Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Nina Nin-Yuen Wang
Nominee to be United States District Judge for the District of Colorado

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

   Response: The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), found that the Bill of Rights contains certain unenumerated rights that are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." As a United States Magistrate Judge, I have applied Supreme Court and Tenth Circuit precedent in interpreting any issues involving fundamental rights, and if I am confirmed, I will continue to do so.

2. **Please explain the difference between the original intent of a law and its original public meaning.**

   Response: Black's Law Dictionary defines "original meaning" as "[t]he understanding of a text, esp. an important legal instrument such as the U.S. Constitution, reflecting what an informed, reasonable member of the community would have understood at the time of adoption according to then-prevailing linguistic meanings and interpretive principles." *Original meaning*, Black's Law Dictionary (11th ed. 2019). "Original intent" is defined as "[t]he subjective intention of the drafters or ratifiers of an authoritative text." *Intent*, Black's Law Dictionary (11th ed. 2019). Courts look to the text's original public meaning at the time the statute was enacted to understand Congress's original intent. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). For example, the Supreme Court has looked to the original public meaning of the Constitution's text in interpreting rights under the Bill of Rights in various contexts. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment).

   a. **If there is a conflict between a law's original intent and original public meaning, which should a judge rely on to determine how to interpret and apply the law?**

      Response: Courts first look to the plain meaning of the text in interpreting a statute, *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), because courts assume that Congress intended for the statutory language to be given its plain and ordinary meaning. *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 101 (2011). If confirmed, I will faithfully follow Supreme Court and Tenth Circuit precedent.

3. **As a judge, what legal framework would you use to evaluate a claim about a violation of the Establishment Clause?**

Response: The traditional framework for evaluating an Establishment Clause challenge has been the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 608 (1971). *See Janny v. Gamez*, 8 F.4th 883, 904 (10th Cir. 2021). In *Lemon*, the Supreme Court identified a three-part test to determine whether a law is constitutional under the Establishment Clause: (1) the law "must have a secular legislative purpose"; (2) the law's "principal or primary effect must be one that neither advances nor inhibits religion"; and (3) the law must not "foster an excessive government entanglement with religion." 403 U.S. at 612-13 (citations and quotation omitted). However, the *Lemon* test has been criticized as confusing or unworkable by the Supreme Court, *see, e.g.*, *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1607 n.9 (2022) (Gorsuch, J., concurring) (citing cases), and "[i]n many cases, [the Supreme] Court has either expressly declined to apply the test or has simply ignored it." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019). In the past several years, the Supreme Court has instead analyzed claims arising under the Establishment Clause by focusing on "historical practices and understandings," *id.* at 2087, and has instructed that "any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 572 U.S. 565, 566 (2014). If presented with an Establishment Clause claim, I would carefully research Supreme Court and Tenth Circuit precedent governing the specific claim at issue, *see, e.g.*, *Janny*, 8 F.4th at 908 (adopting a three-part test for evaluating claims of religious coercion), and faithfully apply that precedent.

4. **Please describe your understanding of the constitutionality of nationwide or universal injunctions based on current Supreme Court and Tenth Circuit precedent.**

   Response: The extraordinary remedy of an injunction is controlled by Rule 65 of the Federal Rules of Civil Procedure and applicable case law. In the Tenth Circuit, to obtain a preliminary injunction, the moving party must establish four factors: "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Preliminary injunctions are considered an "extraordinary remedy." *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009).

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

   Response: Yes, the Supreme Court has found such a right under the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

6. **Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?**

   Response: Under *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, a court will defer to an agency's interpretation of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. 452, 461 (1997)

(quotation omitted); *Seminole Rock*, 325 U.S. 410, 414 (1945). The Supreme Court has referenced *Auer* deference and *Seminole Rock* deference together and has used the terms interchangeably. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019); *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part). I am not aware of any Supreme Court or Tenth Circuit precedent identifying an analytical difference between *Auer* deference and *Seminole Rock* deference.

7. When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?

Response: If presented with a question of statutory interpretation, I would first determine whether the Supreme Court or the Tenth Circuit has interpreted the statute in question. If there is no binding precedent interpreting a text and the text is ambiguous, I would apply the "ordinary tools of statutory construction." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013). "These tools include examination of the statute's text, structure, purpose, history, and relationship to other statutes." *Harbert v. Healthcare Servs. Grp., Inc*., 391 F.3d 1140, 1147 (10th Cir. 2004). I would also look to Supreme Court or Tenth Circuit decisions interpreting analogous legal texts. Only if, after consulting these tools, the statute remains ambiguous would I turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

8. When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?

Response: "It is not uncommon to find 'apparent tension' between different canons of statutory construction." *Landgraf v. USI Film Prods*., 511 U.S. 244, 263 (1994). If faced with conflicting canons of statutory interpretation, I would look to Supreme Court and Tenth Circuit precedent for guidance as to how the conflict should be resolved. *See, e.g.*, *Jordan v. Maxim Healthcare Servs., Inc*., 950 F.3d 724, 745 (10th Cir. 2020) (explaining that the series-qualifier canon is "perhaps more than most canons . . . subject to defeasance by other canons") (quotation omitted).

9. How do you decide when text is ambiguous?

Response: A legal text is ambiguous if it is "capable of being understood in two or more possible senses or ways," *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (quotation omitted), or if it is "reasonably susceptible to more than one interpretation." *Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, 1201 (10th Cir. 2019).

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

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

Response: As a sitting United States Magistrate Judge and District Judge nominee, it is not appropriate for me to provide an opinion as to whether any

decision of the Supreme Court was correctly decided. To the extent that I am confirmed and a specific case presents an issue under these precedents, I would consider the facts in the record and apply the law as interpreted by the Supreme Court and Tenth Circuit. With that said, because the holdings in *Brown v. Board of Education* and *Loving v. Virgina* are unlikely to be challenged or litigated before me, I am comfortable stating that I believe those cases were correctly decided.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

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

Response: Please see my response to Question 10a.

11. 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 April 23, 2021, I submitted an application to the Advisory Committee established by Senators Michael Bennet and John Hickenlooper for a position on the United States District Court for the District of Colorado. On May 12, 2021, I interviewed with the Advisory Committee. On May 16, 2021, I interviewed with Senators Bennet and Hickenlooper. On May 25, 2021, I interviewed with attorneys from the White House Counsel's Office. On October 16, 2021, an attorney from the White House Counsel's Office informed me that I would be vetted for a District of Colorado judgeship. Since that date, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On January 19, 2022, my nomination was submitted to the Senate.

12. 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: I am not familiar with the Raben Group or the Committee for a Fair Judiciary or anyone associated with these groups. I am not aware of being in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary.

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

Response: I am not aware of being in contact with anyone associated with Demand Justice.

14. 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: During my selection process, an attorney with whom I had a prior professional relationship contacted me on behalf of the local Colorado chapter of the American Constitution Society about my application to become a District Judge after Senators Bennet and Hickenlooper recommended me as one of three candidates to serve as a District Judge for the United States District Court for the District of Colorado. I had a brief conversation with her regarding my prior legal experience and interest in serving as a District Judge.

15. 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: I am not familiar with Arabella Advisors or any individuals associated with it. I am not aware of being in contact with anyone associated with Arabella Advisors.

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

    Response: I am not familiar with Open Society Foundation or any individuals associated with it. I am not aware of being in contact with anyone associated with the Open Society Foundation.

17. **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, and/or Jen Dansereau?**

       Response: I am not aware of being in contact with anyone associated with Demand Justice.

    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, and/or Jen Dansereau?**

       Response: I am not aware of being in contact with anyone associated with Demand Justice.

18. **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: I am not familiar with the Alliance for Justice or anyone associated with it.

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: I am not aware of being in contact with anyone associated with the Alliance for Justice.

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: I am not aware of being in contact with anyone associated with the Alliance for Justice.

19. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

Response: I am not familiar with Arabella Advisors or any individuals associated with it.

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

Response: I am not aware of being in contact with anyone associated with Arabella Advisors.

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

Response: I am not aware of being in contact with anyone associated with Arabella Advisors.

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

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

Response: I am not familiar with Open Society Fund or any individuals associated with it.

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

Response: I am not aware of being in contact with anyone associated with the Open Society Foundations.

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

Response: I am not aware of being in contact with anyone associated with the Open Society Foundations.

21. 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: I am not familiar with Fix the Court or anyone associated with it.

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: I am not aware of being in contact with anyone associated with Fix the Court.

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: I am not aware of being in contact with anyone associated with Fix the Court.

22. 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: I am not familiar with the Raben Group or the Committee for a Fair Judiciary or anyone associated with these groups.

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: I am not aware of being in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary.

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: I am not aware of being in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary.

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

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

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

Questions for the Record for Nina Nin-Yuen Wang, Nominee for the District of Colorado

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes, discrimination based on race is prohibited by various federal statutes, including but not limited to Title VII of the Civil Rights Act of 1964. As a United States Magistrate Judge, I have applied Supreme Court and Tenth Circuit precedent in cases presenting issues of racial discrimination, and if confirmed, I will continue to do so.

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

Response: As a United States Magistrate Judge, I took an oath that states "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent on me as a Magistrate Judge under the Constitution and the laws of the United States." 28 U.S.C. § 453. In every case, I focus upon the specific facts in the record and rigorously apply the Supreme Court and Tenth Circuit case law to the issues presented, after considering the arguments of the Parties and with the benefit of independent research, and attempt to communicate in a clear and respectful manner. I have not studied the judicial philosophies of the Supreme Court Justices from the Warren, Burger, Rehnquist, and Roberts Courts, and accordingly, cannot identify a particular justice whose philosophy is most analogous to mine.

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

Response: I am aware that one definition of "originalism" is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Originalism*, Black's Law Dictionary (11th ed. 2019). As a United States Magistrate Judge, I have interpreted the Constitution according to all binding Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed, without regard to any characterizations or labels.

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

Response: I am not aware of a precise definition of the term "living constitutionalism," but am aware that one definition is "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living constitutionalism*, Black's Law Dictionary (11th ed. 2019). To the extent that "living constitution" refers to the notion that the Constitution changes with contemporary opinions, I disagree with that concept. As a

United States Magistrate Judge, I have interpreted the Constitution according to all binding Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed.

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

Response: In my seven years as a United States Magistrate Judge, I have not had the experience either in a presiding capacity, 28 U.S.C. § 636(c), or in the referral capacity, 28 U.S.C. § 636(b), of considering a constitutional issue of true first impression. In cases where there has been no binding Supreme Court or Tenth Circuit case law on a precise constitutional issue, I have considered out-of-circuit precedent. In addition, I apply original public meaning of the Constitution in instances where the Supreme Court has done so. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Generally, the public's current understanding of the Constitution or of a statute is not relevant to determining the meaning of the Constitution or statute. However, the Supreme Court has indicated that the Eighth Amendment requires prison and jail officials to provide humane conditions of confinement guided by "contemporary standards of decency." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). As a United States Magistrate Judge, I have interpreted the Constitution according to all binding Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed.

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

Response: I do not believe that the fundamental principles of the Constitution change over time absent changes through the Article V amendment process.

8. In 2008, you financially supported a cause to have the Colorado Constitution amended. Would you support any modern attempts to amend the U.S. Constitution? If so, which provision of the Constitution would you seek to amend?

Response: I believe you are referring to a donation made to a ballot initiative to vote no on Colorado Amendment 46. Respectfully, I would note that the cause I supported was against – not in support of – a proposed amendment to the Colorado Constitution. Since that time, I have become a United States Magistrate Judge and I would note that policy considerations, such as amendments to the U.S. Constitution, are outside the role of a judicial officer and it would be inappropriate as a United States Magistrate Judge and District Judge nominee to opine as to any attempts to amend the U.S. Constitution.

9. 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: Any personal opinion regarding whether there are any unenumerated rights in the Constitution, yet unarticulated by the Supreme Court, that can or should be identified in the future is not relevant to my role as a judicial officer. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit law to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

10. In your opinion, how should the U.S. Supreme Court rule in *Dobbs v. Jackson Women's Health Organization*?

Response: Any personal opinion regarding how the Supreme Court should rule in *Dobbs v. Jackson Women's Health Organization* is outside of the role of a judicial official and is not relevant to the discharge of my duties. As a United States Magistrate Judge, I must and have faithfully applied Supreme Court and Tenth Circuit law to the facts of each particular case before me. Should I be confirmed, I will continue to do so.

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

In addition, the Religious Freedom Restoration Act ("RFRA") prohibits the government from substantially burdening a person's exercise of religion, even where the burden results from a rule of general applicability, unless the government can demonstrate that the application of the burden is (1) in furtherance of a compelling government interest and (2) the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014); 42 U.S.C. §§ 2000bb–1(a)-(b). The Supreme Court has held that RFRA applies to restrictions on the activities of a for-profit closely

held corporation, *see Hobby Lobby*, 573 U.S. at 719, and to religious organizations. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020).

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

Response: No. The Supreme Court has instructed that the government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018), and "a law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Under RFRA, even a law that is neutral and generally applicable may not substantially burden a person's exercise of religion unless the application of the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014).

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

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

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

***Newsom*.**

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that government regulations are not neutral or generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). The Court determined that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* In the context of COVID-19 restrictions on religious activity, the government was required to "show that the religious exercise at issue is more dangerous than [comparable secular] activities even when the same precautions are applied." *Id.* at 1297. The Court ultimately concluded that the applicants, who challenged restrictions on religious gatherings instituted during the COVID-19 pandemic, were likely to succeed on the merits of their free exercise claim and granted an injunction pending the appeal of their case. *Id.* at 1297-98.

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

Response: Yes. The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that a baker's First Amendment rights were violated when the Colorado Civil Rights Commission exhibited "clear and impermissible hostility toward the sincere religious beliefs" when it evaluated the baker's refusal to bake a wedding cake for a same-sex couple. *Id.* at 1729. The Court concluded that "the Commission's treatment of [the baker's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint, *id.* at 1731, as the Commission's "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732.

17. 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. A person's religious beliefs are protected so long as they are sincerely held. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). "Scrutiny of the validity of particular beliefs largely is beyond [a court's] judicial function because 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)).

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

Response: While sincerely held religious beliefs are protected by the Free Exercise Clause of the First Amendment, the Supreme Court has held that "[p]urely secular views" are not. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). The Court has acknowledged "the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held," *id.*, but a court's role is limited to determining whether an individual's religious beliefs are sincerely held. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

Response: A court's role is limited to determining whether an individual's religious beliefs are sincerely held. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). The court's ruling does not turn on "judicial perception of a particular belief or practice in question," and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Accordingly, the court does not address whether a person's religious beliefs are an acceptable "view" or "interpretation" of religious doctrine.

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

Response: As a United States Magistrate Judge, it is my duty to apply the law to the facts of the case without regard to an official position of a religious sect – whether official or otherwise – or any personal opinion, and I will continue to do so if I am confirmed.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court concluded that it could not entertain employment discrimination claims brought by teachers who were terminated from their employment at religious schools based on the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 190 (2012). Application of the ministerial exception is based on the First Amendment's guarantee that religious institutions "decide for themselves, free from state interference, matters of church

government as well as those of faith and doctrine," *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (quotation omitted), and requires that courts "stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* at 2060. The Court recognized a number of factors relevant to the determination of whether the ministerial exception applies, *id.* at 2062-64, but noted that "[w]hat matters, at bottom, is what an employee does." *Id.* at 2064. Because the teachers' core responsibilities were educating students in religious studies and because the schools "expressly saw [the teachers] as playing a vital part in carrying out the mission of the church," the Court concluded that the ministerial exception applied to bar judicial review of the discrimination claims. *Id.* at 2066-67.

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

Response: In *Fulton v. City of Philadelphia*, the Supreme Court determined that the city's decision to stop referring children to a religious foster care agency, which was based on the agency's refusal to certify same-sex couples as foster parents, violated the First Amendment's Free Exercise Clause. 141 S. Ct. 1868, 1874, 1882 (2021). Importantly, the city indicated that it would renew its contract with the agency if the agency agreed to certify same-sex couples. *Id*. at 1874. The Court first determined that the city's policy was not generally applicable because the policy incorporated "a system of individual exemptions," made available at the sole discretion of a city official. *Id.* at 1878. The Court reasoned that a law that "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" is not generally applicable. *Id.* at 1877 (quotation and alteration marks omitted). Applying strict scrutiny, the Court concluded that the city failed to demonstrate a compelling interest for its policy and the policy thus violated the Free Exercise Clause. *Id.* at 1881-82.

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

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

Moreover, Justice Gorsuch stated that the lower courts had erred by failing to give an appropriate amount of weight to exceptions given to other non-religious groups or exceptions permitted in other jurisdictions. *Id.* at 2432-33. Finally, Justice Gorsuch cautioned against relying on assumptions or suppositions in applying strict scrutiny and stated that strict scrutiny requires evidence that the applicable regulations are narrowly tailored to advance a compelling government interest. *Id.* at 2433.

21. In 1996, you wrote that the book *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* "explode[d] the myth of America as a melting pot." What did you mean by that statement?

Response: In 1996 as a second-year law student, I wrote a book review of a book entitled *Law Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* by Lucy Salyer. The book focuses on Chinese immigration and immigration laws during the Progressive Era which lasted from 1890 to 1920. The statement was a commentary to Ms. Salyer's analytical style of writing: "[s]he first develops a framework of historical facts, and then weaves into this framework powerful images that explode the myth of America as a melting pot." Specifically, I was referring to Ms. Salyer's quote from Judge John S. Partridge, in which he questions the characterization of the United States as a melting pot in the Progressive Era:

> It is the daily experience of this Court . . . that the Melting Pot does not always melt; that there are many who come to this country of such a character that it is impossible to fuse them into our national life. They have brought here their prejudices and their radical tendencies, which they maintained in their own country and they have found it, in many instances, impossible to realize the fact that there was no place and no occasion for such ideas in a free America.

22. Is cultural assimilation, as symbolized by the American "melting pot," a good thing or a bad thing in your opinion?

Response: As a United States Magistrate Judge and District Judge nominee, my personal opinion with respect to cultural assimilation is not relevant to my role as a judicial officer. I have faithfully applied Supreme Court and Tenth Circuit precedent to any issue of immigration law that has come before me, and if confirmed, I will continue to do so.

23. 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.

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

Response: No.

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

Response: No.

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

Response: No.

24. 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: As a United States Magistrate Judge, I am not aware of any training by the United States District Court for the District of Colorado that teaches that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist. To the extent I have a say, all trainings for the United States District Court for the District of Colorado will be faithful to the Constitution, and Supreme Court and Tenth Circuit precedent.

25. 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. As a United States Magistrate Judge, I consider a variety of factors, including but not limited to law school performance, prior work experience, and community service in selecting law clerks.

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

Response: As a United States Magistrate Judge and a District Judge nominee, it is not appropriate for me to pass on the factors appropriate to consider for political appointments. To the extent I was asked to consider whether a particular political appointment was constitutional within the context of a case before me, I would faithfully apply the Supreme Court and Tenth Circuit precedent.

27. Is the criminal justice system systemically racist?

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

28. President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the

number of justices on the U.S. Supreme Court? Please explain.

Response: As a United States Magistrate Judge and a District Court nominee, any personal belief regarding reforming the Supreme Court is not relevant to the discharge of my duties and would not be appropriate for me to discuss. I have faithfully applied Supreme Court precedent, and I will continue to do so if I am confirmed, regardless of the size of the Supreme Court or any policy discussions about reforming the Court or its size.

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

Response: The Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms" in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

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

Response: I am not aware of any precedent from the Supreme Court or the Tenth Circuit holding that the right to own a firearm is entitled to less protection than other enumerated rights. If I am confirmed, I will faithfully apply all Supreme Court and Tenth Circuit precedent.

31. 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 precedent from the Supreme Court or the Tenth Circuit holding that the right to own a firearm is entitled to less protection than the right to vote. If I am confirmed, I will faithfully apply all Supreme Court and Tenth Circuit precedent.

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

Response: As a United States Magistrate Judge, policy considerations with respect to the enforcement of a law is outside the role of a judicial officer. If presented with a case involving refusal to enforce a law, absent constitutional concerns, by an executive under the Constitution, I would rigorously apply Supreme Court or Tenth Circuit precedent to render a decision.

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

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

Administrative rule changes must comply with the requirements of the Administrative Procedure Act.

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

Response: Section 3591 of Title 18 of the United States Code provides for the death penalty in certain circumstances. The President does not have the unilateral authority to repeal that, or any other, federal statute.

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

Response: In this case, a number of real-estate-agent associations and property managers challenged the Centers for Disease Control and Prevention (CDC)'s imposition of a nationwide moratorium on tenant evictions. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021). The district court vacated the moratorium upon concluding that the CDC lacked statutory authority to impose the moratorium, but stayed its order pending appeal. *Id.* at 2487. The Supreme Court vacated the stay, concluding that the challengers had a substantial likelihood of success on the merits of their claims concerning the CDC's statutory authority and "[t]he equities [did] not justify depriving the applicants of the District Court's judgment in their favor." *Id.* at 2488-89.

Senator Josh Hawley
Questions for the Record

Nina Wang
Nominee, District of Colorado

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

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

    Response: I am not familiar with Justice Marshall's philosophy or the context of the statement that "You do what you think is right and let the law catch up." As a United States Magistrate Judge, I have been committed to applying the precedent of the Supreme Court and the Tenth Circuit to the facts of each case in a fair and impartial manner, and if I am confirmed, I will continue to do so.

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

    Response: As a United States Magistrate Judge and a District Judge nominee, any personal belief regarding a Supreme Court Justice's philosophy, or whether such philosophy violated a judicial oath, is not relevant to the discharge of my duties. I am bound, and if I am confirmed, will continue to be bound, by Supreme Court and Tenth Circuit precedent.

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

    Response: The *Younger* abstention doctrine instructs that federal courts must abstain from exercising jurisdiction over a case when (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-court proceedings "involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Amanatullah v. Colo. Bd. of Med. Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999) (quoting *Taylor v. Jaquez*, 126 F.3d 1294, 1297 (10th Cir. 1997)).

    Pullman abstention applies where (1) an "uncertain issue of state law underlies the federal constitutional claim"; (2) the state issue is "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 (quotation omitted). The *Pullman* abstention doctrine should be used "only in exceptional circumstances" and is based on the notion that "federal courts should avoid 'premature constitutional adjudication'" and "rendering advisory opinions." *Id.* at 1178 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979)).

Burford abstention "arises when a federal district court faces issues that involve complicated state regulatory schemes." *Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992). This doctrine instructs that a federal court sitting in equity should decline to interfere with proceedings or orders of state administrative agencies where (1) "there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case the 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 City of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989) (quotation omitted).

The *Colorado River* doctrine 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 Fam. P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1233 (10th Cir. 2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 (1976)). The Supreme Court identified four factors to be used in determining whether dismissal is warranted: (1) whether the state or federal court first assumed jurisdiction over the property; (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. *Colo. River*, 424 U.S. at 818. The Tenth Circuit has stated that "[i]n the strictest sense, the *Colorado River* doctrine is not an abstention doctrine at all," but is instead "a judicially crafted doctrine of efficiency that arose to fill a gap in the federal courts' existing inventory of abstention principles," *D.A. Osguthorpe*, 705 F.3d at 1233 n.13, but has also classified the doctrine as an abstention doctrine. *See, e.g.*, *Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, 910 F.3d 1118, 1122 (10th Cir. 2018).

Thibodaux abstention applies to "cases raising issues 'intimately involved with [the States'] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

The *Brillhart*/*Wilton* doctrine relates to a federal court's ability to stay or dismiss a declaratory judgment action while a parallel state-court proceeding is pending. A court has "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995); *see also Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 497 (1942). In exercising this discretion, the court considers whether the questions in the federal suit can be better resolved in the state-court proceeding. *Wilton*, 515 U.S. at 282-83.

Finally, the *Rooker-Feldman* doctrine has been "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). "*Rooker-Feldman* is a jurisdictional prohibition on lower federal courts exercising appellate jurisdiction over state-court judgments." *Campbell v. City of Spencer*, 682 F.3d 1278, 1281 (10th Cir. 2012). The doctrine precludes a federal court from modifying or setting aside a state court judgment on the basis that the state-court judgment is erroneous or incorrect. *Mayotte v. U.S. Bank Nat'l Ass'n for Structured Asset Inv. Loan Tr. Mortg. Pass-Through Certificates, Series 2006-4*, 880 F.3d 1169, 1175 (10th Cir. 2018).

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

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

        Response: No.

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

    Response: The Supreme Court has looked to the original public meaning of the Constitution's text in interpreting rights under the Bill of Rights in various contexts. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). As a United States Magistrate Judge, I have rigorously applied Supreme Court and Tenth Circuit precedent, including looking to the original public meaning, and if confirmed, I will continue to do so.

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

Response: In interpreting legal texts, I first look to whether the Supreme Court or the Tenth Circuit has interpreted the text at issue, as such precedent would be binding on the court. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990); *United States v. Bowen*, 936 F.3d 1091, 1106 (10th Cir. 2019). If there is no such precedent, the starting point in interpreting the Constitution or a statute is the text itself. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). If the legal text is clear and ambiguous, then the court must not look further. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). If the text is not clear and unambiguous, I would consult Supreme Court and Tenth Circuit precedent on statutory interpretation for similar statutes, as well as "traditional canons of statutory construction." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd*, 567 U.S. 182 (2012). Only when the court exhausts the traditional tools of statutory interpretation may the court "cautiously" turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The Supreme Court and the Tenth Circuit have suggested that some types of legislative history may be afforded greater weight than others. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S. 102, 118 n.13 (1980) ("[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."); *Stauffer Chem. Co. v. Env't Prot. Agency*, 647 F.2d 1075, 1079 (10th Cir. 1981) ("Post-enactment legislative history is generally not to be accorded the same weight as legislative history occurring in connection with the enactment of the statutory language under immediate consideration.").

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

Response: I am not aware of any Supreme Court or Tenth Circuit precedent that directs district courts to consider the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

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

Response: An individual challenging an execution protocol on this basis bears the burden of demonstrating (1) a substantial, objectively intolerable risk of serious harm, and (2) a feasible, readily implemented alternative that will significantly reduce the substantial risk of severe pain. *Glossip v. Gross*, 576 U.S. 863, 877 (2015). The individual must also demonstrate that the State "has refused to adopt [the alternative] without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019); *see also Jones v. Crow*, No. 21-6139, 2021 WL 5277462, at *2, *3 (10th Cir. Nov. 12, 2021) (applying *Glossip* and *Bucklew*).

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

   Response: Yes. *See Glossip v. Gross*, 576 U.S. 863, 878-80 (2015).

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

   Response: I am not aware of any Supreme Court or Tenth Circuit precedent recognizing such a right.

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

   Response: No.

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

    Response: In the First Amendment context, "laws 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 Philadelphia*, 141 S. Ct. 1868, 1876 (2021). On the other hand, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Thus, a court must first determine whether a law is neutral and generally applicable. A law is not

neutral if the "object of a law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if it invites the government to consider the reasons behind a person's conduct or if it prohibits religious conduct but permits secular conduct that similarly undermines the government's asserted interest. *Fulton*, 141 S. Ct. at 1877. If the challenged law is not neutral and generally applicable, it is subject to strict scrutiny, which requires the government to establish that the law furthers a compelling government interest and is narrowly tailored to further than interest. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546-47; *see also Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1232-33 (10th Cir. 2009).

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

Response: Please see my response to Question 10. In the Tenth Circuit, "[a]lthough violations of the Free Exercise Clause are generally analyzed in terms of strict scrutiny, where governmental bodies discriminate out of 'animus' against particular religions, such decisions are plainly unconstitutional. After all, government action motivated by religious animus cannot be "narrowly tailored to advance" "a compelling governmental interest." *Ashaheed v. Currington*, 7 F.4th 1236, 1244-45 (10th Cir. 2021) (quotations, citations, and alteration marks omitted).

Laws that target or are hostile to religious conduct or practices, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993), that treat comparable secular activity more favorably than religious activity, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296, (2021), or that invite the government to consider the reasons behind a person's conduct or fail to similarly regulate secular conduct that undermines the government's asserted interests, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), are not neutral and generally applicable and are thus subject to strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546-47.

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

Response: A person's religious beliefs are protected so long as they are sincerely held. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). Courts generally do not inquire into the merits of particular religious beliefs in addressing sincerity of those beliefs. *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991). "Scrutiny of the validity of particular beliefs largely is beyond [a court's] judicial function because 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others

in order to merit First Amendment protection.'" *Id.* (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). The Tenth Circuit has instructed that "[t]he inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment." *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007). "[S]ummary dismissal on the sincerity prong is appropriate only in the very rare case in which the plaintiff's beliefs are so bizarre, so clearly nonreligious in motivation that they are not entitled to First Amendment protection." *Id.*

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

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

Response: In *Heller*, the Supreme Court held that "on the basis of both text and history, . . . the Second Amendment confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (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: Yes. *See Leo Combat, LLC v. United States Dep't of State*, No. 15-cv-02323-NYW, 2016 WL 6436653, at *1 (D. Colo. Aug. 29, 2016).

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

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

Response: I am not familiar with Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905), nor have I studied the opinion. Whether or not I agree with Justice Holmes's opinion is not relevant to the discharge of my duties as a judicial officer. Regardless of whether I agree or disagree with Justice Holmes or any other Supreme Court justice, if I am confirmed, I will rigorously apply Supreme Court and Tenth Circuit precedent.

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

Response: As a United States Magistrate Judge and District Court nominee, it is not appropriate for me to provide an opinion as to whether any decision of the Supreme Court was correctly decided. However, I note that the Supreme Court has stated that the doctrine in *Lochner* "has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

Response: As a United States Magistrate Judge and District Court nominee, it is not appropriate for me to provide an opinion as to whether any decision of the Supreme Court was correctly decided.

a. If so, what are they?

Response: Not applicable.

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

Response: As a United States Magistrate Judge, I have faithfully applied Supreme Court precedent, and if I am confirmed, I will continue to do so.

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

a. Do you agree with Judge Learned Hand?

Response: As a United States Magistrate Judge, I have faithfully applied Supreme Court and Tenth Circuit precedent regardless of whether I agree with it or not. If I am confirmed, I will continue to do so. I note that Supreme Court decisions since *United States v. Aluminum Co. of America* have implicitly or expressly adopted Judge Hand's reasoning. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (holding that control of "80% to 95% of the service market, with no readily available substitutes, is, [] sufficient to survive summary judgment under the more stringent monopoly standard of § 2" of the Sherman Act); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (citing favorably to Judge Hand's conclusion that 90% market share constitutes monopoly power and concluded that 87% market share also "leaves no doubt" that monopoly power exists). *Am. Tobacco Co. v. United States*, 328 U.S. 781,

797 (1946) (holding that "over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted a "substantial monopoly."). If confirmed, I would follow this and all other binding Supreme Court and Tenth Circuit precedent.

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

Response: Please see my response to Question 16a above.

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 16a above.

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

Response: "There is no federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), but there are "limited areas of 'specialized federal common law.'" *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1258 (10th Cir. 2022) (quoting *Am. Elec. Power Co., Inc. v. Connecticut (AEP)*, 564 U.S. 410, 421 (2011)). Thus, "only limited areas exist in which federal judges may appropriately craft the rule of decision," such as admiralty cases and certain controversies between states. *Rodriguez v. Fed. Deposit Ins. Corp*., 140 S. Ct. 713, 717 (2020).

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

Response: State constitutional provisions must be interpreted in accordance with state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: I am unaware of any Supreme Court or Tenth Circuit case law that requires that identical texts between the federal Constitution and state constitutions be interpreted identically in all instances. Should that issue arise in a case before me, I would rigorously look at the facts in the record before me and faithfully apply the Supreme Court and Tenth Circuit precedent.

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

Response: Generally, yes. The Supremacy Clause provides that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. At the same time, state courts may interpret state constitutional provisions to accord greater protection to individuals as compared to similar provisions in the United States Constitution. *See Arizona v. Evans*, 514 U.S. 1, 8 (1995).

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

Response: As a sitting United States Magistrate Judge and District Judge nominee, it is not appropriate for me to provide an opinion as to whether any decision of the Supreme Court was correctly decided. To the extent that I am confirmed and a specific case presents an issue under these precedents, I would consider the facts in the record and apply the law as interpreted by the Supreme Court and Tenth Circuit. With that said, because the holding in *Brown v. Board of Education* is unlikely to be challenged or litigated before me, I am comfortable stating that I believe this case was correctly decided.

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

Response: The extraordinary remedy of an injunction is controlled by Rule 65 of the Federal Rules of Civil Procedure and applicable case law. In the Tenth Circuit, to obtain a preliminary injunction, the moving party must establish four factors: "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Preliminary injunctions are considered an "extraordinary remedy." *Att'y Gen. of Okla. v. Tyson Foods, Inc*., 565 F.3d 769, 776 (10th Cir. 2009).

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

Response: Please see my response to Question 20.

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

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

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

Response: Please see my response to Question 20b.

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

Response: In *Younger v. Harris*, the Supreme Court observed that the concept of federalism represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. 37, 44 (1971).

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

Response: Please see my response to Question 2.

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

Response: Policy considerations regarding the relative advantages and disadvantages of awarding damages versus injunctive relief are not within the authority of judicial officers. In any given case, the award of damages and/or injunctive relief rests upon the claims and defenses asserted and the proof introduced in evidence

25. 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 Due Process Clause of the Fourteenth Amendment "protects those fundamental rights and liberties which are, objectively, deeply rooted in our Nation's history and tradition" and which are "implicit in the concept of ordered liberty." 521 U.S. 702, 720-21 (1997) (quotation omitted). As noted by the *Glucksberg* Court, the rights protected by the Due Process Clause include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952);

and the right to terminate a pregnancy in certain circumstances. *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833 (1992); *see also Glucksberg*, 521 U.S. at 720. After *Glucksberg*, the Supreme Court has held that the Due Process Clause protects the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), as well was the right of same-sex couples to marry. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

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

Response: Please see my response to Question 10.

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

Response: It is my understanding that the Supreme Court has used the term "freedom of worship" interchangeably with "freedom of religion." *See, e.g.*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942).

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: In *Burwell v. Hobby Lobby*, the Supreme Court identified two circumstances in which a law would impose a substantial burden on an individual's exercise of religion: (1) when non-compliance with the law would cause "severe" economic consequences, *see* 573 U.S. 682, 720 (2014), and (2) when compliance with the law would require an individual to violate a sincerely held religious belief. *Id.* at 723. The Tenth Circuit has explained that a burden on a religious exercise "rises to the level of being 'substantial' when (at the very least) the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir.

2014) (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). If confirmed, I would faithfully apply this precedent.

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: A person's religious beliefs are protected so long as they are sincerely held. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). A court may be tasked with the "narrow function" of determining whether a person's asserted religious belief reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 686 (2014) (quotation omitted). Courts generally do not inquire into the merits of particular religious beliefs in addressing sincerity of those beliefs. *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991). "Scrutiny of the validity of particular beliefs largely is beyond [a court's] judicial function because 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Id.* (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). The Tenth Circuit has instructed that "[t]he inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment." *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007). "[S]ummary dismissal on the sincerity prong is appropriate only in the very rare case in which the plaintiff's beliefs are so bizarre, so clearly nonreligious in motivation that they are not entitled to First Amendment protection." *Id.*

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

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. § 2000bb–3(a), but "permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: Yes. Please see below.

Mohamed v. Jones, No. 20-cv-02516-RBJ-NYW, 2022 WL 523440 (D. Colo. Feb. 22, 2022), *report and recommendation adopted*, Docket No. 120 (May 18, 2022).

Smith v. Williams, No. 20-cv-00841-WJM-NYW, 2021 WL 4947353 (D. Colo. Oct. 13, 2021), *report and recommendation adopted sub nom. Smith v. Crockett*, 2021 WL 5736434 (D. Colo. Dec. 2, 2021).

Mostafa v. Barr, No. 20-cv-00694-PAB-NYW, 2021 WL 330167 (D. Colo. Jan. 30, 2021), *report and recommendation adopted*, Docket No. 62 (Feb. 26, 2021).

Baker v. Wells Fargo Bank, N.A., No. 19-cv-03416-RBJ-NYW, 2020 WL 5079060 (D. Colo. Aug. 3, 2020), *report and recommendation adopted*, 2020 WL 5076802 (D. Colo. Aug. 26, 2020).

Weinstein v. Woitte, No. 17-cv-02506-CMA-NYW, 2018 WL 3899079 (D. Colo. Aug. 14, 2018).

Chesser v. Dir. Fed. Bureau of Prisons, No. 15-cv-01939-NYW, 2018 WL 3729511 (D. Colo. Aug. 6, 2018).

Mares v. LePage, No. 16-cv-03082-RBJ-NYW, 2017 WL 3836042 (D. Colo. Aug. 31, 2017), *report and recommendation adopted*, 2018 WL 1312814 (D. Colo. Mar. 13, 2018).

Chesser v. Dir. Fed. Bureau of Prisons, No. 15-cv-01939-NYW, 2017 WL 2377122 (D. Colo. June 1, 2017).

Chesser v. Dir. Fed. Bureau of Prisons, No. 15-cv-01939-NYW, 2017 WL 698794 (D. Colo. Feb. 22, 2017).

Harvey v. Gonzalez, No. 14-cv-02174-RBJ-NYW, 2016 WL 7383769 (D. Colo. Nov. 21, 2016), *report and recommendation adopted*, 2016 WL 7383725 (D. Colo. Dec. 20, 2016).

Chesser v. Dir. Fed. Bureau of Prisons, No. 15-cv-01939-NYW, 2016 WL 1170448 (D. Colo. Mar. 25, 2016).

Harvey v. Gonzalez, No. 14-cv-02174-RBJ-NYW, 2015 WL 13730685 (D. Colo. Nov. 24, 2015), *report and recommendation adopted*, 2015 WL 9462057 (D. Colo. Dec. 28, 2015).

Harvey v. Segura, No. 13-cv-01574-RBJ-NYW, 2015 WL 13730082 (D. Colo. Aug. 10, 2015), *report and recommendation adopted*, 2015 WL 5462146 (D. Colo. Sept. 17, 2015), *aff'd*, 646 F. App'x 650 (10th Cir. 2016).

Mason v. Clear Creek Cnty. Sheriff, No. 14-cv-01917-WJM-NYW, 2015 WL 13730679 (D. Colo. Aug. 10, 2015), *report and recommendation adopted as modified*, 2015 WL 5258851 (D. Colo. Sept. 10, 2015).

Aragon v. Erlanger, No. 13-cv-01726-RBJ-NYW, 2015 WL 4484383 (D. Colo. July 23, 2015), *report and recommendation adopted in part, rejected in part*, 2015 WL 5731891 (D. Colo. Oct. 1, 2015).

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

a. What do you understand this statement to mean?

Response: I am not familiar with Justice Scalia's statement or the context in which he made such a statement. However, based on a plain reading of the quotation, I understand Justice Scalia's statement to be consistent with Canon 3(A)(1) of Code of Judicial Conduct which states "A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism."

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

Response: I am not aware of any occasion where I have taken the position in litigation or a publication that a federal or state statute was unconstitutional.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

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

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

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

Response: Yes.

32. How did you handle the situation?

Response: As an attorney, I was ethically obligated to zealously advocate for the position of my clients, so long as the legal positions were supported by the applicable law and facts, without regard to my personal views.

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

Response: Yes.

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

Response: I cannot identify a Federalist Paper that has shaped my views of the law.

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

Response: As a United States Magistrate Judge and a District Judge nominee, any personal belief regarding whether an unborn child is a human being is not relevant to the discharge of my duties. I have faithfully followed Supreme Court and Tenth Circuit precedent, and if confirmed, I will continue to do so.

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

Response: No.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

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

Response: As an associate in private law firms and as an Assistant United States Attorney, I may have drafted and/or edited briefs that were filed in court without my name. I cannot recall any specific briefs or cases.

40. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I cannot recall ever confessing error to a court.

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

Response: My understanding of the duty of candor is that I am obligated to respond to the questions posed by the Senate Judiciary Committee in connection with my nomination to become a District Judge for the United States District Court for the District of Colorado to the best of my ability based on my knowledge and consistent with my obligations under the Code of Judicial Conduct as a United States Magistrate Judge.

Questions for the Record for Nina Nin-Yuen Wang
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Questions for the Record

Senator John Kennedy

Nina Y. Wang

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: As a United States Magistrate Judge, I took an oath that states "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent on me as a Magistrate Judge under the Constitution and the laws of the United States." 28 U.S.C. § 453. In every case, I focus upon the specific facts in the record and rigorously apply the Supreme Court and Tenth Circuit case law to the issues presented, after considering the arguments of the Parties and with the benefit of independent research, and attempt to communicate in a clear and respectful manner.

2. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: No. If the statutory text is clear and unambiguous, then the court must not look further. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

3. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: I am not aware of any Supreme Court or Tenth Circuit authority which definitively addresses this issue. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the plaintiffs challenged whether the President had authority under the Immigration and Naturalization Act to issue Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) that imposed entry restrictions on nationals from certain countries, and whether the entry policy violates the Establishment Clause of the First Amendment. *Id.* at 2403. The plaintiffs asked the Supreme Court "to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements." *Id.* at 2418. The Supreme Court stated that "we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review [and] we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional ground." *Id.* at 2420. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me. I will continue to do so if I am confirmed.

4. **What First Amendment restrictions can the owner of a shopping center place on private property?**

   Response: Generally speaking, the First Amendment constrains government actors and protects private actors. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926

(2019). Thus, "while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself." *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).

5. How does the Major Questions Doctrine relate to *Chevron*?

Response: The Major Questions Doctrine refers to the notion that the Supreme Court "expect[s] Congress to speak clearly if it wishes to assign to an executive agency decisions of vast economic and political significance." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). Meanwhile, under *Chevron* deference, a court defers to an agency's permissible interpretation of an ambiguous regulation or statute; this doctrine is grounded in the presumption "that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013) (quotation omitted). I am not aware of any Supreme Court precedent definitively setting out the relationship between the Major Questions Doctrine and *Chevron* deference. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me. I will continue to do so if I am confirmed.

6. What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?

Response: I am aware that the Supreme Court has defined "the people" in the context of certain constitutional amendments contained in the Bill of Rights. For example, the Supreme Court has stated that the term "people" "unambiguously refers to all members of the political community, not an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me. To the extent a case presents an issue of determining the meaning of "the people" within a particular constitutional amendment, I will apply Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed.

7. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: The Supreme Court has stated that "[t]he [F]ourteenth [A]mendment to the constitution is not confined to the protection of citizens," and that its provisions "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Yick v. Hopkins*, 118 U.S. 356, 369 (1886). Moreover, the Court has held that the Due Process Clause "applies to all 'persons' within the United States," whether "their presence here is lawful, unlawful, temporary, or permanent."

Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982). As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, including in cases involving non-citizens. I will continue to do so if I am confirmed.

8. When does equal protection of the law in the United States attach to a human life?

Response: I am unaware that this issue has been definitively determined by the Supreme Court. In the context of current Supreme Court precedent, the Supreme Court held "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Roe v. Wade*, 410 U.S. 113, 163 (1973). In *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court further stated that "there is no line other than viability which is more workable." *Id.* at 870. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me. I will continue to do so if I am confirmed.

9. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: Certain voter identification laws have been upheld as constitutional by the Supreme Court. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). As a United States Magistrate Judge, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

10. What is the constitutional basis for a federal judge to issue a universal injunction?

Response: I am aware that there is ongoing legal debate concerning the constitutional basis for issuing universal injunctions. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay). As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, including the application of Rule 65 of the Federal Rules of Civil Procedure that governs injunctions. I will continue to do so if I am confirmed.

Senator Mike Lee
Questions for the Record
Nina Wang, Nominee to be United States District Judge for the District of Colorado

1. How would you describe your judicial philosophy?

Response: As a United States Magistrate Judge, I took an oath that states "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent on me as a Magistrate Judge under the Constitution and the laws of the United States." 28 U.S.C. § 453. In every case, I focus upon the specific facts in the record and rigorously apply the Supreme Court and Tenth Circuit case law to the issues presented, after considering the arguments of the Parties and with the benefit of independent research, and attempt to communicate in a clear and respectful manner.

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

Response: First, I would look to whether the Supreme Court or the Tenth Circuit has interpreted the statute at issue, as such precedent would be binding on the court. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990); *United States v. Bowen*, 936 F.3d 1091, 1106 (10th Cir. 2019). If there is no such precedent, the starting point in interpreting a statute is the text itself. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). If the legal text is clear and ambiguous, then the court must not look further. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). If the text is not clear and unambiguous, I would consult Supreme Court and Tenth Circuit precedent on statutory interpretation for similar statutes, as well as "traditional canons of statutory construction." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd*, 567 U.S. 182 (2012). Only when the court exhausts the traditional tools of statutory interpretation may the court "cautiously" turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

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

Response: First, I would look to whether the Supreme Court or the Tenth Circuit has interpreted the constitutional provision at issue, as such precedent would be binding on the court. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990); *United States v. Bowen*, 936 F.3d 1091, 1106 (10th Cir. 2019). If there is no such precedent, the starting point in interpreting the Constitution is the text itself. *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). If the Constitution is clear, then the court must not look further. If I were faced with an issue of first impression on which there is no binding or persuasive precedent, I would consider the text and meaning of the terms of the constitutional provision at the time it was enacted. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

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

Response: As noted above, the starting point in interpreting the Constitution is the text itself. *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). If the Constitution is clear, then the court must not look further. The Supreme Court has looked to the original public meaning of the Constitution's text in interpreting rights under the Bill of Rights in various contexts. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). As a United States Magistrate Judge, I have rigorously applied Supreme Court and Tenth Circuit precedent, and if confirmed, I will continue to do so.

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 starting point in interpreting a statute is the text itself. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). If the legal text is clear and ambiguous, then the court must not look further. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). As a United States Magistrate Judge, I have rigorously applied Supreme Court and Tenth Circuit precedent as to the interpretation to the text of the statute.

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: Under Supreme Court precedent, statutes are "interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

6. What are the constitutional requirements for standing?

Response: To satisfy Article III's standing requirements, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

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

Response: Yes. The Supreme Court has held that the Necessary and Proper Clause empowers Congress to pass all necessary and proper laws for carrying its powers into execution," and that "the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted." *McCulloch v.*

Maryland, 17 U.S. 316, 323-24 (1819); *see also Carter v. Carter Coal Co*., 298 U.S. 238, 291 (1936).

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

Response: I would evaluate the constitutionality of any federal law, regardless of whether it has a specific reference to a constitutional enumerated power or not, pursuant to the binding Supreme Court and Tenth Circuit 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 Due Process Clause of the Fourteenth Amendment "protects those fundamental rights and liberties which are, objectively, deeply rooted in our Nation's history and tradition" and which are "implicit in the concept of ordered liberty." 521 U.S. 702, 720-21 (1997) (quotation omitted). As noted by the *Glucksberg* Court, the rights protected by the Due Process Clause include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and the right to terminate a pregnancy in certain circumstances. *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833 (1992); *see also Glucksberg*, 521 U.S. at 720. After *Glucksberg*, the Supreme Court has held that the Due Process Clause protects the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), as well was 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 has distinguished economic rights from other rights in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937). Moreover, the Supreme Court has instructed the "doctrine that prevailed in *Lochner* . . . has long . . . been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). As with all cases, I am duty bound to apply binding Supreme Court precedent.

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

Response: The Commerce Clause provides Congress the authority to regulate three areas: (1) the channels of interstate or foreign commerce; (2) the instrumentalities of interstate commerce; and (3) activities substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Supreme Court has instructed that Congress's authority under the Commerce Clause "may not be extended so as to . . . obliterate the distinction between what is national and what is local." *Id.* at 557. The Supreme Court has identified some limits on Congress's power under the Commerce Clause; for example, Congress may not compel individuals to become active in commerce, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012), and may not regulate noneconomic 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 group is characterized as a "suspect class" where the group possesses an "immutable characteristic determined solely by the accident of birth" or is "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." *Johnson v. Robison*, 415 U.S. 361, 375 (1974) (quotations omitted). Under Supreme Court precedent, race, alienage, national origin, and religion are suspect classes subject to strict scrutiny. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 n.4 (1976); *City of 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: The system of separation of powers established in the United States Constitution "was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quotation omitted).

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

Response: As with any case involving the Constitution, I would proceed by rigorously reviewing the text of the Constitution and faithfully applying Supreme Court and Tenth Circuit precedent.

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

Response: As a United States Magistrate Judge, I took an oath that states "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties

incumbent on me as a Magistrate Judge under the Constitution and the laws of the United States." 28 U.S.C. § 453. In every case, I focus upon the specific facts in the record and rigorously apply the Supreme Court and Tenth Circuit case law to the issues presented, after considering the arguments of the parties and with the benefit of independent research, and attempt to communicate in a clear and respectful manner.

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

Response: Either outcome is undesirable.

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 data associated with this trend nor the underlying contributing factors. As a United States Magistrate Judge and District Judge nominee, I cannot think of an instance where a trial court would be called upon to consider the Supreme Court's exercise of judicial review or judicial passivity.

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: My understanding is that elected officials also typically swear an oath to uphold the Constitution and have an obligation to follow duly rendered judicial opinions. If a case before me where those principles were in tension, I would look

carefully to binding Supreme Court and Tenth Circuit precedent and the facts of the case to render a decision.

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: Federalist 78 has been interpreted to include the principle that "[t]o avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (citing The Federalist No. 78, p. 529 (J. Cooke ed. 1961)). As a United States Magistrate Judge, I have faithfully applied Supreme Court and Tenth Circuit precedent, and if confirmed, I will continue to do so.

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: Please see my response to Question 8.

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: Under the Sentencing Guidelines, the history and characteristics of the defendant is one of the factors courts consider in imposing a sentence. 18 U.S.C. § 3553(a)(1) (setting forth factors courts are required to consider when imposing a sentence, including but not limited to, "(1) the nature and circumstances of the offense and the history and characteristics of the defendant . . . ."). To my knowledge, the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) is not a factor that Congress has set forth that a judge should consider when imposing a sentence.

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 above-referenced definition of "equity." Black's Law Dictionary defines the term as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). As a United States Magistrate Judge, I took an oath that states "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent on me as a Magistrate Judge under the Constitution and the laws of the United States." 28 U.S.C. § 453.

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

Response: Based on my understanding of the definitions of the two terms, yes. Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th ed. 2019). "Equality," meanwhile, is defined as "[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 Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. I am not aware of any Supreme Court or Tenth Circuit precedent addressing whether the Fourteenth Amendment's Equal Protection Clause guarantees "equity" as defined above.

27. How do you define "systemic racism?"

Response: I do not know of a precise definition of the term "systemic racism" and understand that its meaning may differ depending upon who is using the term. I do not have a personal definition for the term "systemic racism" and I do not know of any Supreme Court or Tenth Circuit case that defines it.

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

Response: I do not know of a precise definition of the term "critical race theory" and understand that its meaning may differ depending upon who is using the term. I do not have a personal definition for the term "critical race theory" and I do not know of any Supreme Court or Tenth Circuit case that defines it.

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

Response: I do not know of precise definitions of either term, and thus, do not have a basis to distinguish or not distinguish between them.

Senator Ben Sasse
Questions for the Record for Nina Nin-Yuen Wang
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 25, 2022

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

   Response: No.

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

   Response: As a United States Magistrate Judge, I took an oath that states "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent on me as a Magistrate Judge under the Constitution and the laws of the United States." 28 U.S.C. § 453. In every case, I focus upon the specific facts in the record and rigorously apply the Supreme Court and Tenth Circuit case law to the issues presented, after considering the arguments of the Parties and with the benefit of independent research, and attempt to communicate in a clear and respectful manner.

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

   Response: I am aware that one definition of "originalism" is "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Originalism*, Black's Law Dictionary (11th ed. 2019). As a United States Magistrate Judge, I have taken care to avoid any labels in order to uphold Canon 2 of the Code of Conduct for United States Judges that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." I have interpreted the Constitution according to all binding Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed, without regard to any characterizations or labels.

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

   Response: I am aware that one definition of "textualism" is "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." *Textualism*, Black's Law Dictionary (11th ed. 2019). As a United States Magistrate Judge, I have interpreted the Constitution according to all binding Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed, without regard to any characterizations or labels.

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

   Response: I am not aware of a precise definition of the term "living constitution." To the extent that "living constitution" refers to the notion that the Constitution changes with contemporary opinions, I disagree with that concept. As a United States Magistrate Judge, I have interpreted the Constitution according to all binding Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed.

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

   Response: As a United States Magistrate Judge, I have followed binding Supreme Court precedent without regard to the Justice who authored the opinion, and I will continue to do so if I am confirmed. Accordingly, I cannot name a Supreme Court Justice or Justices whose jurisprudence I admire most.

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

   Response: As a United States Magistrate Judge, I have faithfully applied Supreme Court and Tenth Circuit precedent, and I will continue to do so if I am confirmed. I cannot think of an instance where a trial court would be called upon to reconsider binding Tenth Circuit precedent.

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: The starting point in interpreting a statute is the text itself. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). Where the text is clear, legislative history should not be consulted. *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). Only when the court exhausts the traditional tools of statutory interpretation may the court "cautiously" turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

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

Response: Under the Sentencing Guidelines, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is one factor to be considered in sentencing. 18 U.S.C. § 3553(a)(6).

Questions from Senator Thom Tillis
for Nina Nin-Yuen Wang
Nominee to be US District Judge for the
District of Colorado

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

   Response: Yes.

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

   Response: I am not aware of a precise definition of "judicial activism," but understand that the term may refer to judicial officers that exceed the limits of their authority. As a United States Magistrate Judge, my personal beliefs are not relevant to the discharge of my duties. Canon 1 of the Code of Judicial Conduct for United States Judges provides that "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." Thus, I have faithfully applied Supreme Court and Tenth Circuit precedent, and will continue to do so if I am confirmed.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No.

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

   Response: Policy considerations are outside the role of a judicial officer and any personal opinion is not relevant to the discharge of judicial duties. As a United States Magistrate Judge, I have faithfully applied Supreme Court and Tenth Circuit precedent, and will continue to do so if I am confirmed.

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

   Response: No.

7. **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 is applicable unless the [government] official's conduct violated a clearly established constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Thus, a court analyzing a defense of qualified immunity must determine (1) whether the defendant violated the plaintiff's constitutional rights; and (2) whether those rights were clearly established at the time of the alleged violation. *Id.* The Supreme Court has held that courts have discretion to address these prongs in any order. *Id.* at 236.

8. **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: Policy considerations related to whether qualified immunity provides sufficient protection for law enforcement officers are outside the role of a judicial officer. As a United States Magistrate Judge, it is my duty to apply the law on qualified immunity to the facts of the case without regard to any personal opinion, and I will continue to do so if I am confirmed.

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

   Response: Policy considerations related to the proper scope of qualified immunity are outside the role of a judicial officer. As a United States Magistrate Judge, it is my duty to apply the law on qualified immunity to the facts of the case without regard to any personal opinion, and I will continue to do so if I am confirmed.

10. **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: As a sitting United States Magistrate Judge and District Judge nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. I have had issues of patent eligibility come before me as a United States Magistrate Judge, both as a presiding judge and a referral judge. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Federal Circuit law to the facts of any patent issue before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

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

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

Response: As a sitting United States Magistrate Judge and District Judge nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. To the extent that I am confirmed and a specific case presented a similar issue, I would consider the facts in the record and apply the law with respect to patent eligibility and the interpretation of 35 U.S.C. § 101, as interpreted by the Supreme Court and Federal Circuit, including but not limited to *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012), *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014), *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016), *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016), and *CardioNet, LLC v. InfoBionic, Inc.*, 955 F.3d 1385 (Fed. Cir. 2020).

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 11a.

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 11a.

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 11a.

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 11a.

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 11a.

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 11a.

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 11a.

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 11a.

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 11a.

12. 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: As a former intellectual property trial attorney, I understand the importance and need of clarity and consistency in intellectual property jurisprudence so that innovators can know what to expect when developing and commercializing their inventions. I also recognize that courts must strive to provide clarity and consistency for litigants, including through writing in a manner that the legal framework, and its application to the particular technology at issue, accessible to both attorneys and non-attorneys. I further appreciate your interest in this topic – these are very important policy considerations for policymakers to consider. As a sitting United States Magistrate Judge and District Judge nominee, however, it would not be appropriate for me to provide an opinion with respect to whether the current jurisprudence provides the clarity and consistency needed to incentivize innovation. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Federal Circuit law with respect to intellectual property issues, including patent eligibility, to the facts before me. I will continue to do so if I am confirmed.

13. 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: Prior to my service as a United States Magistrate Judge, I worked as an intellectual property trial attorney for approximately ten years, but my focus was upon patent litigation, and I rarely handled copyright issues. In my seven

years as a United States Magistrate Judge, I have seen a handful of copyright cases come before me that required me to substantively consider federal copyright law and related claims. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

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

Response: Prior to my service as a United States Magistrate Judge, I worked as an intellectual property trial attorney for approximately ten years, but my focus was upon patent litigation, and I rarely handled copyright issues. I recall attending continuing legal education courses that discussed the Digital Millennium Copyright Act, but I do not recall any specific cases involving it. To the best of my recollection, in my seven years as a United States Magistrate Judge, I have not been presented with any cases requiring me to substantively consider the Digital Millennium Copyright Act. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

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

Response: Prior to my service as a United States Magistrate Judge, I worked as an intellectual property trial attorney for approximately ten years, but I do not recall any specific cases addressing intermediary liability for online service providers that hosted unlawful content posted by users. To the best of my recollection, in my seven years as a United States Magistrate Judge, I have not been presented with any cases requiring me to address intermediary liability for online service providers that host unlawful content posted by users. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court, Tenth Circuit, and Federal Circuit law to the facts before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

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: Prior to my service as a United States Magistrate Judge, I worked as an intellectual property trial attorney for approximately ten years, but I do not recall any specific cases involving the First Amendment, free speech, and intellectual property issues, including copyright. In my seven years as a United

States Magistrate Judge, I have handled a number of cases involving allegations of First Amendment violations in the context of free speech. To the best of my recollection, I have not been presented with any cases that address the interplay between free speech and intellectual property issues. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

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

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

Response: If the Supreme Court or the Tenth Circuit has interpreted the statute at issue, as such precedent would be binding on the court. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990); *United States v. Bowen*, 936 F.3d 1091, 1106 (10th Cir. 2019). If there is no such precedent, the starting point in interpreting a statute is the text itself. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). If the legal text is clear and ambiguous, then the court must not look further. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Only when the court exhausts the traditional tools of statutory interpretation may the court "cautiously" turn to legislative history. *Kan. Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020).

b. Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?

Response: I am not aware of any Supreme Court or Tenth Circuit precedent determining the level of deference to be afforded to reports published by the United States Copyright Office. However, some Circuit courts have determined that the Copyright Office's interpretations of copyright law may be entitled to *Skidmore* deference: "while not controlling upon the courts by reason of their authority, [the interpretations] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (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: As a sitting United States Magistrate Judge and District Judge nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, without regard to personal value judgments. I will continue to do so if I am confirmed.

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

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

Response: As a sitting United States Magistrate Judge and District Judge nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, including in cases that present issues related to emerging technology. I will continue to do so if I am confirmed.

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

Response: As a sitting United States Magistrate Judge and District Judge nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court. As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me, including in cases that present issues related to emerging technology. In addition, I have made affirmative efforts to understand the technology at issue in any given case. I will continue to do so if I am confirmed.

16. 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 Chief Justice John G. Roberts' 2021 Year-End Report on the Federal Judiciary, he highlighted "an arcane but important matter of judicial administration: judicial assignment and venue for patent cases in federal trial court." Justice Roberts noted that "Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case," and identified "[t]wo important and sometimes competing values are at issue. First, the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues. But the Conference is also mindful that Congress has intentionally shaped the lower courts into districts and divisions codified by law so that litigants are served by federal judges tied to their communities. Reconciling these values is important to public confidence in the courts[.]" As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Federal Circuit law, including those cases interpreting 28 U.S.C. § 1400(b) such as *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) and *In re Volkswagen*, Appeal Nos. 2022-108, 2022-109, 2022 WL 697526 (Fed. Cir. Mar. 9, 2022), to the facts before me. Finally, I note that in the District of Colorado, all cases – including intellectual property cases –are randomly assigned to judicial officers across the District pursuant to the Local Rules of Practice. *See* D.C.COLO.LCivR 40.1(a).

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

Response: In the District of Colorado, all cases – including intellectual property cases –are randomly assigned to judicial officers across the District pursuant to the Local Rules of Practice. *See* D.C.COLO.LCivR 40.1(a). As a United States Magistrate Judge, in each case that has come before me, I have faithfully applied the binding Supreme Court and Tenth Circuit law to the facts before me. I will continue to do so if I am confirmed.

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: I am not familiar with the term "forum selling," but I have not proactively taken steps to attract a particular type of case or litigant in my seven years as a United States Magistrate Judge nor am I aware of any judicial officer in the District of Colorado doing so. In the District of Colorado, all cases – including intellectual property cases –are randomly assigned to judicial officers across the District pursuant to the Local Rules of Practice. *See* D.C.COLO.LCivR 40.1(a). It would be improper for me to comment on the conduct of other judges.

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

Response: In the District of Colorado, all cases – including intellectual property cases –are randomly assigned to judicial officers across the District pursuant to the Local Rules of Practice. *See* D.C.COLO.LCivR 40.1(a). I have not proactively to taken steps to attract a particular type of case or litigant in my seven years as a Magistrate Judge nor am I aware of any judicial officer in the District of Colorado doing so. I commit this will continue to be my approach in the future.

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

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

Response: As a United States Magistrate Judge and District Judge nominee, I can think of no circumstance where a trial court would be called upon to consider the conduct of other judges or an appropriate response by the Federal Circuit to the circumstance where a judge continues to flaunt binding case law despite numerous mandamus orders. In each patent case that has come before me, I have faithfully applied the binding Supreme Court and Federal Circuit law to the facts of the case.

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 17a above.

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

Response: In Chief Justice John G. Roberts' 2021 Year-End Report on the Federal Judiciary, he highlighted "an arcane but important matter of judicial administration: judicial assignment and venue for patent cases in federal trial court" and noted that "Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case." I would leave to policymakers to review whether this or any other litigation practice "undermine[s] the perception of fairness." As a United States Magistrate Judge and District Judge nominee, I must apply Supreme Court, Tenth Circuit, and Federal Circuit precedent to cases that come before me without regard to the public perception.

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 17a.

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 Colorado, the Local Rules of Practice provide that all cases, including patent cases, shall be assigned to judicial officers by random draw. *See* D.C.COLO.LCivR 40.1(a). Accordingly, the Local Rules already address the identified concerns.

19. 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 17a.

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

Response: Please see my response to Question 17a.