Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Matthew Garcia
Judicial Nominee to the United States District Court for the District of New Mexico

1. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: In *Washington v. Glucksberg*, the Supreme Court ruled that the 14th Amendment's Due Process Clause protects some rights that are not expressly enumerated in the Constitution but which are "deeply rooted in this Nation's history and tradition." 521 U.S. 702, 720-21 (1997). Examples of unenumerated rights the Court has recognized include the right to child rearing, *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the freedom to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015). As a judicial nominee, it would not be appropriate for me to opine as to the existence of any additional unenumerated rights that the United States Supreme Court has yet to consider. If confirmed, I will faithfully follow any Supreme Court and Tenth Circuit Court of Appeals precedent addressing unenumerated rights.

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

   Response. I disagree with this statement.

3. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock response was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: No. Judges should faithfully apply Supreme Court precedent.

4. **In *Legacy Church, Inc. v. Kunkel*, you argued that the government had a role in determining "who is essential and who is not essential to produce a church service." Please explain the standard New Mexico used in determining who is essential for a church service.**

   Response: Response: As general counsel to the Office of the Governor, I represented the State of New Mexico in a number of challenges to the various orders

issued in response to the Covid-19 pandemic. *Legacy Church v. Kunkel*, 455 F. Supp. 3d 1100, 1130 (D.N.M. 2020), was one of those cases. There, a church asserted that occupancy restrictions implemented in response to the Covid-19 pandemic violated, *inter alia*, the Free Exercise Clause. The federal district court found in the State's favor and the Tenth Circuit affirmed. *See Legacy Church, Inc. v. Collins*, 853 F. App'x 316 (10th Cir. 2021). The above referenced quote is a question posed by the district court judge when asking questions related to the Legacy Church band. *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1129 (D.N.M. 2020). I did not argue that there were essential or nonessential components of church services.

5. **In *Legacy Church, Inc. v. Kunkel*, you told the court that part of the reason that Governor Michelle Lujan Grisham issued a revised order prohibiting any in-person church services the evening before Easter was because you "w[ere] busy in the morning" and that "the timing of the April 11 Order 'was not intended to preclude religious services.'" The April 11 Order simply removed an exemption allowing gatherings for religious exercise. Please explain how long drafting this revised order took.**

   Response: I do not recall how long it took me to draft the order, but to make the identified deletion and add language allowing for services through audiovisual means was a relatively quick process. I note that the district court found "no animus or overt discrimination in the April 11 Order's timing." *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1149 (D.N.M. 2020).

6. **New Mexico issued stringent orders requiring non-essential businesses to shut down by the beginning of April 2020. On what date did it become legal for non-essential businesses to provide home deliveries or curbside deliveries under New Mexico's COVID orders?**

   Response: As of April 30, 2020, the operative public health order permitted retail businesses that were identified as non-essential businesses to provide delivery and curbside service.

7. **In December 2019, a former campaign staffer alleged that Governor Michelle Lujan Grisham sexually assaulted him. Specifically, he claimed that she "dump[ed] a bottle of water on [his] crotch and then smack[ed] it and grab[bed] it in front of all these people." He said doing so was "not a practical joke." He also alleged that, after she grabbed his crotch, she said, "Is there anything down there?" Two days later, the governor's office issued a statement calling the allegations "categorically false," "bizarre and slanderous," and "disgracefully false." It also said, "The governor has never and would never conduct herself in the manner described." The statement was issued two days after the allegations were made publicly. In April 2021, campaign finance documents revealed that Governor Michelle Lujan Grisham settled the sexual**

assault allegations, and her campaign has paid the former staffer $150,000 to date. As the general counsel to the governor, did you conduct the investigation into whether those allegations were false before the office issued the categorical denial? If so, please explain the extent of that investigation.

Response: As general counsel, I was not tasked with investigating criminal allegations. Those duties are for trained law enforcement officers.

8. **The statement from the governor's office claimed that "multiple other staff members in the room for the extent of the meeting referenced by" the former staffer and "all of them attest to the fact that his accusations of assault are false." The former campaign staffer also alleged that he was "pressured not to report it to law enforcement originally" and "pressured to not quit her campaign when this happened." What steps, if any, did you take to ensure that the governor did not interfere with the investigation in any way, including by pressuring alleged witnesses interviewed as part of the investigation?**

   Response: Please see my response to Question 7. Additionally, I did not work for the Governor at the time the events purportedly took place. The Governor retained outside counsel who represented her in this matter including settlement. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

9. **The former staffer also alleged that Governor Michelle Lujan Grisham had sexually assaulted other staffers, claiming that "[t]here are so many more victims than me." Did you investigate this claim?**

   Response: Please see my response to Question 7 and Question 8.

10. **Did your investigation reveal any information or another allegation inconsistent with the governor's office's categorical statement that the governor "has never and would never conduct herself in the manner described"?**

    Response: Please see my response to Question 7 and Question 8.

11. **Did you provide advice regarding whether the governor should enter into a settlement agreement on this matter?**

    Response: I did not work for the Governor at the time the events purportedly took place. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

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12. Did you advise the governor about whether the settlement should include a non-disclosure agreement? Is there a non-disclosure agreement?

Response: Please see my response to Question 11.

13. After these allegations were made, did the governor's office implement any reforms to its policies or procedures?

Response: In 2019, the Governor's office implemented a code of conduct for its staff members.

14. In 2010, 2011, and 2012, you and the ACLU of New Mexico both referred to you as the "Co-Legal Director" of the organization.[1] You represented that you held this position in court filings.[2] The organization's current Legal Director has said that he leads the "legal department and litigation efforts." You previously indicated that the news article "erroneously characterize[d]" your title as "co-legal director of the local ACLU" and that "[t]o the best of [your] knowledge, [you] never had that job title." Please explain whether you held that job title, and if you did, what your responsibilities were as Co-Legal Director.

Response. I was a member of the ACLU of New Mexico legal panel, which was a volunteer position. I have never been an ACLU of New Mexico employee. Further, I did not identify myself as the co-legal director.

Three of the four footnotes below are press releases which mischaracterize my title. In those matters in which I was involved, I am correctly identified in court filings as a legal panel member or cooperating attorney. *Ramirez v. State ex rel. Children, Youth & Families Dep't*, 2014-NMCA-057, ¶ 1, 326 P.3d 474, 476 (identifying me a "legal panel member"); Complaint, *Thomas v. Kaven et al.*, Case 2:12-cv-00381 [Doc. 1] (Dist. N.M. April 4, 2012) available at https://www.aclu-nm.org/sites/default/files/wp-content/uploads/2012/04/Thomas-File-Stamped-Complaint-and-Cover-Sheet.pdf (identifying me a "cooperating attorney"). I had no involvement whatsoever in the redistricting matter and did not sign the complaint. *See e.g.* Complaint, *Archuleta v. City of Albuquerque et al.*, D-202-CV-201105792 (2nd Jud. Dist. Ct. of N.M.) available at https://www.aclu-nm.org/sites/default/files/wp-content/uploads/2011/06/Redistricting-Complaint.pdf. As to the Complaint in *Collins v. United States*, 1:10-cv-00778-CCM, Doc. 1 (Nov. 10, 2010), I can only surmise that my title was incorrectly communicated to lead counsel in the matter as my name was incorrectly listed as "Matt Garcia" on the cover sheet. The court's decisions identified my law firm partner and me as "of counsel."

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[1] *See, e.g.*, Joline Gutierrez Krueger, *Veteran Fights On in Courtroom*, Albuquerque Journal, Feb. 3, 2012, https://www.abqjournal.com/85237/veteran-fights-on-in-courtroom.html; https://www.aclu-nm.org/en/news/aclu-nm-sues-city-albuquerque-force-redistricting-0; https://www.aclu-nm.org/en/news/aclu-sues-unm-hospital-mistreatment-12-year-old-patient.

[2] *See, e.g.*, Complaint, *Collins v. United States*, 1:10-cv-00778-CCM, Doc. 1 (Nov. 10, 2010).

See e.g. Memorandum Opinion, *Collins v. United States*, 1:10-cv-00778-CCM, Doc. 26 (October 11, 2011) available at https://www.aclu.org/sites/default/files/field_document/collins_decision.pdf.

15. Please define the term "living constitution."

Response: Living constitutionalism is "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019).

16. Do you think that election integrity is a problem in this country? Please explain.

Response: Ensuring election integrity is a matter for policymakers, and it would be inappropriate for a judicial nominee to opine on the matter.

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

Response: Please see my response to Question 15. If confirmed, I would faithfully apply all Supreme Court and Tenth Circuit precedent.

18. Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.

Response: If confirmed, I would mirror those attributes I have valued during my many years as a litigator. Specifically, I will impartially apply the law after a careful and exhaustive review of the factual record. Any decisions will be predicated on binding legal directives including Supreme Court and Tenth Circuit precedent. In addition, I will ensure that all parties and counsel are treated with dignity and afforded an opportunity to be heard. Finally, I will work diligently to make sure that cases move expeditiously towards resolution.

19. Please identify a Tenth Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.

Response: Please see my response to Question 18.

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

Response: Funding decisions are a matter for policymakers, and it would be inappropriate for a judicial nominee to opine on the matter. However, I would note that the administration under which I worked significantly increased funding for law enforcement officers.

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

Response: Yes. 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."

22. What role should empathy play in sentencing defendants?

Response: Litigants, attorneys, and all other persons appearing in a courtroom should be treated respectfully and with dignity. However, legal decisions must be based on an application of the law to the relevant facts. Any sentencing decision, including enhancements, should be made in light of the statutory directives set out in 18 U.S.C. § 3553(a) and the relevant sentencing guidelines.

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

Response: Parties generally do not have Sixth Amendment right to counsel in a civil case. *Beaudry v. Corr. Corp. of Am.*, 331 F.3d 1164, 1169 (10th Cir. 2003). In some instances, a party may request appointment of counsel pursuant to 28 U.S.C. § 1915(e)(1). However, the court has discretion in determining whether to grant that request.

24. 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 judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions. Nevertheless, because the issues in *Brown v. Board of Education* are likely never to be litigated again, I am comfortable answering in the affirmative.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions. Nevertheless, because the issues in *Loving v. Virginia* are likely never to be litigated again, I am comfortable answering in the affirmative.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. However, I would note that the Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. However, I would note that the Supreme Court overruled *Casey* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions.

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

Response: Please see my response to Question 24e.

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

Response: Please see my response to Question 24e.

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

Response: Please see my response to Question 24e.

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

Response: Please see my response to Question 24e.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions.

25. Is threatening Supreme Court justices right or wrong?

Response: Threatening physical harm or otherwise attempting to influence decisions by Supreme Court justices violates federal law. 18 U.S.C. § 1507.

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

Response: 18 U.S.C. § 1507 prohibits any from "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, picket[ing] or parad[ing] 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." It also prohibits anyone from utilizing a "sound-truck or similar device" or resorting "to any other demonstration in or near any such building or residence." *Id*.

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

Response: I am unaware of any Supreme Court or Tenth Circuit precedent addressing this question. Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. Accordingly, I must respectfully refrain from predicting how I might rule in a given situation. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit Court of Appeals precedent

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

Response: Under Supreme Court precedent, "so-called fighting words," which 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." *Cohen v. California*, 403 U.S. 15 (1971) (citation omitted).

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

Response: True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citation omitted). The speaker's intent to carry out a threat is not dispositive. *Id*. "Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id*.

30. 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: No.

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

Response: No.

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

Response: No.

33. 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: No.

34. 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: No.

35. 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.

36. **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.

37. **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.

38. **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.

39. **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.

40. 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.

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

Response: On November 15, 2021, I contacted Senator Martin Heinrich's office to request an application for the existing vacancy in the United States District Court for the District of New Mexico. I received the application forms on November 17, 2021. I

returned both forms to Senator Heinrich's office on December 5, 2021. On January 7, 2022, I interviewed with attorneys from the White House Counsel's Office. On January 9, 2022, I was notified by the White House Counsel's Office that I was selected to undergo vetting. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 14, 2022, my nomination was submitted to the Senate.

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

Response: I reviewed the questions, and, where necessary, reviewed documents to refresh my recollection regarding dates and case holdings. In some instances, I conducted research to answer questions regarding a particular judicial decision or statute. I provided my responses to the Office of Legal Policy who provided feedback on some of my responses. The answers to these questions are mine alone.

Questions for the Record for Matthew L. Garcia
From Senator Mazie K. Hirono

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

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

   Response: No

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

   c. Response: No

Senator Mike Lee
Questions for the Record
Matthew Garcia, Nominee to the United States District Court for the District of New Mexico

1. How would you describe your judicial philosophy?

Response: If confirmed, I would mirror those attributes I have valued during my many years as a litigator. Specifically, I will impartially apply the law after a careful and exhaustive review of the factual record. Any decisions will be predicated on binding legal directives including Supreme Court and Tenth Circuit precedent. In addition, I will ensure that all parties and counsel are treated with dignity and afforded an opportunity to be heard. Finally, I will work diligently to make sure that cases move expeditiously towards resolution.

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

Response: When considering a federal statute, I would begin by looking at the text of the statute and read the statutory language consistent with the ordinary meaning and understanding of any undefined terms. *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). If the relevant language is clear and unequivocal, that would end the inquiry. Where there is an ambiguity in the statutory language, I would review any pertinent United States Supreme Court precedent and decisional authority from the Tenth Circuit Court of Appeals addressing comparable wording. In addition, I would "look to accepted canons of construction to inform [my] interpretation." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd*, 567 U.S. 182 (2012). If case law and "the traditional tools of statutory interpretation" failed to provide the requisite clarity, I would turn to consideration of the underlying legislative history. *Kan. Nat. Res. Coal. v. United States DOI*, 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: The text of the relevant provision along with Supreme Court jurisprudence and Tenth Circuit Court of Appeals decisional authority would be controlling as to any interpretation of a constitutional provisions. *Auraria Student Hous. at the Regency, Ltd. Liab. Co. v. Campus Vill. Apartments, Ltd. Liab. Co.*, 843 F.3d 1225, 1242 (10th Cir. 2016) (acknowledging Supreme Court opinions are binding precedent). In the very rare instance where no controlling case law exists, I would begin by looking at the text of the constitutional provision at issue. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). And I would consider that text utilizing the temporal understanding of the provision's language at the time it was enacted. *McDonald v. City of Chi.*, 561 U.S. 742, 828 (2010) ("When interpreting

constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.").

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

Response: The Supreme Court instructs that "Constitutional analysis must begin with the language of the instrument." *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The Court has sometimes analyzed the original meaning of a constitutional provision to analyze the scope of a particular right. Notable examples of this approach include decisions addressing the Second, Fourth, and Sixth Amendments to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Jones*, 565 U.S. 400 (2012); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will faithfully follow these decisions and all other Supreme Court precedent.

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

Response: The text is the starting point for statutory interpretation. *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). If the relevant language is clear and unequivocal, no further analysis is necessary.

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: The Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I would faithfully follow this precedent.

6. What are the constitutional requirements for standing?

Response: There are three elements necessary to establish standing. First, the plaintiff must have suffered an injury in fact. Second, there must be a causal connection between the injury and the conduct complained of and the injury must be fairly traceable to the challenged action of the defendant. Third, it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

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

Response: Beyond the powers enumerated in the Constitution, the Supreme Court has instructed that Congress may pass "all laws which shall be necessary and proper,

for carrying into execution [enumerated] powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." *McCulloch v. Maryland*, 17 U.S. 316 (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: The Supreme Court has fashioned various modes of analyses when faced with a constitutional challenge to enacted legislation. Accordingly, I would adopt the appropriate test and evaluate the constitutionality of a law through faithful application of pertinent Supreme Court precedent.

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

Response: In *Washington v. Glucksberg*, the Supreme Court ruled that the 14th Amendment's Due Process Clause protects some rights that are not expressly enumerated in the Constitution but which are "deeply rooted in this Nation's history and tradition." 521 U.S. 702, 720-21 (1997). Examples of unenumerated rights the Court has recognized include the right to child rearing, *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the freedom to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The Supreme Court ruled that substantive due process does not protect the personal right to abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244 (2022). And the "doctrine that prevailed in *Lochner* … that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If appointed, I would faithfully follow this precedent.

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

Response: The Supreme Court has identified "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995). "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id*. at 558-59 (internal citations omitted). In addition to the limitations inherent in these categorical descriptions, the Court has ruled the Commerce Clause does not allow Congress 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, 520 (2012). The court has also "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 617 (2000).

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

Response: A suspect class is a group "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Supreme Court has identified four suspect classifications: race, religion, national origin, and alienage. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: Separation of powers and checks and balances serve to promote liberty. As James Madison wrote in The Federalist No. 47, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (ellipsis omitted) (quoting The Federalist No. 47, p. 325 (J. Cooke ed. 1961)).

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 assess the Constitutional text setting out the roles and limitations placed on the government branches at issue. I would also identify any relevant precedent from the Supreme Court and the Tenth Circuit Court of Appeals in rendering any decisions. I would then uphold any express Constitutional directive germane to the dispute and faithfully follow any binding precedent.

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

Response: Litigants, attorneys, and all other persons appearing in a courtroom should be treated respectfully and with dignity. However, legal decisions must be based on an application of the law to the relevant facts.

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

Response: Neither is a legally permissible. In that respect, each of the hypotheticals constitutes an adverse outcome.

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

Response: I am not familiar with the statistics referenced in this question, and so I have not considered any potential reasons for any increase in the invalidation of federal statutes by the Supreme Court. As a district court judge, I would not be called upon to assess the propriety of any Supreme Court decision invalidating a federal statute.

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

Response: Black's Law Dictionary defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." Judicial review, Black's Law Dictionary (11th ed. 2019). "Judicial supremacy" is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Judicial supremacy, Black's Law Dictionary (11th ed. 2019).

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

Response: Elected officials, like all members of the citizenry, should act in accordance with binding legal directives including Supreme Court decisions.

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

Response: The Supreme Court addressed Hamilton's statement in the *Williams-Yulee v. Fla. Bar* decision. There, the Court explained that "[u]nlike the legislature or the executive, the judiciary has no influence over either the sword or the purse … neither force nor will but merely judgment." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015) (internal quotation marks and citation omitted) (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee*, 575 U.S. at 445-46. This result, which the Court characterized as a "state interest of the highest order" is an important principle to bear in mind while judging. *Id*. at 446 (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

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: As a district court judge, I would be obligated to apply Supreme Court precedent in both application and scope. Therefore, my perspective on the case's underpinnings or whether the holding is consistent with constitutional text, history, or tradition is largely immaterial.

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: Section 5H1.10, the U.S. Sentencing Guidelines state that race, sex, national origin, creed, religion and socio-economic status should not be taken into account in sentencing. Rather, sentencing should be undertaken in light of the guidance set out in 18 U.S.C. § 3553(a).

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 Biden Administration's definition of equity or the context in which these definitions were provided. Black's Law Dictionary defines "equity," as, "[f]airness; impartiality; evenhanded dealing." Equity, Black's Law Dictionary (11th ed. 2019). If confirmed, I would apply the law in accordance with this definition and adjudicate all matters without reference to an individual's personal characteristics.

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

Response: Black's Law Dictionary defines "equity," as, "[f]airness; impartiality; evenhanded dealing." Equity, Black's Law Dictionary (11th ed. 2019). By contrast, "equality" is defined as the "[t]he quality, state, or condition of being equal; esp., likeness in power or political status." Equality, Black's Law Dictionary (11th ed. 2019)."

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

Response: The 14th Amendment to the United States Constitution prohibits a State from denying "any person within its jurisdiction the equal protection of the laws." It does not include the word "equity." If confirmed, I will faithfully follow all Supreme Court precedent, and any Tenth Circuit Court of Appeals precedent, analyzing the equal protection clause.

27. How do you define "systemic racism?"

Response: I do not personally have a definition for "systemic racism." The Oxford English Dictionary defines "systemic racism," as, "[d]iscrimination or unequal treatment on the basis of membership in a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." Systematic Racism, Oxford English Dictionary (3rd ed. 2022). This is the only formal definition of which I am aware.

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

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

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

Response: Please see my responses to questions 27 and 28.

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

Questions for the Record for Matthew L. Garcia, nominated to be United States District Judge for the District of New Mexico

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: Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race. In addition, the Supreme Court has noted that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). For that reason, federal courts apply the most exacting review of strict scrutiny to racial classifications imposed by the government.

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: In *Washington v. Glucksberg*, the Supreme Court ruled that the 14th Amendment's Due Process Clause protects some rights that are not expressly enumerated in the Constitution but which are "deeply rooted in this Nation's history and tradition." 521 U.S. 702, 720-21 (1997). Examples of unenumerated rights the Court has recognized include the right to child rearing, *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the freedom to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015). As a judicial nominee, it would not be appropriate for me to opine as to the existence of any additional unenumerated rights that the United States Supreme Court has yet to consider. If confirmed, I will faithfully follow any Supreme Court and Tenth Circuit precedent addressing unenumerated rights.

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: If confirmed, I would mirror those attributes I have valued during my many years as a litigator. Specifically, I will impartially apply the law after a careful and exhaustive review of the factual record. Any decisions will be predicated on binding legal directives including Supreme Court and Tenth Circuit precedent. In addition, I will ensure that all parties and counsel are treated with dignity and afforded an opportunity to be heard. Finally, I will work diligently to make sure that cases move expeditiously towards resolution.

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

Response: Originalism "is the doctrine that "words of a legal instrument are to be given the meaning they had when they were adopted, specifically, the canon that that 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." Black's Law Dictionary (11th ed. 2019). The Court has sometimes employed this analysis when considering the scope of a particular constitutional right. Notable examples of this approach include decisions addressing the Second, Fourth, and Sixth Amendments to the United

States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Jones*, 565 U.S. 400 (2012); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will faithfully follow these decisions and all other Supreme Court precedent.

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

Response: Living constitutionalism is "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

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: The text of the relevant provision along with Supreme Court jurisprudence and Tenth Circuit decisional authority would be controlling as to any interpretation of a constitutional provision. *Auraria Student Hous. at the Regency, Ltd. Liab. Co. v. Campus Vill. Apartments, Ltd. Liab. Co.*, 843 F.3d 1225, 1242 (10th Cir. 2016) (acknowledging Supreme Court opinions are binding precedent). In the very rare instance where no controlling case law exists, I would begin by looking at the text of the constitutional provision at issue. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). And I would consider that text utilizing the temporal understanding of the provision's language at the time it was enacted. *McDonald v. City of Chi.*, 561 U.S. 742, 828 (2010) ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.").

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: Generally, when "interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted." *McDonald v. City of Chi.*, 561 U.S. 742, 828 (2010). Similarly, the Supreme Court has instructed that courts are to interpret a "statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I will faithfully follow these decisions and all other Supreme Court precedent.

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

Response: The Constitution is an enduring document that codifies a series of principles, which are applied to contemporary society.

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

Response: Yes. The Supreme Court's decision is binding precedent.

a. Was it correctly decided?

Response: As a judicial nominee, it would be inappropriate for me to opine on whether a Supreme Court decision was correctly decided. *Dobbs v. Jackson Women's Health Organization* is binding precedent. If I am confirmed, I will faithfully follow all 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. The Supreme Court's decision is binding precedent.

a. Was it correctly decided?

Response: As a judicial nominee, it would be inappropriate for me to opine on whether a Supreme Court decision was correctly decided. *New York Rifle and Pistol Association v. Bruen* is binding precedent. If I am confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

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

Response: Yes. The Supreme Court's decision is binding precedent.

a. Was it correctly decided?

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. Nevertheless, because the issues raised in *Brown v. Board of Education* are likely never to be litigated again, I am comfortable answering in the affirmative.

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

Response: 18 U.S.C. § 3142(e)(3) creates a presumption in favor of pretrial detention for violent offenses, offenses for which the maximum sentence is life in prison or death, controlled substances violations for which the penalty exceeds ten years, certain offenses involving minors, and certain repeat offenders.

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

Response: The statute provides that such presumptions are necessary to assure (1) the defendant's appearance during the criminal proceedings and (2) the safety of any person or the community. 18 U.S.C. § 3142(f).

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. The Religious Freedom Restoration Act "prohibits the Government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the

burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014) (internal brackets and quotations omitted). That limitation applies to restrictions on the activities of a closely held for-profit consideration. *Id.* at 719.

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

Response: The government is barred from taking action that is "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. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

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 v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that restrictions on attendance at religious gatherings, which were implemented in response to the Covid-19 pandemic, were unlawful under the Free Exercise Clause. The Court's holding was predicated on its finding that the challenged restrictions were neither neutral nor generally applicable. *Id*. at 67. As an example, the Court noted that retail stores and factories were treated "less harshly" than nearby houses of worship. *Id*. For this reason, the challenged regulations were subject to strict scrutiny. In applying that analysis, the Court agreed that "[s]temming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'" *Id*. Because the regulations at issue were not narrowly tailored, the Court held that the restrictions should be enjoined. *Id*. at 69.

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 struck down regulations that limited the size of religious gatherings in homes to three households. In explaining its ruling, the Court emphasized that government regulations "trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. at 1296 (emphasis in the original). In the context of the Covid-19 restrictions at issue, the government was required to demonstrate "that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id*. at 1297. "Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Id*. Applying this holding to the facts presented, the Court ruled the state failed to show how "public health would be imperiled by employing less restrictive measures." *Id*. Accordingly, the Court ruled that petitioners were entitled to injunctive relief.

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. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Court considered the application of a public accommodation law to a baker who objected to making a wedding cake as part of a same-sex marriage ceremony. The Colorado Civil Rights Commission ("Commission") found that the baker's conduct violated a state anti-discrimination law and the Colorado state courts affirmed that finding. *Id*. at 1723. The Supreme Court reversed. In reaching its decision, the Court pointed out evidence in the factual record showing that the Commission displayed "elements of a clear and impermissible hostility toward the sincere religious beliefs motivating [the baker's] objection." *Id*. at 1721. This "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id*. at 1732. Thus, "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." *Id*. at 1721.

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. "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protections." *Thomas v. Review Board of the Indiana Emp't Security Division*, 450 U.S. 707, 714 (1981). And an individual need not "be responding to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989). The salient consideration is whether an individual's beliefs are sincerely held. *See generally*, *id*. Under Tenth Circuit precedent, "[t]he inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment" and can rarely be resolved through a dispositive motion. *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007).

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 there may be an instance in which "an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981).

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

Response: Please see my response to Question 19.

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

morally righteous?

Response: I am unaware of the Catholic Church's official position on abortion.

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 Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) the Supreme Court ruled that two elementary school teachers were precluded from bringing discrimination claims against their employer. The Court applied the "ministerial exception" articulated in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), which grants religious educational institutions "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id*. at 2060. The Court ruled that holding in *Hosana-Tabor* was not strictly limited to ministers but included all employees whose position is recognized "as having an important responsibility in elucidating or teaching the tenets of the faith." *Id*. at 2064. The *Morrissey-Berru* opinion provided a non-exhaustive list of factors to consider when considering the applicability of the "ministerial exemption" including whether the "position has an important responsibility in elucidating or teaching the tenets of the faith." *Id*.

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*, 141 S. Ct. 1868 (2021), the City of Philadelphia ("the City") refused to contract with Catholic Social Services for the provision of foster care services unless it agreed to certify same-sex couples as foster parents. The Supreme Court held that this restriction violated the Free Exercise Clause. In reaching its decision, the Court noted that the operative regulation required providers to certify same sex couples as foster parents unless the city manager granted an exemption, and the city manager possessed unfettered discretion in deciding whether to grant an exemption request. *Id*. at 1878. The Court held this process gave rise to a system of individual exemptions that was not "neutral and generally applicable." *Id*. at 1881. Applying strict scrutiny, the Court found that the City's refusal to grant the requested exemption did not serve a compelling interest. *Id*. at 1873.

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: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court addressed a tuition assistance program that permitted parents to allocate state funds to a public or private school of their choice, but limited the use of funds to nonsectarian institutions. *Id*. at 1993. The Court began its analysis by reiterating prior holdings that admonish against the exclusion of "religious observers from otherwise available public benefits." *Id*. at 1996 (citations omitted). Applying this legal principle, the Court analyzed the state

funding scheme and concluded that the state's conditioning of tuition assistance benefits solely on the school's religious character "effectively penalizes the free exercise of religion." *Id*. at 1997. The tuition assistance program was therefore subject to strict scrutiny. The Court explained that to "satisfy strict scrutiny, government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id*. This was not one of those rare cases. The Court held that the state's tuition assistance program violated the Free Exercise Clause because "[r]egardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id*. at 2002.

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

Response: In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated a football coach's right to free exercise of religion and his right to freedom of speech. The Court first found that the school district's efforts to preclude the coach from praying after games was not neutral and generally applicable because it was specifically directed at religious conduct. *Id*. at 2422-23. Evidence supporting this conclusion included an admission that the coach's actions were targeted "at least in part because of their religious character." *Id*. at 2422. The Court further found that the coach's post-game prayers constituted private speech and not public action because his prayers "did not "owe their existence to Mr. Kennedy's responsibilities as a public employee." *Id*. at 2424. Thus, whether "through the lens of the Free Exercise or Free Speech Clause," the Court held that the school district conduct was to be assessed through strict scrutiny analysis. *Id*. The Court found that the school district could not meet this exacting standard and that the Establishment Clause did not mandate otherwise. The Court ruled that the coach was entitled to summary judgment on his First Amendment claims. *Id*. at 2433.

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 Cnty.*, 141 S. Ct. 2430 (2021), the Supreme Court vacated the judgment of a lower court and remanded the proceedings in light of the Court's decision in *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021). The *Mast* decision addressed whether an Amish community was exempt from enforcement of county regulations mandating specific septic systems given the infringement given the burdens the government directives placed on their community. In his concurrence, Justice Gorsuch explained he was "writ[ing] to highlight a few issues the lower courts and administrative authorities may wish to consider on remand." *Id*. To that end, he noted that the courts below had erred in applying strict scrutiny "by treating the County's general interest in sanitation regulations as 'compelling' without reference to the specific application of those rules to this community." *Id* at 2432. Further, Justice Gorsuch pointed out that the salient question to be addressed "is not whether the [County] has a compelling interest in enforcing its septic system requirement *generally*, but whether it has such an interest in denying an exception from that requirement to the Swartzentruber Amish *specifically*." *Id*. (internal brackets and quotations omitted) (emphasis contained in original).

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: I must respectfully refrain from predicting how I might rule in a given situation. Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent

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;

Response: No. However, I am not familiar with any judicial trainings or court programs that include any of these examples.

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

Response: Please see my response to Question 26a.

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

Response: Please see my response to Question 26a.

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

Response: Please see my response to Question 26a.

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: Yes.

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: Political appointments fall within the Executive's purview. Constitution, Article II, Section 2, Clause 2. As a judicial nominee, it would not be appropriate for me to opine on the considerations those decisions.

30. Is the criminal justice system systemically racist?

Response: The Oxford English Dictionary defines "systemic racism," as, "[d]iscrimination or unequal treatment on the basis of membership in a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." Systematic Racism, Oxford English Dictionary (3rd ed. 2022). Applying this definition, the issue is one for legislators to address. If confirmed, I would apply the law impartially.

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: Whether Congress should alter the number of justices who sit on the Court is a question for legislators and policymakers. I have no opinion on the question.

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 addressed the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). There, the Court held the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id*. at 592.

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: In *District of Columbia v. Heller*, the Court held the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). Accordingly, a "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id*. at 635. In addition to this specific prohibition, the Court has instructed that modern firearms regulations must be assessed in light of the Second Amendment's text and historical understanding. *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

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

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

36. Does the right to own a firearm receive less protection than the other individual rights

specifically enumerated in the Constitution?

Response: No.

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

Response: I am not aware of any case that addresses this question.

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

Response: The decision to prosecute falls within the Executive's purview. *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). It would not be appropriate for a judicial nominee to opine on this discretionary authority.

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

Response: The Supreme Court has explained that "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). This "discretion is nearly absolute." *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995). By contrast, I understand a substantive administrative rule changes are to be initiated by executive branch agencies and must comport with the Administrative Procedure Act and other controlling legal directives.

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

Response: No. The President does not possess unilateral authority to abolish the death penalty.

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

Response: In *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021), the Supreme Court vacated a stay of an order lifting the nationwide moratorium implemented in response to the Covid-19 pandemic. In reaching its decision, the Court found that the Centers for Disease Control and Prevention had exceeded its authority when issuing the moratorium and that the applicants had satisfied the elements necessary to obtain injunctive relief.

42. On Christmas day 2019, James Hallinan, a former campaign staffer for New Mexico Governor Michelle Lujan Grisham, accused Lujan Grisham of "sexually abusing him" during a senior staff meeting in 2018. Specifically, Hallinan told a local reporter "[y]ou don't dump a bottle of water on someone's crotch and then smack it and grab it in front of all these people. That is not a practical joke." He went on to say that he "was pressured not to report it to law enforcement originally, and I was pressured to not quit her campaign when this happened." Governor Lujan Grisham responded

days later calling his claims "categorically false[,]… bizarre[,] and slanderous." It became public that by April 2021 the Governor had paid $62,500 to settle the claims and another $87,500 in payments were revealed later that year, for a grand total of at least $150,000. Rumors of similar claims of unwanted touching had previously plagued the Governor.

a. Did you conduct an investigation into Mr. Hallinan's claims?

Response: No. As general counsel, I was not tasked with investigating criminal allegations. Those duties are for trained law enforcement officers.

b. If yes, did the results of your investigation lead to the decision to enter into a cash settlement with Mr. Hallinan?

Response: N/A

c. If you did not conduct such an investigation, what is the source of the Governor Lujan Grisham's statement that the claims were "categorically false?"

Response: I did not work for the Governor at the time the events purportedly took place. The Governor retained outside counsel who represented her in this matter including settlement. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

d. To your knowledge, who are the persons that purportedly pressured Mr. Hallinan not to report the sexual assault to law enforcement?

Response: I did not work for the Governor at the time the events purportedly took place. The Governor retained outside counsel who represented her in this matter including settlement. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

e. How much money has Governor Lujan Grisham, or any affiliated campaign or fund, paid to settle these claims?

Response: According to public reports, there was a settlement of $150,000.

f. Did you participate in, or have any knowledge about, discussions in which Mr. Hallinan would enter into a Non-Disclosure Agreement (NDA) in exchange for a cash settlement?

Response: The Governor retained outside counsel who represented her in this matter including settlement. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

g. Do NDAs silence sexual assault victims?

Response: I must respectfully refrain from predicting how I might rule in a given situation. Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent

h. Should a judge who sexually assaults one of their law clerks resign?

Response: Yes, and depending on the facts of the case, other criminal or civil consequences may be appropriate.

43. During your time in the New Mexico Governor's Office, the State issued COVID-19 lockdown orders that prohibited mass gatherings, a term defined to mean five or more people. In the March 2020, these orders contained an exception to exempt gatherings for religious worship. On April 11, 2020, the State issued a new order banning in-person religious worship altogether.

a. Did you draft, consult on, advise on, or approve the April 11 Order banning in-person religious worship?

Response: In my capacity as a Governor's staff member, I participated in the State's response to the Covid-19 pandemic, including representing the State of New Mexico in a number of challenges to the various issued in response. The ultimate decision to issue any executive orders including those that related to the Covid-19 pandemic was made by the Governor. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

44. The April 11 Order was issued at 5 p.m. on Holy Saturday, the day before Easter. During a hearing challenging the suit, the district court expressed concern regarding the timing of the April 11 Order. You stated that the timing of the April 11 Order was based partially on your "work schedule" and partially because "the governor had asked me to do it." You additionally stated, in open court, that the April 11 Order "was not intended to preclude religious services."

Response: In my capacity as an advocate and General Counsel to the Governor, I represented the State of New Mexico in a number of challenges to the various orders issued in response to the Covid-19 pandemic. The case of *Legacy Church v. Kunkel*, which is the matter addressed in this question, was one of those cases. The district court ultimately upheld the temporary occupancy restrictions at issue. *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100 (D.N.M. 2020). In reaching that decision, the district court found "no animus or overt discrimination in the April 11 Order's timing." *Id*. at 1149. The Tenth Circuit subsequently affirmed the district court's denial of injunctive relief. *See Legacy Church, Inc. v. Collins*, 853 F. App'x 316 (10th Cir. 2021).

a. How do you square your representation to the Court that the April 11 Order "was not intended to preclude religious services" with the Governor's own public statement regarding the April 11 Order, wherein she stated "This year, home is holy. Please, you MUST stay home"?

Response: As I indicated in the hearing, and in my role as an advocate while representing the State of New Mexico in defense of the April 11 order, the State took no enforcement action or other efforts to stop Easter Sunday services. Further, as indicated above, the district court found "no animus or overt discrimination in the April 11 Order's timing." *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1149 (D.N.M. 2020).

b. Was the timing of the April 11 Order designed to thwart judicial review and deny churchgoers legal recourse?

Response: No.

c. Is it proper for a government agency to time an injurious state action so that the affected class will be denied a chance to seek an injunction?

Response: I have not advised a state agency or any other client to act in this manner.

d. Is it ethical for a lawyer to advise a state agency to time an injurious action to deny the affected class legal recourse?

Response: Please see my response to Question 44c. In addition, I am unaware of any ethical rule that addresses this issue.

e. The April 11 Order allowed "essential services" such as big box departments stores to operate at 20 percent capacity, while denying similar treatment to houses of worship. Why were house of worship singled out for disparate treatment from big box stores and other retailers?

Response: In my capacity as an advocate and General Counsel to the Governor, I represented the State of New Mexico in a number of challenges to the various orders issued in response to the Covid-19 pandemic. In that role, I argued that the April 11 Order was intended to limit the risk of a communicable disease in settings where people gather for an extended period of time, not to single out houses or worship. The district court noted, "religious organizations have received preferential treatment relative to their closest comparators—in terms of physical set-up and risk, not necessarily meaning." *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1160 (D.N.M. 2020).

45. Molly Schmidt-Nowara, a then-partner at your former three-partner law firm Garcia Ives Nowara, has been accused of embezzling funds from a client, Stacey Kittner. The Albuquerque Journal reported that Schmidt-Nowara had delayed paying a settlement to Kittner, only to later tender a check to Kittner, which reportedly bounced. Schmidt-Nowara then invited Kittner to her home, where she drew a handgun, and pointed it at Kittner's face. According to reports, Schmidt-Nowara pulled the trigger, only for the handgun to "click," rather than fire.

a. Are you a related defendant in the legal malpractice case involving your former three-partner law firm?

Response: I am not personally named as a defendant in the matter. My former law firm is a named defendant due to Ms. Schmidt Nowara's conduct. As indicated in the disciplinary proceedings against Ms. Schmidt Nowara, I had no knowledge of her

conduct.

b. Were you part of the legal team that provided services to Stacey Kittner?

Response: No.

c. Did you have any role in the collection of payment from Sandia National Laboratory or the sending of a bounced check to Ms. Kittner?

Response: No.

d. Was the bounced check drawn from the Garcia Ives Nowara shared checking account?

Response: Yes.

e. Following Schmidt-Nowara's arrest, the District Attorney, Raul Torrez, recused himself from the case and appointed a special prosecutor, Devin Chapman. The case was immediately dismissed, with Mr. Chapman stating that he needed more time to gather evidence. However, more than three years later, the case has still not been re-indicted and the docket shows no resolution. Did you have any contact with either Mr. Torrez or Mr. Chapman, or their staff, or any other public official, about Ms. Schmidt-Nowara's case? If so, explain in detail.

Response: No.

Senator Ben Sasse
Questions for the Record for Matthew L. Garcia
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
October 12, 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: If confirmed, I would mirror those attributes I have valued during my many years as a litigator. Specifically, I will impartially apply the law after a careful and exhaustive review of the factual record. Any decisions will be predicated on binding legal directives including Supreme Court and Tenth Circuit precedent. In addition, I will ensure that all parties and counsel are treated with dignity and afforded an opportunity to be heard. Finally, I will work diligently to make sure that cases move expeditiously towards resolution.

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

   Response: Black's Law Dictionary defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Originalism, Black's Law Dictionary (11th ed. 2019). The Court has sometimes applied this approach to analyze the scope of a particular right. Notable examples of this approach include decisions addressing the Second, Fourth, and Sixth Amendments to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Jones*, 565 U.S. 400 (2012); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will faithfully follow these decisions and all other Supreme Court precedent.

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

   Response: The text is the starting point for statutory interpretation. *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). Further, the Supreme Court has instructed that courts are to interpret a "statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I will faithfully follow these decisions and all other Supreme Court precedent.

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

Response: Living constitutionalism is "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

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 jurisprudence of every Supreme Court Justice appointed since January 20, 1953. For that reason, I cannot identify a specific Justice whose jurisprudence I most admire. But as a district court judge, my role would be to apply the law handed down by the Supreme Court irrespective of which Justice authored the opinion. If confirmed, I will faithfully follow all Supreme Court precedent.

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: Panels on the Tenth Circuit "are bound by the decision of another panel absent *en banc* reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court." *Jones v. Okla. City Pub. Sch*, 617 F.3d 1273, 1278 (10th Cir. 2010). In considering whether to adhere to prior precedent, the Supreme Court has provided a nonexhaustive list of factors to consider including "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Citizens United v. FEC*, 558 U.S. 310, 363 (2010). As a district court judge, I would not opine on the propriety of any Tenth Circuit decision–including one that reaffirms precedent. Rather, I would be bound to follow that tribunal's decision regardless of any personal views about the 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: Please see my response to Question 7.

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: In interpreting a federal statute, I would begin by looking at the text and read the statutory language consistent with the ordinary meaning and understanding of any undefined terms. *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). If the relevant language is clear and unequivocal, that would end the inquiry. Where there is an ambiguity in the statutory language, I would review any pertinent United States

Supreme Court precedent and decisional authority from the Tenth Circuit Court of Appeals addressing comparable wording. In addition, I would "look to accepted canons of construction to inform [my] interpretation." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd*, 567 U.S. 182 (2012). If case law and "the traditional tools of statutory interpretation" failed to provide the requisite clarity, I would turn to consideration of the underlying legislative history. *Kan. Nat. Res. Coal. v. United States DOI*, 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: Section 5H1.10, the U.S. Sentencing Guidelines, states that race, sex, national origin, creed, religion and socio-economic status should not be taken into account in sentencing. Rather, sentencing should be undertaken in light of the guidance set out in 18 U.S.C. § 3553(a). However, it is incumbent on judges to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Senator Josh Hawley
Questions for the Record

Matthew Garcia
Nominee, U.S. District Court for the District of New Mexico

1. **During the COVID pandemic in 2020, on the night before Easter, New Mexico Governor Lujan Grisham announced that group worship services would be banned in New Mexico—effective immediately. In an April 16th hearing, you characterized this ban as part of a larger effort when you told a court that, under the regulation, "thousands of businesses are closed" and are "not allowed to operate in any manner."**

   Response: In my capacity as an advocate and General Counsel to the Governor, I represented the State of New Mexico in a number of challenges to the various orders issued in response to the Covid-19 pandemic. The case of *Legacy Church v. Kunkel*, which is the matter addressed in this question, was one of those cases. The district court ultimately upheld the temporary occupancy restrictions at issue in the *Legacy Church* case, and the Tenth Circuit later affirmed that decision. *See Legacy Church, Inc. v. Collins*, 853 F. App'x 316 (10th Cir. 2021).

   a. **Did you recommend or otherwise advise that the governor impose the ban on worship services?**

      Response: The ultimate decision to issue any executive orders including those that related to the Covid-19 pandemic was made by the Governor. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

   b. **Did the ban on business activities include exceptions for favored persons?**

      Response: No.

   c. **Did you advise the governor that her decision to have a non-essential business open up so that she could purchase jewelry was an acceptable exercise of her authority?**

      Response: I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

   d. **When the Governor decided to ban church services, the governor tweeted out, "This year, home is holy. Please, you MUST stay home." Did you consult with the governor about making the theological judgment that people didn't actually need to be in houses of worship for Easter?**

Response: I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

2. **Shortly after you left private practice to go into the government, your former law partner in your small firm ended up arrested for felony aggravated assault with a deadly weapon. Specifically, she was representing a client in a case that successfully settled. She sent the client a check, but it bounced. She told the client to meet her at her home to make arrangements to transfer the money, but then pointed a gun at her and pulled the trigger.**

   Response: I would respectfully note that my understanding is that many of the averments contained in this statement have yet to be proven and are being vigorously disputed in a pending lawsuit.

   a. **Was your small law firm insolvent?**

      Response: No.

   b. **What is your understanding of why your recent law partner would engage in these actions?**

      Response: I have no understanding of why my former law partner would engage in any of the alleged wrongful conduct.

   c. **Did you ever discuss this case with law enforcement to obtain a fuller picture of the circumstances?**

      Response: I have never spoken directly with law enforcement about this matter or these allegations. Nor have I been requested to do so.

3. **While you were serving as the governor's chief of staff, she signed a bill abolishing qualified immunity for law enforcement officers.**

   Response: The New Mexico Civil Rights Act, NMSA 1978 §§ 41-4A-1 (NMCA), creates a state law remedy for a person who suffers a "deprivation of any rights, privileges or immunities secured pursuant to the bill of rights of the constitution of New Mexico." NMSA 1978, § 41-4A-3 (2021). A claim for damages under the act may be brought against any public body or person acting on behalf of the public body. *Id*. The bill prohibits the invocation of qualified immunity (or a state law analog) in cases brought pursuant to the state law cause of action by any state employee, not just law enforcement officers. In federal cases founded upon 42 U.S.C. § 1983, all state employees may assert the defense of qualified immunity.

   a. **Did you help develop that bill?**

Response: In my role as Chief of Staff, I did not ordinarily assist in drafting legislation, and I did not do so in this case. The bill was passed in both chambers after hearings and debate in the State Legislature. I did not participate in those proceedings or the legislative process giving rise to the NMCA.

b. Did you advise the governor to sign that bill?

Response: The Governor makes the ultimate decision to sign legislation, including the NMCA. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

4. What was your involvement in handling the settlement of sexual assault allegations against Governor Lujan Grisham? Please provide a full accounting.

Response: The Governor retained outside counsel who represented her in this matter including settlement. I respectfully decline to discuss any confidential communications I had with the Governor as her counsel, or to reveal the content of any advice I may have provided.

5. 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

Response: I am not familiar with Justice Jackson's sentencing decisions, and therefore I cannot characterize her approach to the application of criminal enhancements for child pornography offenders. If confirmed, I would evaluate each case before me on the facts and evidence presented. Any sentencing decision, including enhancements, should be made in light of the statutory directives set out in 18 U.S.C. § 3553(a) and the relevant sentencing guidelines.

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

Response: Please see my response to Question 5a.

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

Response: Please see my response to Question 5a.

d. The enhancements for the number of images involved

Response: Please see my response to Question 5a.

6. **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?**

   Response: Amendment of the pertinent sentencing guidelines is a matter for policymakers, and it would be inappropriate for a judicial nominee to opine on the matter. If confirmed, any sentencing decision would be made in light of the statutory directives set out in 18 U.S.C. § 3553(a) and the relevant sentencing guidelines.

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

   Response: Please see my response to Question 6a.

7. **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 context of this quote. Jurists at all levels should faithfully and impartially apply all controlling legal directives including, inter alia, precedent and statutory directives. If confirmed, I will faithfully comply with this obligation.

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

   Response: Please see my response to Question 7a.

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

Response:

Buford abstention doctrine provides that a federal court should not decide an action when there is "unclear state law ... [and] there is a need to defer to complex state administrative procedures." Erwin Chemerinsky, Federal Jurisdiction 830 (6th ed. 2012). Under Supreme Court precedent, "a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in

similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (internal quotation marks omitted).

Colorado River abstention applies where "reasons of wise judicial administration … weigh in favor of permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding." *D.A. Osguthorpe Family P'ship v. Asc Utah, Inc.*, 705 F.3d 1223, 1233 (10th Cir. 2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976)). The touchstone of the inquiry is efficiency and conservation of judicial resources." *Id*. at 1233-34. Under Supreme Court precedent, applicability of *Colorado River* abstention is premised on the presence of four factors: "(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." *Id*. at 1234 (quoting *Colorado River*, 424 U.S. at 818).

"*Pullman* abstention generally is appropriate when determination of an unsettled question of state law by a state court could avoid the need for decision of a substantial question of federal constitutional law." *Houston v. Hill*, 482 U.S. 451, 476 (1987). In the Tenth Circuit, three requirements must be met to warrant Pullman abstention: "(1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies." *Caldara v. City of Boulder*, 955 F.3d 1175, 1179 (10th Cir. 2020).

The *Rooker-Feldman* doctrine "provides that only the Supreme Court has jurisdiction to hear appeals from final state court judgments." *Bear v. Patton*, 451 F.3d 639, 641 (10th Cir. 2006). Although it is not an abstention doctrine per se, it has been functionally treated "as an extension of the various grounds for abstention by federal courts." *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1234 (10th Cir. 2006).

The *Thibodaux* abstention doctrine applies when "the state-law questions have concerned matters peculiarly within the province of the local courts." *Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83-84 (1975). *See also*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (holding that abstention may be appropriate in "cases raising issues intimately involved with the States' sovereign prerogative, the proper adjudication of which might be impaired by unsettled questions of state law.") (internal quotation marks omitted).

Younger abstention applies when the following three factors are met: "(1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests, matters which traditionally

look to state law for their resolution or implicate separately articulated state policies." *Crown Point I Ltd. Liab. Co. v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003) (citation omitted). Absent extraordinary circumstances, a district court must abstain when these elements are satisfied. *Chapman v. Oklahoma*, 472 F.3d 747, 749 (10th Cir. 2006) (citation omitted).

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

Response: As general counsel to the Office of the Governor, I represented the State of New Mexico in a number of challenges to the various orders issued in response to the Covid-19 pandemic. The case of *Legacy Church v. Kunkel*, 455 F. Supp. 3d 1100, 1130 (D.N.M. 2020), was one of those cases. There, a church asserted that occupancy restrictions implemented in response to the Covid-19 pandemic violated, *inter alia*, the Free Exercise Clause. The federal district court found in the State's favor and the Tenth Circuit affirmed that decision. *See Legacy Church, Inc. v. Collins*, 853 F. App'x 316 (10th Cir. 2021).

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

Response: Please see my response to Question 9.

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

Response: The Supreme Court has sometimes analyzed the original meaning of a constitutional provision to analyze the scope of a particular right. Notable examples of this approach include decisions addressing the Second, Fourth, and Sixth Amendments to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Jones*, 565 U.S. 400 (2012); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will faithfully follow these decisions and all other Supreme Court precedent.

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

Response: Under Tenth Circuit precedent, "the language of the statute must be the primary source of any interpretation." *Miller v. Commissioner*, 836 F.2d 1274, 1283 (10th Cir. 1988). Where there is an ambiguity in the statutory language, I would review any pertinent Supreme Court and Tenth Circuit precedent addressing comparable wording. In addition, I would "look to accepted canons of construction to inform [my] interpretation." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd*, 567 U.S. 182 (2012). If case law and "the traditional tools of statutory interpretation" failed to provide the requisite clarity, I would then turn to consideration of the underlying legislative history. *Kan. Nat. Res. Coal. v. United States DOI*, 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 instructed that certain sources of legislative history are more probative than others. *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (quotation and citation omitted); *Kan. Nat. Res. Coal. v. United States DOI*, 971 F.3d 1222, 1237 (10th Cir. 2020) (legislator statements following a bill's passage constitute "an extremely hazardous basis for inferring the meaning of a congressional enactment.") (citation omitted). If confirmed, I would faithfully follow all Supreme Court and Tenth Circuit precedent addressing 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: The Supreme Court has rarely consulted laws of foreign nations to interpret to the U.S. Constitution. To my knowledge, the Court has undertaken this type of comparative analysis only to assess the Framers' understanding of English common law principles, which may be instructive when interpreting certain constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 592-95 (2008).

12. 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: A "prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015)).

13. 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.

14. 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: The Supreme Court has held that there is no "freestanding right to DNA evidence" under the doctrine of substantive due process. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 72 (2009). I am not aware that the Tenth Circuit has ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime.

15. 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.

16. 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: "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). However, even government conduct that is facially neutral may be subject to strict scrutiny where the underlying action is motivated by animus or hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("the government, if it is to respect the Constitution's guarantee of free exercise, 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.").

Further, government regulations are not deemed neutral and generally applicable "whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citation omitted). In those instances, the government action would also be subject to strict scrutiny. Governmental action that is not neutral and generally applicable is also subject to strict scrutiny. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) ("when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.") (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546 (1993)).

17. 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 16.

18. 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: Under Tenth Circuit precedent, "[t]he inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment" and can rarely be resolved through a dispositive motion. *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007).

19. 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 held "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

20. 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: Justice Holmes explained this statement later in his dissent writing "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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

Response: *Lochner* has been discarded and it is not precedent. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted

unwisely—has long since been discarded."). Accordingly, if confirmed, it is not a decision I would follow.

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

Response: No.

a. If so, what are they?

Response: N/A

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: "While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%." *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (citing 2 E. Kintner, Federal Antitrust Law § 12.6 (1980); 3 P. Areeda & D. Turner, Antitrust Law para. 803 (1978)).

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

Response: Please see my response to Question 22a.

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: Please see my response to Question 22a.

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

Response: In general, there is "no federal general common law. Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision. These areas have included admiralty disputes and certain controversies between States." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (internal quotations and citations omitted).

24. 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: "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: Please see my response to Question 24.

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

Response: Yes. State constitutions may afford more, but not less, protections than federal constitutional provisions.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on Supreme Court decisions. If I am confirmed, I am obligated to comply with all Court precedent regardless of my personal views on those decisions. Nevertheless, because the issues in *Brown v. Board of Education* are likely never to be litigated again, I am comfortable answering in the affirmative.

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

Response: I am unaware of any Supreme Court or Tenth Circuit precedent prohibiting a federal district court from issuing a nationwide injunction. That issue, however, is the source of ongoing discussion and likely to be litigated in the near future. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (discussing his concerns with nationwide injunctions) (Thomas, J., concurring); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (same) (Gorsuch, J., concurring). Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court.

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

Response: Federal Rule of Civil Procedure 65 provides the authority for issuing an injunction.

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

Response: Please see my response to Question 26.

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

Response: Please see my response to Question 26. Further, I must respectfully refrain from predicting how I might rule in a given situation. Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

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

Response: "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). And "by denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 572 U.S. 844, 863 (2014).

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

Response: Please see my response to Question 8.

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

Response: In general, injunctive relief is suited to those instances where other remedies are not available and the moving party will suffer irreparable harm. Damages are a generally better remedy where some amount of money may adequately compensate an injured party.

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

Response: In *Washington v. Glucksberg*, the Supreme Court ruled that the 14th Amendment's Due Process Clause protects some rights that are not expressly enumerated in the Constitution but which are "deeply rooted in this Nation's history and tradition." 521 U.S. 702, 720-21 (1997). Examples of unenumerated rights the Court has recognized include the right to child rearing, *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the freedom to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

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

Response: Please see my response to Question 16.

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

Response: The Free Exercise Clause embraces the freedom of worship and protects religious practices. *Lee v. Weisman*, 505 U.S. 577, 591 (1992); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993).

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

Response: Please see my response to Question 16.

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

Response: Please see my response to Question 18.

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 Supreme Court has instructed that the Religious Freedom Restoration Act applies to all federal laws.

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am unfamiliar with this statement and the context in which it was made. Interpreting the plain language of the text, I understand it to mean that a judge should impartially apply the law.

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

Response: I cannot recall having ever taken such a position.

a. If yes, please provide appropriate citations.

35. 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: For personal reasons unrelated to this nomination, I deleted my limited social media presence many months ago. I do not have copies of the originals.

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

Response: The Oxford English Dictionary defines "systemic racism," as, "[d]iscrimination or unequal treatment on the basis of membership in a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." Systematic Racism, Oxford English Dictionary (3rd ed. 2022). Applying this definition, the issue is generally one for legislators to address. If confirmed, I would apply the law impartially.

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

Response: Yes.

38. How did you handle the situation?

Response: As a lawyer, I have an ethical obligation to serve as a zealous advocate for my client. I comported myself accordingly.

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

Response: Yes.

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

Response: There is not one Federalist Paper that shaped my view of the law.

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

Response: Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

42. 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 was deposed in the matter of *Kittner v. Molly Schmidt-Nowara, et. al*., D-1329-CV-202000993 (13th Jud. Dist. Ct. of N.M.).

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

e. Response: No.

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

a. Apple?

Response: I own shares of a total stock market index fund, which holds a weighted position of every equity in the U.S. market. I do not own any individual shares of the company.

b. Amazon?

Response: Please see my response to Question 44a.

c. Google?

Response: Please see my response to Question 44a.

d. Facebook?

Response: Please see my response to Question 44a.

e. Twitter?

Response: Please see my response to Question 44a.

45. 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.

46. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

47. 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: It is the duty of all nominees to testify truthfully before the committee and to comply with all applicable codes of conduct.

Questions from Senator Thom Tillis
for Matthew Lane Garcia
Nominee to be United States District Judge for the District of New Mexico

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines, "judicial activism," as, "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Judicial Activism, Black's Law Dictionary (11th ed. 2019). Applying this definition, judicial activism is not appropriate. As a district court judge, my role is to apply the law handed down by the Supreme Court and the Tenth Circuit. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

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

   Response: Impartiality is both expected and necessary for any judge.

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

   Response: No.

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

   Response: Yes. Judges are obligated to follow the law, even if that result leads to an outcome that is undesirable.

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

   Response: No.

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

   Response: If confirmed, I will faithfully follow the Supreme Court precedent addressing the Second Amendment including *District of Columbia v. Heller*, 554 U.S. 570 (2008);

McDonald v. City of Chi., 561 U.S. 742, 130 S. Ct. 3020 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

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: Canon 3(A)(6) of the Code of Conduct for United States Judges, which also applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. Accordingly, I must refrain from opining on this hypothetical. However, if faced with this question, I would analyze the matter utilizing Supreme Court precedent including *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

   Response: Qualified immunity applies to any person acting under color of state law unless they violate a clearly established right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The plaintiff bears the burden to overcome an invocation of qualified immunity. *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) ("When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who must clear two hurdles in order to defeat the defendant's motion.").

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: Qualified immunity is a judicial doctrine created by the Supreme Court. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1862-65 (2020) (Thomas, J., dissenting) (discussing the historical underpinnings of qualified immunity). Whether the Supreme Court has provided sufficient protection for law enforcement officers, and all public employees shielded by the doctrine, is a policy consideration for legislators. As a district court judge, I would be bound to follow all Supreme Court and Tenth Circuit precedent addressing the qualified immunity.

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: The Supreme Court has repeatedly expressed that the "[l]aws of nature, natural phenomena, and abstract ideas are not patentable." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014) (quoting *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589)). In *Mayo Collaborative Servs. v. Prometheus Labs., Inc.* and *Alice Corp. Pty. Ltd*, the Court established and defined a two-part framework for "distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice Corp*, 573 U.S. at 217. The Supreme Court outlined the analysis as follows:

> First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, what else is there in the claims before us? To answer that question, we consider the elements of each claim both individually and as an ordered combination to determine whether the additional elements transform the nature of the claim into a patent-eligible application.

Id. (internal citations, quotations, and brackets omitted). The touchstone of the inquiry is the "search for an 'inventive concept'—i.e., an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself." *Id*. The Court has explained that while the exclusion of patent eligibility for law of nature, natural phenomena, and abstract ideas is "not required by the statutory text, they are consistent with the notion that a patentable process must be new and useful." *Bilski v. Kappos*, 561 U.S. 593, 601-02 (2010). Further, the Court has noted that these exceptions flow from "statutory *stare decisis* going back 150 years." *Id*.

As a judicial nominee, it would be inappropriate for me to offer my personal opinion on this precedent, or related, Supreme Court decisions. If confirmed, I am obligated to follow all Court precedent regardless of my personal views.

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

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

    Response: Please see my response to Question 12. In addition, I must respectfully refrain from predicting how I might rule on this hypothetical. Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before

the court. If confirmed, I will faithfully follow all Supreme Court and Tenth Circuit precedent.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Whether current Supreme Court jurisprudence promotes and incentivizes innovation, and how to address any identified deficiencies, is a question for policymakers. As a district court judge, I am bound to follow all Supreme Court and Tenth Circuit precedent.

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

    a. **What experience do you have with copyright law?**

       Response: In the many years I have spent as a trial attorney, I have not had occasion to litigate any cases addressing copyright law.

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

       Response: In the many years I have spent as a trial attorney, I have not had occasion to litigate any cases addressing the Digital Millennium Copyright Act.

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

       Response: In the many years I have spent as a trial attorney, I have not had occasion to litigate any cases addressing intermediary liability for online service providers that host unlawful content posted by users.

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

       Response: I have had some experience litigating First Amendment matters, including some free speech issues. However, in the many years I have spent as a trial attorney, I have not had occasion to litigate any cases addressing free speech and intellectual property issues, including copyright matters.

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: Under Tenth Circuit precedent, "the language of the statute must be the primary source of any interpretation." *Miller v. Commissioner*, 836 F.2d 1274, 1283 (10th Cir. 1988). Where there is an ambiguity in the statutory language, I would review any pertinent Supreme Court precedent and Tenth Circuit precedent addressing comparable wording. In addition, I would "look to accepted canons of construction to inform [my] interpretation." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd*, 567 U.S. 182 (2012). If case law and "the traditional tools of statutory interpretation" failed to provide the requisite clarity, I would then turn to consideration of the underlying legislative history. *Kan. Nat. Res. Coal. v. United States DOI*, 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: To my knowledge, neither the Supreme Court nor the Tenth Circuit have directly addressed this matter. However, some circuits give deference to U.S. Copyright Office decisions pursuant to the Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See*, *e.g.*, *Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78, 93 (2d Cir. 2016); *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 479 (6th Cir. 2015), *aff'd*, 137 S. Ct. 1002 (2017).

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: Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. Accordingly, I cannot opine on how I would rule if faced with this question. If confirmed, I would faithfully follow all Supreme Court and Tenth Circuit precedent.

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

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

Response: Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting on issues that are pending or that might come before the court. Accordingly, I cannot opine on how I would rule if faced with this question. If confirmed, I would faithfully follow all Supreme Court and Tenth Circuit precedent.

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

Response: Please see my response to Question 17a.

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

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

Response: In the District of New Mexico, it is my understanding that cases are assigned randomly to the judges without regard to subject matter. I am not familiar with the process in other districts. However, I would generally agree that "judge shopping" could be a problem in districts where such practices are permitted.

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

Response: Yes.

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: Yes.

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

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

Response: The Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 provides that "a person may file a complaint alleging a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). That legislation also provides a process for adjudicating complaints. 28 U.S.C. §§ 351–364. As a district court nominee, it would not be appropriate for me to opine on the propriety of specific course of action.

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

Response: Please see my response to Question 19a.

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

Response: It is my understanding that Chief Justice Roberts raised this issue with the U.S. Judicial Conference and that they have been tasked with investigating this matter. See Year-End Report on the Federal Judiciary, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf. I am unfamiliar with the underlying data, the reasons for the concentration of patent cases in a particular district. To the extent the judiciary has not fully addressed the matter, the problem is one best left to policymakers.

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

Response: Please see my response to Question 20.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a

local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: In the District of New Mexico, it is my understanding that cases are assigned randomly to the judges without regard to subject matter. I am not familiar with the process in other districts, and it would not be prudent for me to recommend rules of assignment in other districts.

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

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

    Response: Please see my response to Question 20.

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

    Response: Please see my response to Question 20.