Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge S. Kato Crews
Nominee to be United States District Judge for the District of Colorado
March 29, 2023

1. **You have served as a federal magistrate judge since 2018. During your confirmation hearing, you noted that you have issued over 1,500 recommendations and orders while in this role.**

   a. **Please give a general overview of your role as a federal magistrate judge. What types of cases do you routinely handle?**

   Response: The United States District Court for the District of Colorado is a court of limited jurisdiction, with jurisdiction over cases involving the United States government, the United States Constitution or federal laws, or controversies between states or between the United States government and foreign governments. The court also has diversity jurisdiction over cases between citizens of different states where the amount in controversy exceeds $75,000. The jurisdiction or authority of magistrate judges is further limited by 28 U.S.C. § 636. In criminal cases, magistrate judges: consider petitions for issuance of search warrants; conduct preliminary proceedings; and preside over the trial and final disposition of misdemeanor cases. In the District of Colorado, civil cases are randomly drawn directly to both magistrate judges and district judges. In those cases where the parties do not consent to the magistrate judge handling all matters, both a district and magistrate judge are assigned to the case. In those cases, magistrate judges conduct pretrial matters, evidentiary proceedings, and post-trial matters on referral from the district judge. In civil cases where the parties consent to the magistrate judge handling all matters, the magistrate judge presides over the entirety of the case.

   b. **In how many cases have your decisions been reversed by a reviewing court or affirmed with significant criticism of your substantive or procedural rulings?**

   Response: Since my confirmation hearing, I have gone back to determine the number of recommendations and orders I have issued to provide a more precise number. I have issued at least 1,727 recommendations and orders.

   Concerning recommendations I have issued, a recommendation (known as a Report and Recommendation) goes to the presiding district judge and recommends—based on an analysis of the prevailing law applied to the particular facts and circumstances of the case—what should happen with a motion. The parties then have an opportunity to file written objections to the recommendation, which the district judge reviews *de novo*, and either adopts, modifies, or rejects some or all of the recommendation. Unlike a reversal by an appellate court,

> the magistrate judge shall file his proposed findings and recommendations . . . with the court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations[.] A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b)(1)(C). I have had recommendations partially rejected 13 times and rejected four times. None of these rejections included significant criticism of my substantive or procedural analyses. I have been partially reversed by the Tenth Circuit one time.

c. How many of those cases involved a partial reversal or were the result of new legal developments in the Tenth Circuit?

Response: I have had recommendations partially rejected 13 times and rejected four times. Three of these rejections were the result of either new legal developments in the Tenth Circuit or changed circumstances in the specific case.

2. Federal district court judges are trial court judges. District court judges must be familiar with trial court practice and procedure.

a. While in private practice, how many cases did you try to verdict, judgment, or final decision?

Response: I tried approximately 18 cases to verdict, judgment, or final decision.

b. While serving as a federal magistrate judge, how many cases have you presided over that have gone to verdict or judgment?

Response: I have presided over six cases to verdict or judgment. Five of those cases were multi-day jury trials, and one was a bench trial. All were civil matters.

3. All judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a range of legal issues they have not confronted beforehand in their professional practice or judicial service.

What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your professional practice or judicial service?

Response: I would conduct my own legal research into Supreme Court and Tenth Circuit precedent, and persuasive authority within my district and from other circuit courts, to familiarize myself with legal issues I have not previously encountered. This could include requesting briefing, or additional briefing, from counsel where appropriate. I would also utilize training materials and educational resources made available to me by the Administrative Office of the U.S. Courts and the Federal Judicial Center, as well as respected legal treatises on the subject. Where appropriate, I might also consult other judicial colleagues with experience facing those issues—the collegiality among the judges in the District of Colorado has included these types of consultations.

4. **During your confirmation hearing, you were asked several questions pertaining to *Brady v. Maryland*, 373 U.S. 83 (1963) that you said you had not had occasion to address during your time as a magistrate judge. Please provide answers in writing to these questions.**

Response: In my confirmation hearing, I was asked about *Brady* motions. In my 22-plus years in the legal profession, including my four-plus years as a United States Magistrate Judge, I have not dealt with *Brady* motions. I do not recall any party filing a *Brady* motion in a misdemeanor criminal matter I have presided over as a magistrate judge, nor do I recall any district judge referring a *Brady* motion to me in a felony criminal matter.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held the government's withholding of favorable evidence that is material to the determination of the guilt or punishment of a criminal defendant violates the defendant's Fourteenth Amendment right to due process. A defendant may file a *Brady* motion in a criminal case to compel the prosecution to turn over any favorable exculpatory evidence. In *Giglio v. United States*, 405 U.S. 150, 153 (1972), the Supreme Court extended the government's disclosure obligation in criminal cases to include evidence that is useful to the defendant to impeach government witnesses even if the evidence is not inherently exculpatory.

In October 2020, Congress passed the Due Process Protections Act, which amended Federal Rule of Criminal Procedure 5. *See* PL 116-182, October 21, 2020, 134 Stat 894. The Act reaffirms the government's disclosure obligations in criminal cases. It requires, at a defendant's first court appearance, that the judge issue an oral and written order that "confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law." Fed. R. Crim. P. 5(f). I am familiar with these requirements and, during my criminal duty rotation, regularly provide the oral order at the initial appearance of a defendant charged with a criminal offense. In the District of Colorado, the required written order has been incorporated into the form Discovery Conference Memorandum and Order utilized in our district. I regularly sign and issue these form orders during my criminal duty rotation.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Shane Kato Crews
Nominee to be United States District Judge for the District of Colorado

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

   Response: As a sitting United States Magistrate Judge, the referenced statement is not how I approach cases. Judges are duty-bound to apply, and adhere to, precedent faithfully and impartially and without consideration of their "independent value judgments."

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

   Response: As a sitting United States Magistrate Judge, the referenced statement is not how I approach cases. Judges are duty-bound to apply Supreme Court precedent, and the precedent of their circuit court, faithfully and impartially and without consideration of their personal views or agendas.

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

   Response: Black's Law Dictionary defines "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019).

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

   Response: I am not familiar with this statement from now Associate Supreme Court Justice Ketanji Brown Jackson, or the context in which she made it. As a sitting federal judge, I faithfully and impartially apply Supreme Court and Tenth Circuit precedent to matters involving the interpretation of constitutional provisions. Further, the Constitution may be formally amended only in accordance with its Article V.

5. **What is implicit bias?**

   Response: The Oxford English Dictionary defines "implicit bias" as "[a]ny unconscious or unacknowledged preference that affects a person's outlook or behaviour; (now esp.) an unconscious favouritism towards or prejudice against people of a particular race, gender, or group that influences one's actions or perceptions."

6. **Is the federal judiciary affected by implicit bias?**

   Response: I have not conducted research on whether the federal judiciary is affected by implicit bias. In my 22-plus years in the legal profession, first practicing in the District of Colorado and now sitting on that court, that has not been my experience in the court in which I have practiced or sit.

7. **Do you have any implicit biases? If so, what are they?**

   Response: As a sitting United States Magistrate Judge, I take seriously my oath under 28 U.S.C. § 453 to "administer justice without respect to persons," meaning I approach every case with an open mind and impartiality recognizing that the parties in front of me stand equal before the law, and I apply Supreme Court and Tenth Circuit precedent faithfully and impartially to every case.

8. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

   Response: Black's Law Dictionary defines "attack" as "[t]he act of assailing either with physical violence or with sharp words." Black's Law Dictionary (11th ed. 2019). The Oxford English Dictionary defines "criticism" as "[t]he art or practice of analysing, evaluating, and commenting on the qualities and character of something[.]"

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

   Response: A judge's sentencing decisions are guided by 18 U.S.C. § 3553(a). That statute does not provide that any one sentencing purpose or sentencing factor may be prioritized over another. If confirmed, the mandates of Section 3553(a) will guide my sentencing decisions.

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

    Response: My judicial philosophy is that, as a United States Magistrate Judge, I take seriously my oath under 28 U.S.C. § 453 to "administer justice without respect to persons," meaning I approach every case with an open mind and impartiality recognizing that the parties in front of me stand equal before the law. I am a steward of the litigation process following and enforcing the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the District of Colorado's Local Rules of Practice, and applying Supreme Court and Tenth Circuit precedent faithfully and impartially to the issues before me. I am not aware of any Supreme Court decisions that typify my judicial philosophy.

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

Response: Please see my answer to Question 10. I am not aware of any Tenth Circuit judicial opinions that typify my judicial philosophy.

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

Response: 18 U.S.C. § 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

13. **Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: In *Cox v. Louisiana*, the Supreme Court held that a Louisiana statute modeled on 18 U.S.C. § 1507 was constitutional on its face.

14. **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?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
    j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
    k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting United States Magistrate Judge, the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of any United States Supreme Court decision. However, because the issues in *Brown v. Board*

of Education and *Loving v. Virginia* are unlikely to be relitigated, I am able to state that those two cases were correctly decided. I am unable, however, to state whether the other listed cases were correctly decided; but it is a judge's role to apply binding precedent faithfully and impartially to the facts and issues presented regardless of whether the judge believes that precedent was correctly decided.

15. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

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

    Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

    Response: No; not to my knowledge.

16. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**

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

    Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No.

c. **Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response: No; not to my knowledge.

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

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

Response: No.

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

Response: Not applicable.

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

Response: No.

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

Response: No; not to my knowledge.

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

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

Response: No.

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

Response: No.

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

Response: No; not to my knowledge.

19. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

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

Response: No.

b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: No.

c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response: No; not to my knowledge.

20. **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 March 28, 2022, I submitted an application to the Advisory Committee established by Senators Michael Bennet and John Hickenlooper for a vacancy on the United States District Court for the District of Colorado. On April 18, 2022, I interviewed with the Advisory Committee. On April 22, 2022, I interviewed with Senators Bennet and Hickenlooper and two members of their staff. On May 18, 2022, I interviewed with attorneys from the White House Counsel's Office. On August 3, 2022, an attorney from the White House Counsel's Office informed me that I would be vetted for a judgeship. Since August 3, 2022, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On February 22, 2023,

the President announced his intent to nominate me. The President nominated me on February 27, 2023.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: Please see my response to Question 20.

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

    Response: I answered these questions based on my 17-plus years of experience as a civil litigator and trial lawyer, my four-plus years of experience as a federal magistrate judge, and my personal knowledge. Where necessary, I conducted my own legal research on

Westlaw, and consulted Black's Law Dictionary and the Oxford English Dictionary. I also consulted the Code of Conduct for United States Judges. I submitted a draft of my answers to the Office of Legal Policy for review and received minor feedback. I then finalized my answers for submission to the Senate.

Senator Mazie Hirono
Written Questions for Judge S. Kato Crews
Nominee to the United States District Court for the District of Colorado
March 29, 2023

1. **As part of my responsibility as a member of this Committee to ensure the fitness of nominees, I ask each nominee to answer two questions:**

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
S. Kato Crews, Nominee to the United States District Court for the District of Colorado

1. How would you describe your judicial philosophy?

Response: As a sitting United States Magistrate Judge, I take seriously my oath under 28 U.S.C. § 453 to "administer justice without respect to persons," meaning I approach every case with an open mind and impartiality recognizing that the parties in front of me stand equal before the law. I am a steward of the litigation process following and enforcing the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the District of Colorado's Local Rules of Practice, and applying Supreme Court and Tenth Circuit precedent faithfully and impartially to the issues before me.

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

Response: The first source I would consult when deciding a case that turned on the interpretation of a federal statute is Supreme Court and Tenth Circuit precedent. If either court previously interpreted that statute my inquiry would end there and I would apply the precedent to the case before me. In the event neither court has interpreted that statute, I would next consult the text of the statute itself. If the text of the statute is plain and unambiguous, my inquiry would end there and I would apply the statute as written. If, on the other hand, the text of the statute is vague or ambiguous, I would then consult Supreme Court and Tenth Circuit precedent for any applicable canons of construction, and I would apply those canons of construction to interpret the statute.

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

Response: I would consult Supreme Court and Tenth Circuit precedent to determine whether either court previously interpreted that constitutional provision. If either court previously interpreted the constitutional provision my inquiry would end there and I would apply the precedent to the case before me. In the event neither court has interpreted that provision, I would consult the text of the constitutional provision and determine the appropriate method of interpretation mandated by either the Supreme Court or the Tenth Circuit. I would also consider persuasive authority from other federal jurisdictions.

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

Response: As a general rule, any interpretation of the Constitution starts with consideration of the text. *See Utah v. Evans*, 536 U.S. 452, 474 (2002) (beginning with a review of the text of the Census Clause before considering its historical

application). Where the Supreme Court or Tenth Circuit has determined the original meaning is the appropriate method of interpretation, I would follow that precedent.

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

Response: Please see my answer to Question 2.

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: I would follow Supreme Court and Tenth Circuit precedent regarding how to assess the plain meaning of a statute or constitutional provision. For example, in *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020), the Supreme Court instructed that to interpret a statutory term "[w]ithout a statutory definition, we turn to the phrase's plain meaning at the time of enactment."

6. 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 Congress has implied powers beyond those enumerated in the Constitution. For example, in *McCulloch v. State of Maryland*, 17 U.S. 316 (1819), the Supreme Court determined the Necessary and Proper Clause of Article I of the Constitution gave Congress the implied power to establish a national bank. The Court wrote:

> A power without the means to use it, is a nullity. But we are not driven to seek for this power in implication: because the constitution, after enumerating certain specific powers, expressly gives to congress the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or or (sic) in any department or officer thereof.' If, therefore, the act of congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to congress by the constitution.

Id. at 353. *See also United States v. Comstock*, 560 U.S. 126 (2010) (discussing the Necessary and Proper Clause affords Congress the ability to carry-out other acts in the implementation of its explicit powers).

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

Response: The Supreme Court has stated "the 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (citing *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). But it is critical that Congress's exercise of power derive from one or more enumerated powers. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). I would listen to and assess the parties' legal arguments, research relevant Supreme Court and Tenth Circuit precedent on the constitutionality of a law where Congress has not referenced a specific constitutional enumerated power, and I would faithfully and impartially apply the law and precedent to the facts before me.

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

Response: I would listen to and assess the parties' legal arguments, research Supreme Court and Tenth Circuit precedent for guidance or authority on how to evaluate the issue of one branch assuming authority not granted it by the text of the Constitution, and I would faithfully and impartially apply that precedent to the facts before me.

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

Response: A judge should base their decisions solely on the law and applicable precedent.

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

Response: It would be improper for a federal court to invalidate a law that is, in fact, constitutional. It would be equally improper for a federal court to uphold a law that is, in fact, unconstitutional.

11. 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 how common or uncommon it is for the Supreme Court to strike down federal statutes as unconstitutional and I have not studied any academic theories on this issue. As a sitting federal judge my role is to set aside any personal views I may hold and apply Supreme Court precedent, and the applicable circuit court precedent, faithfully and impartially to the matters before me.

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

Response: The principle of judicial review was established by the Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803), and derives from Article III of the Constitution. *Id.* at 173. 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." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "judicial supremacy" 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." *Id*.

13. 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: *Marbury v. Madison*, 5 U.S. 137, 177 (1803), established that it is "emphatically the province and duty of the judicial department to say what the law is." The Supreme Court has held that elected officials must follow court decisions even if they disagree with them. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958). The precise way that elected officials should balance their obligations is an issue for policymakers and elected officials to determine.

14. 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: I have not studied Federalist 78. As I understand the provided excerpt, it is expressing how judges are limited in their decision making to applying precedent, and they lack the ability to apply or impose their own will or personal views in their decision making. This is important to keep in mind because the role of the judge does not include advancing a personal agenda.

15. 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: It is the duty of a lower court judge to apply applicable Supreme Court and Tenth Circuit precedent regardless of whether the judge believes the "constitutional underpinnings" of that precedent are questionable. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.") If applicable precedent does not speak directly to the issue at hand, the judge should look to precedent for applicable methods of interpretation bearing on that issue (such as originalism, for example) while exercising judicial restraint. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (discussing the "fundamental principle of judicial restraint").

16. 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: Judges' sentencing decisions are guided by 18 U.S.C. § 3553(a). Section 3553(a)(5) requires a judge to consider "any pertinent policy statement" issued by the Sentencing Commission. One of these policy statements informs that factors such as race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." United States Sentencing Commission, Guideline Manual, §5H1.10 (Nov. 2021).

17. 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: Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). I do not have a personal definition for "equity."

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

Response: Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." *Id*.

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

Response: The Fourteenth Amendment's equal protection clause guarantees no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not familiar with any Supreme Court or Tenth Circuit precedent addressing whether the Fourteenth Amendment's equal protection clause guarantees "equity."

20. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism." Black's Law Dictionary defines "racism" as "[t]he belief that some races are inherently superior to other races." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." *Id*.

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

Response: I do not have a personal definition of "critical race theory." Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: Please see my answers to Questions 20 and 21.

Senator Josh Hawley
Questions for the Record

Shane Kato Crews
Nominee, U.S. District Court for the District of Colorado

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

   Response: No.

   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: Not applicable.

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

   Response: As a general rule, any interpretation of the Constitution starts with consideration of the text. *See Utah v. Evans*, 536 U.S. 452, 474 (2002) (beginning with a review of the text of the Census Clause before considering its historical application). Where the Supreme Court or Tenth Circuit has determined the original public meaning is the appropriate method of interpretation, I would follow that precedent.

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

   Response: The first source I consult when deciding a case that turns on the interpretation of legal texts is Supreme Court and Tenth Circuit precedent to determine whether either court previously interpreted that text, and if so, I follow that precedent. In the event neither court has interpreted that text, I consult the text of the document itself. If that text is plain and unambiguous, my inquiry ends there and I apply the text. If, on the other hand, the text is vague or ambiguous, I then consult Supreme Court and Tenth Circuit precedent for applicable canons of construction, and possibly case law from other jurisdictions in consideration of persuasive authority. I would rarely and cautiously consider legislative history only as a last resort and only if necessary, still applying Supreme Court and Tenth Circuit precedent to the analysis of legislative history. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("legislative history is not the law"); *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("ambiguous legislative history [may not be used to] muddy clear statutory language"); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020) ("Once we exhaust the traditional tools of statutory interpretation, we may (cautiously) turn to the legislative history.") (parenthetical in original).

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: Please see my answer to Question 3. In addition, the Supreme Court has distinguished between pre-enactment and post-enactment legislative history. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011); *see also Tax & Acct. Software Corp. v. United States*, 301 F.3d 1254, 1266 (10th Cir. 2002).

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 that it is ever appropriate for a judge to consult the laws of a foreign nation when interpreting the U.S. Constitution.

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

Response: In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court held that to prevail on an Eighth Amendment claim challenging an execution protocol "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id*. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, and n. 9 (1994)). The Supreme Court applied this standard in *Glossip v. Gross*, 576 U.S. 863 (2015), including its explanation that the controlling opinion in *Baze* also requires a showing of a "known and available alternative method of execution that entails a lesser risk of pain."

5. 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. Please see my answer to Question 4.

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

Response: The Supreme Court has held that a habeas corpus petitioner does not have a substantive due process right to DNA analysis to prove innocence. *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009). The Tenth Circuit applied *Osborne* in *McDaniel v. Suthers*, 335 F. App'x 734 (10th Cir. 2009).

7. 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.

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

Response: The First Amendment's Free Exercise Clause bars governmental action that suppresses the exercise of religion or religious practices. State action which burdens the free exercise of religion that is not neutral and generally applicable is subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). State action that treats any comparable secular activity more favorably than religious exercise is not neutral or generally applicable. *See id*.; *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018).

In addition, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, prohibits federal governmental action that substantially burdens the exercise of religion even if the burden results from a rule of general applicability. In that instance, the government must demonstrate that application of the burden on the person, to include for-profit corporations and religious organizations, furthers a compelling governmental interest by the least restrictive means. *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 705 (2014); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

9. 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 answer to Question 8. Any such governmental action would be subject to strict scrutiny review. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court stated the courts' "narrow function" in this context is to determine whether the claimed religious belief "reflects an honest conviction."

11. 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 the Second Amendment confers an individual right to keep and bear arms within the home for self-defense.

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

Response: To the best of my recollection I have not issued any decisions adjudicating a claim under the Second Amendment or an analogous state law.

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

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

Response: In *Lochner*, Justice Holmes, writing in dissent, stated the majority's opinion was "decided upon an economic theory which a large part of the country does not entertain." *Id*. He went on to express that his "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." *Id*. His comments in dissent express his view that the majority's opinion was not supported by the Fourteenth Amendment but was instead based on the majority's personal opinions on economic or social matters. If confirmed, I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent on matters involving the Fourteenth Amendment.

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

Response: The Supreme Court effectively overruled *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See also Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952). If confirmed, I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent.

13. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50

years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: In *Trump v. Hawaii*, Chief Justice Roberts wrote: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. . . . *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Id*. (citation omitted). The phrase can be understood as expressing the view that history has rejected the result in *Korematsu*, which allowed the forcible relocation of U.S. citizens to concentration camps based solely and explicitly on their race.

14. 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: Unless specifically overruled or abrogated by the Supreme Court, all Supreme Court opinions remain good law.

a. If so, what are they?

Response: Please see my answer to Question 14.

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

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

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

a. Do you agree with Judge Learned Hand?

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

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response to all subsections: I am not familiar with this excerpt from Judge Learned Hand or this decision from the Second Circuit. The Supreme Court has held that an antitrust claim under Section 2 of the Sherman Act against monopolization requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571 (1966)); *see also Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 968 (10th Cir. 1990) ("We prefer the view that market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.").

Because this is an issue that could come before me, whether as a sitting United States Magistrate Judge or if confirmed, the Code of Conduct for United States Judges precludes me from offering any commentary that could be perceived as prejudging this issue. But I will continue to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to the facts of each case before me.

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

Response: Black's Law Dictionary defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." Black's Law Dictionary (11th ed 2019). But the Supreme Court has held there is no federal general common law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

17. 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: As a general rule, the interpretation of state constitutions and state laws is a matter to be left to the state courts. *Hebert v. State of La.*, 272 U.S. 312, 316-17 (1926). The federal courts must accept state court interpretations of state constitutional provisions unless they are inconsistent with the fundamental principles of liberty and justice. *Bute v. People of State of Ill.*, 333 U.S. 640, 649 (1948); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts.").

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

Response: Please see my answer to Question 17. The U.S. Constitution should be interpreted in accordance with Supreme Court and Tenth Circuit precedent, including those precedents' articulations of applicable canons of construction.

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

Response: A state may provide greater protections than what is provided under federal law. *See California v. Ramos*, 463 U.S. 992, 1013–14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.")

18. 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, the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of any United States Supreme Court decision. However, because the issues in *Brown v. Board of Education* are unlikely to be relitigated, I am able to state that this case was correctly decided.

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

Response: I am not aware of any Supreme Court or Tenth Circuit precedent, or other applicable law, as the explicit source of judicial authority to issue nationwide injunctions. Courts are authorized under Federal Rule of Civil Procedure 65 to issue injunctions. Supreme Court and Tenth Circuit precedent offer further guidance on the elements a party must establish to obtain an injunction. If confirmed, I would apply this precedent faithfully and impartially to requests for injunctive relief that come before me.

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

Response: Please see my answer to Question 19.

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

Response: Please see my answer to Question 19.

20. 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 answer to Question 19.

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

Response: The Supreme Court has stated "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Principles of federalism provide a constitutional structure for limiting the scope of the federal government's authority with respect to the states. *See id*. at 159. It serves as a check on abuses of government power, balances power between the federal government and state governments, and

ensures the protection of fundamental liberties. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: The *Younger* abstention doctrine requires federal courts to abstain from hearing cases seeking injunctive or declaratory relief and that involve ongoing parallel state court proceedings. The doctrine is based on the principle that federal courts should not interfere with the ability of state courts to resolve issues within the state court's jurisdiction. *Younger v. Harris*, 401 U.S. 37 (1971). For *Younger* to apply, there must be an ongoing state judicial proceeding, the presence of an important state interest, and an adequate opportunity to raise federal claims in the state proceedings. *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989). Absent extraordinary circumstances, abstention is non-discretionary once these conditions are met. *Id.* The Supreme Court has held *Younger* applies in three categories of state cases: (1) state criminal prosecutions, (2) civil enforcement proceedings, and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013).

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

Response: Generally, a court may award injunctive relief when there is no adequate remedy at law and a party would suffer irreparable injury in the absence of injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). A court may award damages to remedy a past wrong and make the injured party whole. *Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 604 (1983) (referring to damage awards for past wrongs). The advantages and disadvantages of each depend on the circumstances of each individual case.

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

Response: The Supreme Court has held the Fifth Amendment Due Process Clause protects certain fundamental rights and liberty interests from infringement by the federal government. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). It has held the same under the Fourteenth Amendment Due Process Clause with regard to state governments. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998). There are two primary features to the Supreme Court's substantive-due-process analysis. First, the Due Process Clause protects those fundamental rights and liberty interests that are deeply rooted in this Nation's history and traditions and implicit in the concept of ordered liberty. *Glucksberg*, 521 U.S. at 719. Second, a "careful description" of the asserted liberty interest must be provided. *Id*. Governmental action which infringes on a fundamental liberty interest is subject to strict scrutiny.

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

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

Response: Please see my answers to Questions 8 and 9.

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

Response: The Supreme Court has referred to the Free Exercise Clause as protecting the freedom to worship and the free exercise of religion (or put differently, religious practices). *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021-22 (2017) (free exercise of religion); *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (freedom to worship).

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

Response: Please see my answer to Question 8.

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

Response: Please see my answer to Question 10.

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

Response: The Supreme Court has determined the Religious Freedom Restoration Act (RFRA) provides "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). By its terms, RFRA expressly applies to "all Federal law, and the implementation of that law, whether statutory or otherwise[,]" with certain limited exceptions. 42 U.S.C. § 2000bb-(3)(a).

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: *Ralston v. Cannon*, 2019 WL 8223559, at *2 (D. Colo. Mar. 12, 2019), *aff'd*, 2021 WL 3478634 (10th Cir. 2021); and, *Hale v. Marques*, 2020 WL 2309619, at *2 (D. Colo. Feb. 3, 2020), *report and recommendation adopted as modified*, 2020 WL 1593339 (D. Colo. Mar. 30, 2020).

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

Response: The Supreme Court has held proof beyond a reasonable doubt does not mean the elements of the offense must be proven "to a mathematical certainty." *Holland v. United States*, 348 U.S. 121, 138 (1954).

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

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

Response: Not necessarily. The Supreme Court has acknowledged that "all, or virtually all, [ ] judges occasionally commit error; they make decisions that in retrospect may be characterized as 'unreasonable.' . . . Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another." *Williams v. Taylor*, 529 U.S. 362, 378 (2000).

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

Response: Please see my answers to Questions 17, 21, and 27(a).

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

Response: Please see my answers to Questions 17, 21, and 27(a).

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

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

Response: As a sitting United States Magistrate Judge, I am duty-bound to follow Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1. If confirmed, I would continue to follow these rules when citing and considering Tenth Circuit precedent.

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

Response: Please see my answer to Question 28(a).

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

Response: Please see my answer to Question 28(a).

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

Response: Please see my answer to Question 28(a).

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

Response: Yes. Consistent with Tenth Circuit Rule 32.1, I would consider unpublished decisions cited by litigants "for their persuasive value" or "under the doctrines of law of the case, claim preclusion, and issue preclusion."

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

Response: No. Rule 32.1(a) for the Tenth Circuit, which encompasses the District of Colorado, permits the citation of unpublished opinions. Also, the 2006 committee notes to Federal Rule of Appellate Procedure 32.1 state: "[U]nder Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue."

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

Response: Please see my answer to 28(f).

29. In your legal career:

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

Response: In my 17-plus years of prior practice as a civil litigator, I tried approximately 15 cases to verdict as first chair.

b. How many have you tried as second chair?

Response: In my 17-plus years of prior practice as a civil litigator, I tried approximately three cases to verdict as second chair.

c. How many depositions have you taken?

Response: During my 17-plus years of prior practice as a civil litigator, I tried approximately 18 cases to verdict. While I did not track the number of depositions I took during my time in practice, I estimate I took hundreds of depositions.

d. How many depositions have you defended?

Response: During my 17-plus years of prior practice as a civil litigator, I tried approximately 18 cases to verdict. While I did not track the number of depositions I defended during my time in practice, I estimate I defended hundreds of depositions.

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

Response: While I have filed a brief with the Tenth Circuit, I have never argued before a federal appellate court.

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

Response: I have argued two cases before the Colorado Court of Appeals.

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

Response: I have appeared before the National Labor Relations Board in two or three hearings involving issues related to petitions for a union representation election.

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

Response: While I have filed hundreds of dispositive motions in the trial courts during my 17-plus years of practice, I have not tracked the number of times the court allowed or requested oral argument on those motions.

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

Response: While I have filed numerous evidentiary motions in the trial courts during my 17-plus years of practice, I have not tracked the number of times the court allowed or requested oral argument on those motions.

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

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

Response: To the best of my recollection, the maximum number of hours I billed in a single year was between 1900 and 2000 hours.

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

Response: I do not have a record of how many of those hours were dedicated to pro bono work.

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

a. What do you understand this statement to mean?

Response: I am unfamiliar with this statement and its context. I understand it to highlight that a good judge understands that the role of a judicial officer includes having to issue decisions with which you may personally disagree.

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

a. What do you understand this statement to mean?

Response: I am unfamiliar with the context of this statement. I understand it to highlight that the judge's role is to apply the law and precedent faithfully and impartially to the facts before them.

b. Do you agree or disagree with this statement?

Response: I agree with this statement based on my understanding of it, as described above.

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

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

Response: I am unfamiliar with this statement and its context. I understand it to highlight that it is improper for a judge to make decisions based on a personal agenda or personal views. Instead, judges are to follow and apply precedent faithfully and impartially to the matters before them.

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

Response: I agree with this statement based on my understanding of it, as described above.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

36. What were the last three books you read?

Response: Kings of the Wyld, by Nicholas Eames; The Count of Monte Cristo, by Alexandre Dumas; and Interior Chinatown, by Charles Yu.

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

Response: I have not studied the issue of whether America is a "systemically racist" country. I understand the terminology, "systemic racism," is subject to differing interpretations. In my personal experience, I have had the honor to become a United States Magistrate Judge—the issue of "systemic racism," therefore, is not something I am aware I have experienced in my career.

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

Response: I am most proud of my development of the Federal Limited Appearance Program (FLAP) in the District of Colorado. Within my first two years as a magistrate judge, I founded FLAP in conjunction with the Colorado Bar Association (CBA) Young Lawyers Division. This is a volunteer-driven program developed by the U.S. District Court for the District of Colorado and the CBA YLD, in coordination with the existing Federal Pro Bono Panel and the Faculty of Federal Advocates. It provides *pro se* litigants with legal representation during certain non-dispositive court hearings.

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

Response: From my 17-plus years of prior experience practicing law as a civil litigator, I do not specifically recall whether I took a position in litigation that conflicted with a personal view. When I litigated cases, I represented my clients' interests to the best of my ability and within the bounds of the Colorado Rules of Professional Conduct, and without allowing my personal views to affect my representation.

a. How did you handle the situation?

Response: Please see my answer to Question 39.

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

Response: Yes. If confirmed, I commit to applying Supreme Court and Tenth Circuit precedent faithfully and impartially (as I do now as a United States Magistrate Judge) to the matters before me, and without regard to my personal beliefs.

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

Response: I do not regularly read any specific law professors' work.

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

Response: No specific Federalist Paper has shaped my views of the law.

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

Response: In my 22-plus years in the legal profession, first as a lawyer and most recently as a federal judge, I cannot think of a specific judicial opinion, law review article, or other legal opinion that made me change my mind. As a sitting United States Magistrate Judge, I apply Supreme Court and Tenth Circuit precedent regardless of any other materials I might find to be persuasive.

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

Response: As a sitting United States Magistrate Judge, the Code of Conduct for United States Judges precludes me from prejudging an issue that could come before me in future litigation. But if this issue came before me, I would apply Supreme Court and Tenth Circuit precedent, including *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), faithfully and impartially to the facts of that case.

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

Response: Yes. My SJQ lists *Bernal v. Diamond Elite et al.*, No. 2017-cv-31075, Adams County District Court, in which I represented the individual defendant, Ms. Waterhouse, as sole trial counsel. This was a civil action involving a dispute between former business partners. In the bench trial, my client prevailed on a motion for judgment as a matter of law made after the close of plaintiff's case-in-chief. The court awarded my client her reasonable attorney's fees. I then withdrew from the case based on my appointment as a United States Magistrate Judge and was later called to testify in the attorney's-fee hearing about the work I had performed. I do not have a record of this testimony and am not aware that it is available online.

In addition, just prior to my appointment as a Trustee of the University of Northern Colorado in 2015, I appeared before a state legislative committee to offer testimony about my appointment. I do not have a record of this testimony and am not aware of whether it is available online.

45. 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.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No to all subparts.

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

Response: No.

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

Response: Not applicable.

48. Have you ever confessed error to a court?

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

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: I understand nominees are sworn before testifying before the Committee and that they have a duty to be candid when testifying. I also understand, as a sitting United States Magistrate Judge, and as a nominee, the Code of Conduct for United States Judges informs, under Canon 2, a judge should avoid impropriety and the appearance of impropriety in all activities—this includes avoiding circumstances which may cause the judge's impartiality to be questioned. And under Canon 3A(6), a judge should not make public comment on the merits of a matter pending or impending in any court.

Questions from Senator Thom Tillis
for Shane Kato Crews
Nominee to be United States District Judge for the District of Colorado

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions[.]" Black's Law Dictionary (11th ed. 2019). I do not consider "judicial activism" to be appropriate to judicial decision making.

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

   Response: As a sitting United States Magistrate Judge, I took an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and *impartially* discharge and perform all the duties incumbent upon me as a magistrate judge under the Constitution and laws of the United States." 28 U.S.C. § 453 (emphasis added). Impartiality is an expectation.

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: Faithful application of the law may result in outcomes that some find undesirable. But it is a judge's role to faithfully apply binding precedent to the facts and issues presented regardless of whether I or others view the outcome as undesirable.

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

   Response: No.

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

   Response: If confirmed, I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent to Second Amendment cases that come before me, including the decisions

in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: I would listen to and assess the parties' legal arguments; research the applicable statutory law or constitutional provisions bearing on the facts, to include Supreme Court and Tenth Circuit precedent; and I would faithfully and impartially apply the law and precedent to the facts before me.

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

Response: Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Callahan v. Unified Gov't of Wyandotte Cnty.*, 806 F.3d 1022, 1026 (10th Cir. 2015). When considering qualified immunity, I listen to and assess the parties' legal arguments and research and analyze Supreme Court and Tenth Circuit precedent, and I apply that precedent to determine whether a statutory or constitutional right has been violated, and if so, whether that right was clearly established.

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

Response: As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to any questions of qualified immunity that come before me. As with all issues that come before me, if faced with a case implicating qualified immunity I would listen to and assess the parties' legal arguments without prejudging any issues; research the applicable law, to include Supreme Court and Tenth Circuit precedent; and I would faithfully and impartially apply the law and the precedent to the facts.

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

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in

abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold, and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to any questions of patent eligibility that come before me.

13. **Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: Please see my response to Question 12.

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

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

    Response: In my 17-plus years of practice as a lawyer, I did not practice copyright law. In my four-plus years as a United States Magistrate Judge, I have been the referral magistrate judge on 18 cases alleging copyright infringement, and the presiding judge (on consent of the parties) in 13 cases alleging copyright infringement. For example, in *RE/MAX, LLC v. Argus & Kronos, LLC*, No. 1:17-cv-02006-MSK-SKC, 2019 WL 1437768 (D. Colo. Jan. 29, 2019), *report and recommendation adopted*, 2019 WL 967815 (D. Colo. Feb. 27, 2019), I issued a report and recommendation recommending to the district judge that the plaintiff's motion for default judgment alleging claims for trademark counterfeiting, trademark infringement and unfair competition, and copyright infringement, be granted after finding, in relevant part, that the plaintiff stated plausible claims for relief. The district judge adopted my recommendation.

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

    Response: I was the referral magistrate judge in at least one case involving the Digital Millennium Copyright Act (DMCA). *See Millennium Funding, Inc. v. Private Internet Access, Inc.*, Civil Action No. 1:21-cv-01261-NYW-SKC (D. Colo.). In that case, the plaintiff alleged the defendant, through its virtual private network, either directly engaged in or induced or contributed to third parties' infringement of the plaintiff's copyrights, and alleged the defendant should be

held secondarily liable for the DMCA violations of its end users. I handled all pretrial matters on referral from the district judge.

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

Response: In my 22-plus years in the legal profession (first as a lawyer and then as a judicial officer), I have not handled or adjudicated any cases addressing intermediary liability for online service providers for content posted by users.

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

Response: As a lawyer, I defended a charter school against allegations that it violated a teacher's First Amendment free speech rights after it declined to renew her contract. My client prevailed in that case after a five-day jury trial. As a federal magistrate judge, I have randomly drawn cases involving the First Amendment and free speech issues. For example, in *Hale v. Marques*, Civil Action No. 1:19-cv-00752-WJM-SKC, 2020 WL 2309619, at *9-11 (D. Colo. Feb. 3, 2020), *report and recommendation adopted as modified sub nom.* 2020 WL 1593339 (D. Colo. Mar. 30, 2020), the plaintiff, a *pro se* incarcerated person, alleged (in relevant part) the defendant Bureau of Prison's (BOP) personnel violated his free speech rights because of restrictions they placed on his speech related to his white supremacist organization that was deemed a security threat group by the BOP. I issued a report and recommendation recommending finding the plaintiff's free speech claims were barred by issue preclusion based on a prior decision involving this plaintiff issued by the Tenth Circuit. The presiding district judge adopted my recommendation.

Concerning intellectual property issues, on referral from the presiding district judge, I issued an order granting the plaintiff's motion to amend its initial patent infringement contentions to assert an additional claim for infringement. The presiding district judge overruled the defendants' objections to my order and affirmed my order. *See Cocona, Inc. v. VF Outdoor, LLC*, Civil Action No. 1:16-CV-02703-CMA-SKC, 2023 WL 2743270 (D. Colo. Mar. 30, 2023).

I approach each of these cases with an open mind by listening to and assessing the parties' legal arguments, and by researching, analyzing, and faithfully and impartially applying Supreme Court and Tenth Circuit precedent.

15. 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 reported that 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: Supreme Court and Tenth Circuit precedent have guided that legislative history should be considered rarely and cautiously, and only as a last resort. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("legislative history is not the law"); *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("ambiguous legislative history [may not be used to] muddy clear statutory language"); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020) ("Once we exhaust the traditional tools of statutory interpretation, we may (cautiously) turn to the legislative history.") (parenthetical in original). As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent, including any methods of interpretation dictated by that precedent, faithfully and impartially when considering how to apply the law to the facts in a particular case.

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: The Supreme Court has developed a series of doctrines which afford deference to certain agency decisions. For example, in *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022), the Supreme Court announced the "major questions" doctrine, which provides that in extraordinary cases involving statutes that confer authority upon an administrative agency, the agency must point to clear congressional authorization for the authority the agency claims. In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that when a court reviews an agency's construction of a statute the agency administers, if the statue is silent or ambiguous with respect to the specific issue, the court should defer to the agency's interpretation so long as it is based on a permissible construction of the statute. Additional deference doctrines include *Auer* deference and *Skidmore* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997) (affording deference to an agency's reasonable readings of genuinely ambiguous regulations); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (affording deference to agency decisions which lack the force of law and based on the degree of the agency's care, its consistency, formality, relative expertise, and the persuasiveness of the agency's position).

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: Supreme Court and Tenth Circuit precedent have guided that legislative history should be considered rarely and cautiously, and only as a last resort. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("legislative history is not the law"); *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("ambiguous legislative history [may not be used to] muddy clear statutory language"); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020) ("Once we exhaust the traditional tools of statutory interpretation, we may (cautiously) turn to the legislative history.") (parenthetical in original). As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent, including any methods of interpretation dictated by that precedent, faithfully and impartially when considering how to apply the law to the facts in a particular case.

16. 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: When deciding a case that turns on the interpretation of a federal statute like the DMCA, I start with examining the text of the statute. If the text of the statute is plain and unambiguous, my inquiry ends there and I apply the statute as written to the facts before me. If, on the other hand, the text of the statute is vague or ambiguous, I consult Supreme Court and Tenth Circuit precedent for any applicable canons of construction, and I apply those canons of construction to interpret the statute.

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: Federal trial courts are duty-bound to apply Supreme Court precedent, as well as the precedent of their circuit court, faithfully and impartially to the facts before them. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.")

17. 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 this practice.

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

Response: In the District of Colorado, new cases are randomly drawn to both district and magistrate judges, which prevents the problem of judge shopping. In any event, regardless of how cases are assigned, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to the matters before me.

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

Response: Please see my answer to Question 17(a).

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

Response: No.

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

Response: Please see my answers to 17(a) and 17(c). As a sitting United States Magistrate Judge, I have never engaged in forum selling. If I were confirmed to be a United States District Judge I would continue to preside over the matters assigned to me through the District of Colorado's procedures for assigning cases.

18. 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: As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to the matters before me. If faced with a question about whether procedures or rules adopted in a judicial district have biased the administration of justice and encouraged forum shopping, I would listen to and assess the parties' legal arguments and evaluate the lawfulness of the circumstances by researching and applying Supreme Court and Tenth Circuit precedent and faithfully and impartially applying that precedent.

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

Response: Please see my answers to Questions 17(a) and 18.