmed, I would faithfully apply all Supreme Court and Tenth Circuit precedent and rule only on the matter before me.

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

Response: Judicial review refers to court's authority to hear and decide cases concerning the legality of actions of the legislative and executive branches of government. *See Marbury v. Madison*, 5 U.S. 137 (1803). I am unfamiliar with how judicial supremacy is being defined as it is subject to many definitions. If confirmed, I would faithfully apply all Supreme Court and Tenth Circuit precedent and rule only on the matter before me.

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

Response: All elected officials in the United States are bound by oath to support the Constitution and follow the decisions of the Supreme Court interpreting the Constitution. Per Question 14, it is not appropriate for a member of the judiciary to opine on how an elected official should act in their official capacity.

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

Response: It is important for a judge to always keep in mind that a judge's role is to only consider the specific case and facts before them—judges are not policy makers. If confirmed, I would faithfully apply all Supreme Court and Tenth Circuit precedent and rule only on the matter before me.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when

confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If confirmed, I would faithfully apply all Supreme Court and Tenth Circuit precedent and rule only on the matter before me.

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

Response: When sentencing, I must faithfully apply the factors set forth in 18 U.S.C. §3553(a). Any consideration of the defendant's group identity(ies) is not appropriate.

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

Response: I am not familiar with the definition of equity ascribed to the Biden Administration. As a judicial nominee, it would be generally inappropriate for me to comment on any statement made by elected officials. Black's Law Dictionary (11th ed. 2019) defines equity as "fairness, impartiality, and evenhanded dealing."

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

Response: I define equality as the state of being equal or the same. Please see my response to question 24 as to the definition of equity.

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

Response: Section 1 of the Fourteenth Amendment states "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

27. How do you define "systemic racism?"

Response: I generally understand systemic racism to mean patterns, practices or policies that disproportionately impact people based on race, as opposed to individual instances of discrimination.

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

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

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

Response: Please see my answers to Questions 27 and 28.

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

Questions for the Record for Gordon P. Gallagher, nominated to be United States District Judge for the District of Colorado

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Discrimination based on race has been deemed illegal by the United States Supreme Court and is prohibited by various federal statutes, including but not limited to Title VII of the Civil Rights Act of 1964. If confirmed, I will adhere to Supreme Court and Tenth Circuit precedent in cases presenting issues of racial discrimination.

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect those fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). *Glucksberg* identified cases in which the Court recognized certain Due Process rights not specifically enumerated in the Constitution's text: the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (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, to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to live with one's family, *Moore v. East Cleveland*, 431 U.S. 494 (1977). *See also* the right to engage in intimate relations in private, *Lawrence v. Texas*, 539 U.S. 558 (2003). Furthermore, any personal opinion regarding whether there are any unenumerated rights in the Constitution, yet unarticulated by the Supreme Court, that can or should be identified in the future is not relevant to my role as a judicial officer. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: As a Magistrate Judge, I must decide the issues in each case fairly and impartially in accordance with precedent. If confirmed, I would start by viewing each case with an open mind. My approach, in every case, is to fully understand the facts, diligently research the applicable law, including binding United States Supreme Court and Tenth Circuit precedent, and faithfully apply the facts to the law without interjecting my personal preferences. In all cases, I would ensure that litigants are heard and respected in my courtroom, that my opinions are clear and well-reasoned, and that I exercise judicial restraint by only hearing the cases and controversies that are before me and not exceeding the authority granted to Article III judges.

4. **Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an "originalist"?**

Response: Originalism is defined as: (1) "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; . . . the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect" or (2) "[t]he doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." *Originalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I will faithfully apply United States Supreme Court and Tenth Circuit precedent concerning how to interpret any constitutional provision or statute, including the provision's original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (applying the original public meaning to interpret the Second Amendment).

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

Response: The term is defined as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019).

The Constitution is an enduring document that sets forth the principles that govern our Nation and that has been interpreted by the Supreme Court over time. The Constitution does not change unless though the processes described in Article V.

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

Response: As previously mentioned, I would first examine the issue and research whether there was any binding precedent from the Supreme Court and Tenth Circuit. In the rare instance that the issue was still ambiguous and there was no controlling precedent, I would examine whether the Supreme Court had issued any guidance as to how the text should generally be interpreted along with any evidence of the original public meaning of the provision. The Supreme Court has noted the importance of looking at the original public meaning in certain contexts. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: I am bound to follow and apply the controlling precedent of the Supreme Court and Tenth Circuit. The Supreme Court, in examining the bounds of cruel and unusual punishment under the Eighth Amendment, stated "[t]he Amendment must draw its

meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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

Response: No.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: As a currently sitting Magistrate Judge and as a federal judicial nominee, it would be inappropriate for me to comment on the correctness of any United States Supreme Court decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. Furthermore, it is inappropriate for me to comment on such a topic as the issues or related issues raised in this case may come before in future litigation. If I am fortunate enough to be confirmed, I would faithfully apply applicable Supreme Court and Tenth Circuit precedent.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: Yes.

a. **Was it correctly decided?**

Response: Please see my answer to Question 9 above.

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

Response: Yes.

a. **Was it correctly decided?**

Response: As a currently sitting United States Magistrate Judge and as a federal judicial nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. As the holding in this case is

not likely to be relitigated, I can state that I believe the United States Supreme Court correctly decided it.

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

Response: Generally, per the Bail Reform Act, the rebuttable presumption of pretrial detention is triggered in certain drug-related offenses, certain sex crimes or crimes on persons (e.g., human trafficking or kidnapping), certain terrorism offenses, and crimes related to firearms—generally these are all triggered only by a prescribed term of imprisonment of ten years or more. *See* 18 U.S.C. § 3142(e)(3).

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

Response: I am unaware of the policy rationale; I cannot and would not consider any such rationale as a sitting United States Magistrate Judge and Article III judicial nominee.

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

Response: Yes, there are limits on what the government may impose on or require of private institutions or businesses operated by religious owners. The First Amendment's Free Exercise Clause bars governmental regulation of religious beliefs or interference with the dissemination of religious ideas. *Gillette v. United States*, 401 U.S. 437, 462 (1971). Laws that are not neutral and generally applicable are subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Laws are not neutral or generally applicable when they treat a comparable secular activity more favorably than religious exercise. *Id.* The government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

The Religious Freedom Restoration Act ("RFRA") prohibits the government from substantially burdening a person's exercise of religion, even where the burden results from a rule of general applicability, unless the federal government can demonstrate that the application of the burden is (1) in furtherance of a compelling government interest and (2) the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014); 42 U.S.C. §§ 2000bb–1(a)-(b). The Supreme Court has held that RFRA applies to restrictions on the activities of a for-profit closely held corporation, *see Hobby Lobby*, 573 U.S. at 719, and to religious organizations. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020).

14. **Is it ever permissible for the government to discriminate against religious**

organizations or religious people?

Response: Generally speaking, no. As noted in response to question 13, the First Amendment's Free Exercise Clause bars governmental regulation of religious beliefs or interference with the dissemination of religious ideas. *Gillette v. United States,* 401 U.S. 437, 462 (1971). Laws that are not neutral and generally applicable are subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the United States Supreme Court ruled that the applicants were entitled to a preliminary injunction enjoining the state of New York from enforcing the Governor's executive order restricting occupancy limits on religious services in certain zones. *Id.* at 65-66. The Court concluded that the applicants were likely to prevail on their First Amendment challenge to the executive order. The Court determined that the challenged restrictions were not neutral or generally applicable because they "single[d] out houses of worship for especially harsh treatment" and were thus subject to strict scrutiny. *Id.* at 66-67. Although the Court concluded that preventing the spread of COVID-19 was a compelling governmental interest, it held that the restrictions imposed in the executive order were not narrowly tailored to meet that interest. *Id.* Then, the Court concluded that the applicants were likely to suffer irreparable harm absent an injunction because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Finally, the Court concluded that the government had not established that an injunction would harm the public interest. *Id.* at 68. Thus, the court concluded that injunctive relief was appropriate.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that Plaintiffs were entitled to injunctive relief because the state of California's COVID-19 restrictions on at-home religious exercise were not neutral or generally applicable, especially "whenever they treat *any* comparable secular activity more favorably than religious exercise," and triggered strict scrutiny. *Id.* at 1296 (emphasis in original). The Court determined that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* In the context of COVID-19 restrictions on religious activity,

the government was required to "show that the religious exercise at issue is more dangerous than [comparable secular] activities even when the same precautions are applied." *Id.* at 1297. The Court concluded that the applicants, who challenged restrictions on religious gatherings instituted during the COVID-19 pandemic, were likely to succeed on the merits of their free exercise claim and granted an injunction pending the appeal of their case. *Id.* at 1297-98.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that a baker's First Amendment rights, under the Free Exercise Clause, were violated when the Colorado Civil Rights Commission exhibited "clear and impermissible hostility toward [the baker's] sincere religious beliefs" when it evaluated the baker's refusal to bake a wedding cake for a same-sex couple. *Id.* at 1729. The Court concluded that "the Commission's treatment of [the baker's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint, as the Commission's "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1731-32.

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

Response: Yes. An individual's sincere religious beliefs are protected regardless of whether the beliefs "respond[] to the commands of a particular religious organization" or despite "disagreement among sect members." *Frazee v. Illinois Department of Emp. Sec.*, 489 U.S. 829, 833-34 (1989); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

Response: The Supreme Court has held that "only beliefs rooted in religion – not "[p]urely secular views" – are protected. Sincere religious beliefs need not be "acceptable, logical, consistent or comprehensible" in order to be protected. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 713-14 (1981). A Court may only assess, based on a subjective test, the extent to which a religious belief is sincerely held. *Id.* at 714.

b. **Can courts decide that anything could constitute an acceptable "view" or**

"interpretation" of religious and/or church doctrine?

Response: Please see my previous answers to Question 19.

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

Response: I am unfamiliar with the official position of the Catholic Church.

20. **In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), the Supreme Court concluded that courts could not entertain employment discrimination claims brought by teachers who were terminated from their employment at religious schools based on the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 190 (2012). Application of the ministerial exception is based on the First Amendment's guarantee that religious institutions "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *Id.* at 2055 (quotation omitted), and requires that courts "stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* at 2060. The Court recognized a number of factors relevant to the determination of whether the ministerial exception applies, *id.* at 2062-64, but noted that "[w]hat matters, at bottom, is what an employee does." *Id.* at 2064. Because the teachers' core responsibilities were educating students in religious studies and because the schools "expressly saw [the teachers] as playing a vital part in carrying out the mission of the church," the Court concluded that the ministerial exception applied to bar judicial review of the discrimination claims. *Id.* at 2066-67, 2069.

21. **In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.**

Response: In *Fulton v. City of Philadelphia*, the Supreme Court determined that the city's decision to stop referring children to a religious foster care agency, which was based on the agency's refusal to certify same-sex couples as foster parents, violated the First Amendment's Free Exercise Clause. 141 S. Ct. 1868, 1874, 1882 (2021). Importantly, the city indicated that it would renew its contract with the agency if the agency agreed to certify same-sex couples. *Id*. at 1874. The Court first determined that the city's policy was not generally applicable because the policy incorporated "a system

of individual exemptions," made available at the sole discretion of a city official. *Id.* at 1878. The Court reasoned that a law that "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" is not generally applicable. *Id.* at 1877 (quotation and alteration marks omitted). Applying strict scrutiny, the Court concluded that the city failed to demonstrate a compelling interest for its policy and the policy thus violated the Free Exercise Clause. *Id.* at 1881-82.

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

Response: Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause because a State may not exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits. *Carson v. Makin*, 142 S. Ct. 1987, 1997-98, 2002 (2022).

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.**

Response: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022).

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated the judgment of the Court of Appeals of Minnesota and remanded the case back to the Court of Appeals for further consideration in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *See Mast*, 141 S. Ct. at 2430. Justice Gorsuch concurred in the decision to vacate and remand but wrote separately to "highlight a few issues the lower courts and administrative authorities may wish to consider on remand." *Id.* at 2430 (Gorsuch, J., concurring). Specifically, Justice Gorsuch instructed that in applying strict scrutiny, courts cannot rely on "broadly formulated" governmental interests but must instead analyze the government's interest in denying an exception to the religious claimant specifically. *Id.* at 2432 (quoting *Fulton*, 141 S. Ct. at 1881). Moreover, Justice Gorsuch stated that the lower courts had erred by failing to give an appropriate amount of weight to exceptions given to other non-religious groups or exceptions permitted in other jurisdictions. *Id.* at 2432-33. Finally, Justice Gorsuch

cautioned against relying on assumptions or suppositions in applying strict scrutiny and stated that strict scrutiny requires evidence that the applicable regulations are narrowly tailored to advance a compelling government interest. *Id.* at 2433.

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?**

Response: This is an issue that may come before me in future litigation; therefore, as a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). I am not aware of any binding Supreme Court or Tenth Circuit precedent regarding the constitutionality of this specific statute. But, if a case came before me presenting that question, I would carefully review the facts of the case, the arguments of the parties, the text of the First Amendment, and the most closely analogous Supreme Court and Tenth Circuit case law to reach a decision.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

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

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

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

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

Response as to all subsections: I am not aware of any human resources training of this nature or which "court" is referred to in this question.

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

Response: I am not aware of any human resources training of this nature within the U.S. District Court for the District of Colorado.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

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

Response: As an Article III judicial nominee, it would be inappropriate of me to comment on what factors should be considered for political appointment.

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

Response: I have not reviewed or conducted any research into this issue. As a United States Magistrate Judge, I have treated every litigant who comes before me fairly, respectfully, and impartially and I will continue to do so if confirmed as a federal district judge.

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

Response: As a United States Magistrate Judge I am bound to apply Supreme Court precedent regardless of the size or composition of that Court. And should I be confirmed, I will continue to do so.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

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

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: The United States Supreme Court has held that restrictions on the Second Amendment will only survive constitutional scrutiny if the government demonstrates that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). This holding is to be read in conjunction with the holdings established in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Bruen, 142 S. Ct. at 2157 (Alito, J., concurring).

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

Response: Please see my response to Question 34.

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

Response: Please see my response to Question 34.

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

Response: Please see my response to Question 34.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

Response: My understanding of "prosecutorial discretion" is consistent with the definition provided by Black's Law Dictionary, which defines prosecutorial discretion as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." *Discretion*, Black's Law Dictionary (11th ed. 2019). Administrative rule changes must comply with the requirements of the Administrative Procedure Act.

40. **Does the President have the authority to abolish the death penalty?**

Response: 18 U.S.C. § 3591 provides for the death penalty in certain circumstances and can only be amended or repealed through the normal legislative process. The President does not have the unilateral authority to repeal this federal statute.

41. **Explain the U.S. Supreme Court's holding on the application to vacate stay in**

Alabama Association of Realtors v. HHS.

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated the United States District Court for the District of Columbia's stay pending appeal of the district court's grant of summary judgment in favor of the Alabama Association of Realtors (the "AAR") regarding a national wide eviction moratorium for residential rental properties imposed by the Center for Disease Control and Prevention (the "CDC"). The Supreme Court held that the applicants were likely to succeed on the merits of their claim that the CDC exceeded its authority in imposing the moratorium and the applicants were at risk of irreparable harm by deprivation of rent payments with no guarantee of eventual recovery. *Id.* at 2486-89.

42. **You presided over a number of Naturalization Ceremonies where you touched upon the topic of social justice. At a ceremony at Fruita Monument High School, you said, "In addition, our nation is currently roiled by social turbulence as groups whose voices have not been heard or who have had their opinions suppressed seek to stand shoulder to shoulder on equal footing with all other citizens in a quest to truly realize the promise of the declaration of independence—that we are all equal and all endowed by our creator with certain inalienable rights."**

a. **What "groups" were you referring to?**

Response: I was speaking broadly as to any group(s) that have not been historically heard or that have been historically suppressed.

b. **What did you mean when you said "groups whose voices have not been heard or have their opinion suppressed"?**

Response: Please see my answer to subsection a.

c. **Who is responsible for suppressing the voices of these groups?**

Response: I did not and do not ascribe that suppression to any one source.

d. **What does it mean for a group's voice to be suppressed?**

Response: A group's voice may be suppressed if that group, for some reason, has not been allowed to be a part of or had access to that national or local conversation.

e. **Do you believe some American citizens are not afforded equal justice under law?**

Response: I believe, consistent with the quotation on the pediment of the United States Supreme Court, that equal justice under the law continues to be the aspiration and the daily work of the justice system in the United States.

f. **Does "equity" play a role in judging?**

Response: I believe equity is and should be a consideration for policymakers, not judges. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

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

   Response: No.

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

   Response: As a Magistrate Judge, I must decide the issues in each case fairly and impartially in accordance with precedent. If confirmed, I would start by viewing each case with an open mind. My approach, in every case, is to fully understand the facts, diligently research the applicable law, including binding United States Supreme Court and Tenth Circuit precedent, and faithfully apply the facts to the law without interjecting my personal preferences. In all cases, I would ensure that litigants are heard and respected in my courtroom, that my opinions are clear and well-reasoned, and that I exercise judicial restraint by only hearing the cases and controversies that are before me and not exceeding the authority granted to Article III judges.

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

   Response: Originalism is defined as: (1) "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; . . . the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect" or (2) "[t]he doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." *Originalism*, Black's Law Dictionary (11th ed. 2019). If confirmed, I will faithfully apply United States Supreme Court and Tenth Circuit precedent concerning how to interpret any Constitutional provision or statute, including the provision's original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (applying the original public meaning to interpret the Second Amendment)

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

   Response: If confirmed, I will apply Supreme Court and Tenth Circuit precedent concerning how to interpret any Constitutional provision or statute. I would not apply any

label to my judicial philosophy. In a case of first impression involving statutory interpretation, I would start with the text of the statute.

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

   Response: The Constitution is an enduring document that sets forth the principles that govern our Nation and that has been interpreted by the Supreme Court over time. The Constitution does not change unless amended pursuant to Article 5.

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

   Response: I have not studied the full jurisprudence and approach of the United States Supreme Court Justices. I admire each of them for their service to the United States.

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

   Response: As a nominee for the district court, I am not likely to be in a position to make such a decision. An appellate court will follow its precedent unless a Supreme Court decision or an *en banc* holding of the same appellate court implicitly or explicitly overrules the prior decision.

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

   Response: As a nominee for the district court, I am not likely to be in a position to make such a decision. Federal Rule of Appellate Procedure 35(a) states that, in determining when to grant *en banc* review, a court must decide whether: "(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. 35(a)(1)-(2).

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

   Response: If the United States Supreme Court or individual Circuit Court has interpreted a federal statutory provision, that interpretation must be binding precedent on all district judges in that Circuit. If there is no binding precedent, a lower court judge must first look

at the statutory text because "the authoritative statement *is the statutory text*, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005) (emphasis supplied). If "the statutory language is unambiguous and the statutory scheme is coherent and consistent" the "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). If there is no binding precedent interpreting a text and the text is ambiguous, I would apply the "ordinary tools of statutory construction." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). "These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes." *Harbert v. Healthcare Servs. Grp., Inc*., 391 F.3d 1140, 1147 (10th Cir. 2004). I would also look to Supreme Court or Tenth Circuit decisions interpreting analogous legal texts. Only if, after consulting these tools, the statute remains ambiguous would I turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

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

Response: If confirmed, my role as a district judge would be to impose sentence on individual defendants pursuant to the factors set forth in 18 U.S.C. §3553(a). Considerations such as "average longer sentences . . . [for members] of [certain] racial or ethnic groups" are issues for debate by academics and resolution by policymakers and not the judiciary.

Senator Josh Hawley
Questions for the Record

Gordon Gallagher
Nominee, District of Colorado

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

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

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

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

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

    Response as to all subparts: If confirmed, I intend to sentence consistent with the dictates of 18 U.S.C. §3553(a) as applied to any statute to which a defendant plead guilty or of which a defendant was found guilty. I would take into account the sentencing guideline, all memoranda, victim statements, statements of counsel, and the defendant's allocution.

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

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

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

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

    Response as to all subparts: With respect to whether statutory penalties should be changed for any particular federal crime, that is a question for policy makers to consider. As a United States Magistrate Judge, I am bound to apply the laws of the United States as they are written.

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

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

Response: I am unfamiliar with the quotation; regardless, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

Response: Please see my response to subpart a.

4. **Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?**

Response: I agree that it is binding precedent that I am bound to follow as a United States Magistrate Judge just as I am bound to follow all Supreme Court precedent.

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

Response: There are a variety of abstention doctrines applicable in the Tenth Circuit. These include:

The *Colorado River* abstention doctrine is an exception to the general rule that a federal Court should not abstain due to the mere presence of a concurrent state proceeding. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). In the Tenth Circuit, the courts must examine (1) whether the state or federal court first assumed jurisdiction over the same res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums. *D.A. Osguthorpe Fam. P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1234 (10th Cir. 2013)

The *Pullman* abstention doctrine allows federal courts to abstain from deciding federal constitutional questions where the case can be disposed on the issues pertaining to state law. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941).

The *Younger* abstention doctrine allows federal courts to abstain from hearing cases, specifically granting injunctive or declaratory relief, that involve ongoing parallel state court proceedings. This doctrine is based on the principle that federal courts should not interfere with the ability of state courts to resolve issues that are within their jurisdiction. *Younger v. Harris*, 401 U.S. 37 (1971). Courts should abstain from granting relief in three categories: (1) state criminal prosecutions, (2) civil enforcement proceedings, and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.

Courthouse News Serv. v. New Mexico Admin. Off. of Cts., 53 F.4th 1245, 1256 (10th Cir. 2022) (internal quotations and citation omitted).

The *Rooker-Feldman* abstention doctrine allows federal courts to abstain from hearing cases that involve issues that have already been decided by a state court (i.e., exercising appellate jurisdiction over a state court's final judgment). *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416 (1923).

The political questions doctrine mandates that courts should abstain from deciding political questions pursuant to the six-factor test established in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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

   Response: I do not recall ever working on a legal case or representation in which I 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.**

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

   Response: I would first examine the issue and research whether there was any binding precedent from the Supreme Court and Tenth Circuit. In the rare instance that the issue was still ambiguous and there was no controlling precedent, I would examine whether the Supreme Court had issued any guidance as to how the text should generally be interpreted along with any evidence of the original public meaning of the provision. The Supreme Court has noted the importance of looking at the original public meaning in certain contexts. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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

   Response: If, after consulting other appropriate tools, a statute remained ambiguous I would then turn to legislative history. *See Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

   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 and the Tenth Circuit have suggested that some types of legislative history may be afforded greater weight than others. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms

of legislative history."). I would apply both Supreme Court and Tenth Circuit precedent in determining what weight to give any particular legislative history.

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

Response: It is generally not appropriate to consult the laws of foreign nations when interpreting the United States Constitution.

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

Response: In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court held that an execution protocol does not violate the Eighth Amendment unless it creates a "substantial risk of serious harm." This standard requires the plaintiff to show that there is a "substantial risk" that the execution will result in severe pain or suffering, and that this risk is "serious" enough to be considered "cruel and unusual."

The Supreme Court applied this standard in *Glossip v. Gross*, 576 U.S. 863 (2015). In *Glossip* the court found that the execution protocols at issue did not present a substantial risk of serious harm and therefore did not violate the Eighth Amendment.

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

Response: Yes. In *Glossip*, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, which is a requirement of all Eighth Amendment method-of-execution claims. *Glossip v. Gross*, 576 U.S. 863, 867 (2015).

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

Response: In *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), the Supreme Court held that a habeas petitioner seeking postconviction relief does not have a due process right to access DNA evidence for testing.

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

Response: No.

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

Response: The First Amendment's Free Exercise Clause bars governmental regulation of religious beliefs or interference with the dissemination of religious ideas. *Gillette v. United States*, 401 U.S. 437, 462 (1971). State laws that are not neutral and generally applicable are subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

The Religious Freedom Restoration Act ("RFRA") prohibits the federal government from substantially burdening a person's exercise of religion, even where the burden results from a rule of general applicability, unless the government can demonstrate that the application of the burden is (1) in furtherance of a compelling government interest and (2) the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014); 42 U.S.C. §§ 2000bb–1(a)-(b). The Supreme Court has held that RFRA applies to restrictions on the activities of a for-profit closely held corporation, *see Hobby Lobby*, 573 U.S. at 719, and to religious organizations. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020).

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

Response: Please see my response to question 13. A government action is only permissible if it survives strict scrutiny (i.e., a narrowly tailored government interest that serves a compelling state interest).

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

Response: The Tenth Circuit follows Supreme Court precedent. The courts have a narrow scope which is to determine "whether the plaintiffs' asserted religious belief reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686, (2014).

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

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

Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) determined the original public meaning to be that possession of a firearm is an individual right. *See also New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (noting that the Second Amendment serves to protect an individual right to armed self-defense). In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm in the home for self-defense.

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: I do not recall issuing such an opinion.

17. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

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

Response: Writing in dissent, Justice Holmes stated in *Lochner v. New York*, 198 U.S. 45 (1905), that the "Constitution is not intended to embody a particular economic theory." *Id.* at 75 (Holmes, J., dissenting). This statement is understood to reflect Justice Holmes' view that the Fourteenth Amendment did not mandate the majority opinion's holding that "the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *Id.* at 64. If confirmed, I will adhere to Supreme Court and Tenth Circuit precedent.

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

Response: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court effectively overruled *Lochner* and rejected its characterization of the freedom of contract as absolute. *See also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (the "doctrine that prevailed in *Lochner* . . . has long since been discarded"). If confirmed, I will adhere to Supreme Court and Tenth Circuit precedent.

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

a. If so, what are they?

Response: I understand all opinions of the United States Supreme Court which have not been formally overruled or clearly abrogated to be good law.

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

Response: I commit to faithfully applying all United Stated Supreme Court precedent.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent 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 as to all subsections: I am unfamiliar with the quotation ascribed to Judge Hand. The Supreme Court has explained that the prohibition against monopoly in Section 2 of "the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). Regardless, this is precedent from the Second Circuit. If confirmed, I will adhere to Supreme Court and Tenth Circuit precedent.

This is an issue that may come before me in future litigation; therefore, as a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment further on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

Response: There is no federal general common law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: With respect to provisions of the U.S. Constitution, the Supreme Court has explained that it is the "duty of [federal courts] to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). With respect to the provisions of state constitutions, the Supreme Court has confirmed that "the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Please see my prior response. Federal district courts must interpret provisions of the U.S. Constitution in accordance with precedent of the Supreme Court and the relevant Circuit, including precedents setting forth methods of interpretation. With respect to the state constitutional provisions, "the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: Federal law affords a floor but a state constitutional provision may provide greater protections.

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

Response: As a currently sitting United States Magistrate Judge and as a federal judicial nominee, it would generally be inappropriate for me to comment on the correctness of any United States Supreme Court decision. I am governed by the Code of Conduct for United States Judges, Canon 3, which requires that a judge not make public comments on the merits of a matter pending or impending in any court. As the holding in this case is not likely to be relitigated, I can state that I believe the United States Supreme Court correctly decided it.

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

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

Response: I am not aware of any Supreme Court or Tenth Circuit authority that establishes the source of judicial authority to issue nationwide injunctions. To the extent such authority exists, it seems to derive from the court's power under Federal Rule of Civil Procedure 65.

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

Response: I am not aware of any additional authority, other that Rule 65 and its interpreting case law, that governs the exercise of court's authority to issue an injunction.

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

Response: Please see my previous response.

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

Response: Federalism is designed to ensure "a healthy balance of power between the States and the Federal Government" in order to "reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Federalism "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 564 U.S. 211, 221 (2011).

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

Please see my response to Question 5.

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

Response: Courts may award damages to remedy past harm that has already occurred and make a party whole, and may award injunctive relief to address ongoing harm or to prevent future harm that has not yet occurred. The availability and advantage or disadvantages of a particular form of relief depends on the circumstances of an individual case.

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

Response: The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects certain substantive rights that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that

neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

Glucksberg identified cases in which the Court recognized certain Due Process rights not specifically enumerated in the Constitution's text: the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (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, to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to live with one's family, *Moore v. East Cleveland*, 431 U.S. 494 (1977). *See also* the right to engage in intimate relations in private, *Lawrence v. Texas*, 539 U.S. 558 (2003).

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 answers to Question 13 and Question 14.

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

Response: The Supreme Court has referred to both "freedom of worship" and "free exercise of religion," but does not appear to have delineated any differences between the two terms. *Compare Lee v. Weisman*, 505 U.S. 577, 591 (1992) (referring to the right protected by the First Amendment Free Exercise Clause as the "freedom of worship") *with Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019–20 (referring to the right protected by the Free Exercise Clause as "the free exercise of religion").

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

Response: Please see my answer to Question 13.

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 answer to Question 15.

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 (RFRA) plainly indicates that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. §§ 2000bb-3(a). However, "RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citing 42 U.S.C. § 2000bb–3(b)). Finally, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014), the Supreme Court held that federal regulations mandating specified employers' group health plans to provide coverage for certain contraceptive methods imposed a substantial burden on the defendant business owners' free exercise of their sincerely held religious beliefs and thus violated RFRA.

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: I do not believe I have issued an opinion in one of the listed areas.

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

a. What do you understand this statement to mean?

Response: While I am not familiar with the statement, I take it to mean that judges who faithfully follow the law and precedent sometimes must make decisions they do not like or personally agree with.

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

Response: I do not believe that I have ever taken such a position.

a. If yes, please provide appropriate citations.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

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

Response: Policy considerations of whether the criminal justice system is systemically racist are outside the role of a judicial officer, and I am unaware of any Supreme Court or Tenth Circuit precedent that has held the criminal justice system is systemically racist.

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

Response: In litigation, I zealously represented my client's interests and did not allow my personal views to be interjected into the litigation.

35. How did you handle the situation?

Response: I handled the situation by ensuring that I was representing my client and not interjecting my personal views.

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

Response: As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

Response: I have not considered the Federalist Papers in context of any views of the law which I might have.

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

Response: I am not aware of any Supreme Court decision definitely addressing when human life begins. The Supreme Court also did not address the question of fetal personhood in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). This is an issue that may come before me in future litigation; therefore, as a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment further on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

Response: Yes. I have testified pursuant to Colorado Rule of Criminal Procedure 35(c). I have no record or reference as to the testimony.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response: No as to all subparts.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No as to all subparts.

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

Response: No.

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

43. Have you ever confessed error to a court?

Response: I do not believe I have ever confessed error to a court.

a. If so, please describe the circumstances.

44. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I believe that a judicial nominee has a duty to be candid in their answer(s) and to refuse to respond when a response would be violative of the Code of Judicial Conduct for United States Judges or could otherwise compromise their ability to be fair and impartial in future matters.

Questions from Senator Thom Tillis
for Gordon Paul Gallagher
Nominee to be United States District Judge for the District of Colorado

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

   Response: Yes.

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

   Response: While judicial activism is subject to many possible definitions, I define it as a judge interjecting their personal views rather than upon the neutral application of the law to the facts. Judicial activism is not appropriate.

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

   Response: Impartiality is both an expectation and an aspiration for a judge.

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

   Response: No. The judiciary is only one of the three branches of the Federal Government; it may serve a function in the system of checks and balances, but it should not opine on matters that are not before it.

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

   Response: Yes. If a judge is faithfully applying the law to the facts, this may on some occasion(s) reach what could be perceived as an undesirable outcome. As a judicial officer, I reconcile this by recognizing that consistency of process and outcome is of paramount importance to our democratic institutions.

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: The United States Supreme Court has held that restrictions on the Second Amendment will only survive constitutional scrutiny if the government demonstrates that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126

(2022). This holding is to be read in conjunction with the holdings established in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring). I will faithfully apply all Supreme Court and Tenth Circuit precedent in this area if confirmed.

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: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that plaintiffs were entitled to injunctive relief because the state of California's COVID-19 restrictions on at-home religious exercise were not neutral or generally applicable, especially "whenever they treat *any* comparable secular activity more favorably than religious exercise," and triggered strict scrutiny. *Id.* at 1296 (emphasis in original). The Court determined that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* In the context of COVID-19 restrictions on religious activity, the government was required to "show that the religious exercise at issue is more dangerous than [comparable secular] activities even when the same precautions are applied." *Id.* at 1297. The Court concluded that the applicants, who challenged restrictions on religious gatherings instituted during the COVID-19 pandemic, were likely to succeed on the merits of their free exercise claim and granted an injunction pending the appeal of their case. *Id.* at 1297-98. I would faithfully apply the lessons of *Tandon* in conjunction with the case law discussed in my answer to Question 7 to reach a resolution of this issue as well as any additional Supreme Court or Tenth Circuit precedent which may be applicable.

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: Government officials are shielded from liability for damages for discretionary acts pursuant to 42 U.S.C. § 1983 "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018). "Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Id*. If confirmed as a district judge for the District of Colorado, I would be bound by, and would faithfully and impartially follow all binding precedent of the Supreme Court and Tenth Circuit, including but not limited to *Wesby*.

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 question of whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policy makers to consider. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

Response: Please see my response to Question 10.

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

Response: This is an issue that may come before me in future litigation; therefore, as a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so. If faced with issues such as those described in this question, I would carefully study the Supreme Court's decisions on patent eligibility, including: *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 134 S. Ct. 2347, 189 L. Ed. 2d 296 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); and *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012).

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

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

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

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if

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

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

e. ***Natural Laws and Substances, Inc.*** **specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

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

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

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

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

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

Response to all subparts: Please see my response to Question 12.

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

Response: Please see my response to Question 12.

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

a. What experience do you have with copyright law?

Response: I have not yet addressed a matter involving copyright law.

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

Response: I have not yet addressed a matter involving the Digital Millennium Copyright Act.

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

Response: I have not yet addressed such a matter.

d. What experience do you have with First Amendment and free speech issues?

Response: I addressed a matter relating to First Amendment and free speech issues by way of a recommendation on a motion to dismiss in *Anderson v. Colorado Mountain News Media Co.*, No. 18-CV-02934-CMA-GPG, 2019 WL 3321843 (D. Colo. May 20, 2019), *report and recommendation adopted*, No. 18-CV-02934-CMA-GPG, 2019 WL 6888275 (D.

Colo. Dec. 18, 2019).

Do you have experience addressing free speech and intellectual property issues, including copyright?

Response: I have not yet addressed such a matter.

16. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If the United States Supreme Court or individual Circuit Court has interpreted a federal statutory provision, that interpretation must be binding precedent on all district judges in that Circuit. If there is no binding precedent, a lower court judge must first look at the statutory text because "the authoritative statement *is the statutory text*, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005) (emphasis supplied). If "the statutory language is unambiguous and the statutory scheme is coherent and consistent" the "the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). If there is no binding precedent interpreting a text and the text is ambiguous, I would apply the "ordinary tools of statutory construction." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). "These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes." *Harbert v. Healthcare Servs. Grp., Inc*., 391 F.3d 1140, 1147 (10th Cir. 2004). I would also look to Supreme Court or Tenth Circuit decisions interpreting analogous legal texts. Only if, after consulting these tools, the statute remains ambiguous would I turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

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: Under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), courts should defer to reasonable administrative agency interpretations of applicable statutes. An expert federal agency's advice or analysis as to the interpretation of legislative text, as contained in an agency opinion letter, policy statement, agency manual, or

enforcement guideline, receives *Skidmore* deference. *See Skidmore v. Swift*, 323 U.S. 134 (1944). Applying *Skidmore* deference, the agency's advice and analysis is "entitled to respect," but only to the extent they are persuasive, which is not the level of deference afforded under the *Chevron* doctrine. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

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: The issue of whether the current legal regime provides online service providers with sufficient notice of copyright infringement is a question best left to policy makers. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

17. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

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 to both subparts: If confirmed as a district judge for the District of Colorado and presented with a case or controversy that properly raises the question of how to interpret and apply the DMCA in its current form or as it may be amended, I would impartially apply the law, including Supreme Court and Tenth Circuit precedents, to the facts as established by the evidence in the record.

The issues of whether the DMCA is adequate in the internet era and whether any new laws are needed present important questions for policy makers. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

18. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have

expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: I have served as a United States Magistrate Judge in the District of Colorado since 2012. In that role, it has been my observation that the Local Rules for the District of Colorado are structured in such a manner as to avoid individual judge shopping.

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

Response: I believe that courts should structure the local rules for each district in a manner which balances local geographic need and attempts to avoid judge shopping.

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

Response: No.

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

Response: I commit to not engage in such conduct.

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

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

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

Response as to both parts: As a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

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

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

Response to the question and both subparts: If confirmed as a district judge for the District of Colorado, I would be bound by, and would faithfully and impartially follow, the Federal Rules of Civil Procedure and the Local Rules of District of Colorado. As a pending judicial nominee, it would be inappropriate for me to comment on the merits of those Local Rules or any proposals to amend those rules with respect to patent cases.

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

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

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

Response as to both parts: As a sitting United States Magistrate Judge and judicial nominee, it is not appropriate for me to comment on this question. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit precedent to the facts of each particular case before me. Should I be confirmed, I will continue to do so.