

**Nomination of Allison Eid to the Tenth Circuit Court of Appeals
Questions for the Record
Submitted September 27, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be “originalist”? If so, what does that mean to you? If not, how would you describe your approach?

Response: In my experience on the Colorado Supreme Court, judges do not describe themselves in terms of labels, and therefore I eschew labels. My approach to constitutional interpretation is the same as my approach to judicial review generally. I carefully review the arguments of the parties in their briefs and at oral argument, consult with my colleagues, and conduct independent legal research concerning the relevant precedent. That said, as the United States Supreme Court has recognized, how the text was understood at the time of the founding plays an important role in constitutional interpretation.

2. You have written a number of law review articles about New Federalism. In one piece, *The Property Clause and New Federalism*, you addressed one test the Supreme Court continues to use to determine whether a statute enacted by Congress falls within Congress’s Commerce Clause power. You wrote of the “substantial effects” test: “The Court preserved the substantial effects test not necessarily because it was the right test; in fact, no one in the Court’s majority defended the test on any grounds other than precedent.” (74 UNIV. OF COLO. L. REV. 1241, 1256)

a. Do you believe that the “substantial effects” test is a proper method of determining whether an activity falls within Congress’s power to regulate under the Commerce Clause?

Response: The Supreme Court has held that the Commerce Clause permits Congress to regulate only that activity which has a “substantial effect” on interstate commerce. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). If I am confirmed I will faithfully apply precedent in this area.

b. If confirmed to the Tenth Circuit, would you have any problem applying Supreme Court precedents that you believed could not be supported “on any grounds other than precedent”? If so, please discuss.

Response: If I am confirmed, I would have no problem applying Supreme Court precedent regardless of its basis.

3. In the same article, you wrote that “[C]onstitutional provisions impacting the federal-state relationship, especially in the age of New Federalism, must have boundaries.” (74 UNIV. OF COLO. L. REV. 1241, 1259-60).

a. What “boundaries” do you believe are appropriate in the “age of New Federalism”?

Response: The statement to which you refer was made in my previous capacity as a full-time academic. If I were confirmed to this position, I would follow all Tenth Circuit and United States Supreme Court precedent regarding the boundaries of constitutional provisions impacting the federal-state relationship.

b. What approach would you take to determine whether a certain area of regulation falls within Congress’s authority, or is instead reserved solely to the states?

Response: If I am confirmed, my approach would be to carefully review the proposed regulation, consider the parties’ arguments, and faithfully apply all precedent of the Tenth Circuit and the United States Supreme Court.

4. Do you agree that several leading cases reflecting the doctrine of New Federalism as applied to the Commerce Clause, including *New York v. United States* (1992), *United States v. Lopez* (1995), and *United States v. Morrison* (2000), departed from decades of Supreme Court precedent on Congress’s power to regulate activities pursuant to that Constitutional provision?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it would be appropriate for me to offer an opinion as to whether these cases departed from previous United States Supreme Court precedent. If I am confirmed, I will faithfully apply these cases and all precedent established by the United States Supreme Court.

a. If so, what justified the Court’s departure from that precedent, which extended uninterrupted from the New Deal?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it would be appropriate for me to offer an opinion as to whether these cases departed from previous United States Supreme Court precedent. If I am confirmed, I will faithfully apply these cases and all precedent established by the United States Supreme Court.

5. In your dissent in *Hall v. Moreno* (2012), your argument against redrawing Colorado’s congressional districts relied in large part on the “minimization factor” in Colorado law. You wrote: “Importantly, the majority and the district court fail to recognize the significant interest that the minimization factor is designed to protect. Obviously, the interest is not the straw man that district lines should always remain the same. Nor is it only that existing district lines are likely to reflect communities of interest now because they did so in the past. It is that district lines, once drawn, reflect and encourage important relationships among constituents, community leaders, and the congressional representative surrounding particular issues—relationships that are lost when district lines change, or in this case, shift dramatically.”

a. How do you define “communities of interest”?

Response: As observed by the majority opinion in *Hall v. Moreno*, “communities of interest” is a term defined under Colorado law as “similarly situated populations” in terms of “ethnic, cultural, economic, trade area, geographic, and demographic factors.” *Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012) (quoting Colo. Rev. Stat. § 2-1-102(1)(b)(II)).

b. If existing district lines “encourage important relationships” but also dilute the voting power of minority voters, should those existing lines nevertheless be retained?

Response: Existing district lines should be maintained only when such lines comply with the Voting Rights Act.

c. How do you balance the interests of preserving the “important relationships” you identify with the need to ensure that minority voters are adequately represented? With the mandate of “one person, one vote”? With the requirements of the Voting Rights Act?

Response: As observed by the majority opinion in *Hall v. Moreno*, Colorado law requires compliance with the mandate of “one person, one vote” as well as with the Voting Rights Act.

6. Colorado law directs state trial courts drawing congressional maps to consider several non-exhaustive factors, none of which are binding. These factors include “the preservation of political subdivisions,” “the preservation of communities of interest,” “direct compactness,” and “the minimal disruption of the existing district boundaries.” (*Hall v. Moreno*, at 969) In your dissent, you argued that the trial court had “abused its discretion by failing to give adequate weight to ‘the minimization of disruption of prior district lines.’”

a. Given that the factors laid out under Colorado law are advisory, non-binding, and non-exhaustive, how was it an abuse of discretion to give more weight to other factors than to “the minimization of disruption of prior district lines”?

Response: As stated in my dissent, the district court abused its discretion in giving little or no weight to the minimization factor.

b. Why did your dissent not address the fact that this minimization factor was just one that the trial court could consider in redrawing congressional districts?

Response: As stated in my dissent, minimization is a factor the legislature listed in Colo. Rev. Stat. § 2-1-102(b), and the district court abused its discretion in giving little or no weight to that factor.

c. Why did you favor the “minimization” factor at the expense of the other factors?

Response: It is inaccurate to characterize my dissent as “favoring” minimization. As stated in my dissent, minimization is a factor the legislature listed in Colo. Rev.

Stat. § 2-1-102(b), and the district court abused its discretion in giving little or no weight to that factor.

7. In 2013, you joined a 4-2 opinion in *Lobato v. State* ruling that Colorado’s public school financing system was constitutional, even though, as the dissent pointed out, the entire public education system was underfunded and there was a “gross funding disparity among districts.” The majority that you joined held that the phrase “thorough and uniform” did “not demand absolute equality in the state’s provision of educational services, supplies, or expenditures.”

a. Please explain how uniformity in public education is different than equality in public education.

Response: As the majority opinion written by now-Chief Justice Rice in *Lobato* explained: “Our interpretation of ‘thorough and uniform’ is consistent with the exclusions described in [a Colorado Supreme Court precedent] because providing a public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state does not demand absolute equality in the state's provision of educational services, supplies, or expenditures.”

8. In 2015, you wrote the majority opinion in two companion cases, *People v. Vigil* and *People v. Tate*, which related to sentences of life without the possibility of parole (LWOP) for juvenile offenders. In those cases, you were called upon to decide whether a U.S. Supreme Court case, *Miller v. Alabama* (2012), applied retroactively to juvenile offenders who were sentenced to LWOP before *Miller v. Alabama* was decided and who subsequently challenged their sentences on collateral review.

You concluded that the rule of *Miller v. Alabama*—holding that LWOP sentences for juvenile offenders violated the Eighth Amendment—was “procedural, rather than substantive, because it does not bar the imposition of a LWOP sentence on a juvenile, but rather requires that a ‘certain process’ be followed before a juvenile may be sentenced to LWOP.”

The U.S. Supreme Court later overruled you in a 6-3 opinion holding that “*Miller* announced a substantive rule that is retroactive in cases on collateral review.”

a. On what basis did you conclude that the rule of *Miller v. Alabama* was “procedural, rather than substantive”?

Response: As explained in *People v. Tate*, 352 P.3d 959, 972 (Colo. 2015), I concluded that “[b]ecause *Miller* is procedural in nature, and is not a ‘watershed’ rule of procedure, it does not apply retroactively to cases on collateral review of a final judgment.”

b. In *Miller v. Alabama*, Justice Kagan, writing the majority opinion, wrote the following: “We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel

and unusual punishments.” What in that holding suggests that the rule announced by the High Court was “procedural, rather than substantive”?

Response: The Court in *Miller* described its holding as “mandat[ing] only that a sentencer follow a certain *process* – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.” *Miller v. Alabama*, 567 U.S. 460, 483 (2012) (emphasis added).

9. In 2011, you dissented from the Colorado Supreme Court’s opinion in *Jackson v. Unocal*. In a 5-2 opinion, the court’s majority held that a trial court did not have to apply a preponderance of the evidence standard to each requirement of the state’s class certification rule—numerosity, commonality, typicality, and adequacy of representation. The majority emphasized that its holding was consistent with liberally construing the class certification rule “in light of Colorado’s policy of favoring the maintenance of class actions.” You would have held that a trial court must apply a preponderance of the evidence standard to all class certification decisions.

a. Do you believe your dissent was consistent with “Colorado’s policy of favoring the maintenance of class actions”?

Response: Yes.

b. If not, why did you believe it was appropriate for the Colorado Supreme Court to depart from that policy?

Response: Please see my response to Question 9.a.

10. In 2013, in *Scott v. Saint John’s Church in the Wilderness*, No. 12SC658, 2013 Colo. LEXIS 51 (Jan. 7, 2013), the Colorado Court of Appeals upheld an injunction in a church’s private nuisance action against anti-abortion protestors who interfered with outdoor church services. The injunction prohibited the protestors from using large posters or other displays depicting grisly images in a manner where they were likely to be observed by children under 12 years old. The court found the injunction to be narrowly tailored, for First Amendment free speech purposes, to the compelling governmental interest in protecting children from disturbing images. You dissented from the Colorado Supreme Court’s denial of certiorari.

a. Why were you interested in reviewing this decision by the Colorado Court of Appeals?

Response: Decisions regarding certiorari are made in a closed conference of the Colorado Supreme Court. The protocols of the Colorado Supreme Court permit a justice to indicate that she voted to grant certiorari in a particular case when certiorari has been denied. The protocols do not permit a justice to explain her reasoning regarding her vote to grant certiorari.

11. When is it appropriate for judges to consider legislative history in construing a statute?

Response: The Tenth Circuit has held that it is appropriate to consider legislative history when the statutory language is ambiguous. See, e.g., *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006).

12. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

Response: It is never appropriate for a lower court to depart from Supreme Court precedent. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

Response: As noted above, a circuit court is always bound by Supreme Court precedent. There may, however, be rare occasions where a circuit court judge would note in a concurring opinion or dissent that Supreme Court precedent should be reconsidered. This does not, however, alleviate the responsibility of the circuit court judge to follow the relevant precedent.

c. When, in your view, is it appropriate for a circuit court to overturn its own precedent?

Response: The Tenth Circuit can overturn its own precedent only when the court is sitting *en banc*. In *re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

Response: As a nominee for a lower federal court, it is not appropriate for me to opine on what circumstances might be sufficient for the Supreme Court to overturn its own precedent. The Supreme Court determines when it is appropriate to overturn its precedent.

13. Your name appeared on President Trump's short list of Supreme Court nominees. As a presidential candidate, President Trump made clear that conservative interest groups played a significant role in choosing who made that list. In June 2016, for instance, he stated "we're going to have great judges, conservative, all picked by the Federalist Society," and, last September, President Trump specifically thanked both the Heritage Foundation and the Federalist Society (of which you are a member) for their work on the list.

a. Before the President issued his list of potential nominees, did you have any contact with anyone from the Heritage Foundation, including John Malcolm, or the

Federalist Society, including Leonard Leo, about your possible inclusion on that list, or your potential nomination to the Supreme Court generally?

Response: No.

b. Why do you think the Federalist Society and Heritage Foundation recommended you for inclusion on then-candidate Trump's list?

Response: I do not know.

c. From 2008 to the present, did you have any contact with anyone at the Federalist Society or the Heritage Foundation about your possible nomination to the Tenth Circuit?

Response: No.

14. President Trump repeatedly stated that he would apply a litmus test in selecting only Supreme Court nominees who will oppose a woman's right to choose and overturn *Roe v. Wade*. President Trump also repeatedly stated that he would apply a litmus test in selecting Supreme Court nominees who would be "very pro-Second Amendment."

You were on President Trump's Supreme Court shortlist, which was drawn up by the Heritage Foundation and the Federalist Society.

a. In your meetings with any Trump administration officials, please answer whether there was any mention or discussion of:

- i. Abortion, contraception, or the right to privacy
- ii. Second Amendment

Response: No.

b. Have you ever spoken with anyone at the Heritage Foundation about how you would approach a case involving:

- i. Abortion, contraception, or the right to privacy
- ii. Second Amendment

Response: No.

c. Have you ever spoken with anyone at the Federalist Society about how you would approach a case involving:

- i. Abortion, contraception, or the right to privacy
- ii. Second Amendment

Response: No.

d. If you have not had conversations with any officials in the Trump Administration, the Heritage Foundation, or the Federalist Society about these issues—why do you believe your name was included on a list of candidates who purportedly shared President Trump’s views on these issues?

Response: I do not know.

15. Please respond with your views on the proper role of precedent.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

Response: Please see my response to Question 12.

b. When, in your view, is it appropriate for a circuit court to overturn its own precedent?

Response: Please see my response to Question 12.

c. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

Response: Please see my response to Question 12.

16. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?

Response: As a sitting justice on the Colorado Supreme Court, all decisions of the United States Supreme Court are, and would be if I am confirmed to the Tenth Circuit, binding precedent that I do, and would, faithfully apply without regard to whether such precedent is labeled “super-stare decisis” or “superprecedent.”

b. Is it settled law?

Response: *Roe v. Wade* is settled as a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

17. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. Is the holding in *Obergefell* settled law?

Response: *Obergefell v. Hodges* is settled as a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

18. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

Responses: I do not believe it would be appropriate for me to offer an opinion concerning the merits of Justice Stevens' dissent. If I am confirmed, I will adhere to *Heller* and all precedent established by the United States Supreme Court.

b. Did *Heller* leave room for common-sense gun regulation?

Response: I do not believe it would be appropriate for me to offer an opinion as to the contours of the *Heller* decision and its implications other than to note that the Court's decision states that "[n]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

Response: I do not believe it would be appropriate for me to offer an opinion concerning the merits of *Heller* or whether it departed from previous Supreme Court precedent. If I am confirmed, I will adhere to *Heller* and all precedent established by the United States Supreme Court.

19. In addition to being picked by the Heritage Foundation and the Federalist Society for the President's Supreme Court short list, you indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 1988. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that

the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

a. You taught as a law school professor for many years. Please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools.

Response: I do not know what the Federalist Society meant by this statement.

b. As a former member of the Federalist Society, explain how exactly the organization seeks to “reorder priorities within the legal system.”

Response: I do not know what the Federalist Society meant by this statement.

c. As a former member of the Federalist Society, explain what “traditional values” you understood the organization placed a premium on.

Response: I do not know what the Federalist Society meant by this statement.

20. Please describe with particularity the process by which you answered these questions.

Response: I received these questions on September 27, 2017. I reviewed the questions, conducted research, and drafted answers. I then shared the answers with the Department of Justice’s Office of Legal Policy (“OLP”). After speaking with attorneys in OLP, I made revisions, finalized my responses, and authorized OLP to submit my responses.

Senator Dick Durbin
Written Questions for Allison Eid, Thomas Farr and William Ray
September 27, 2017

For questions with subparts, please answer each subpart separately.

Questions for Justice Allison Eid

1. During your hearing, I asked you about the 2015 case *Westin Operator LLC v. Groh*. In this case, 22-year-old Jillian Groh and two friends had rented a room at a Denver Westin hotel so they could go out for a night on the town and then not have to drive home. They returned around 2 a.m. to their room with several more friends and ended up in an argument with hotel security guards over noise. The guards told Ms. Groh that she and her group had to leave the premises and they escorted her out of the hotel, even though the group told the guards they could not leave, saying “we are drunk, we can’t drive.”

One of the friends asked if they could wait in the lobby while they called a taxi because it was freezing outside, but a security guard refused, blocked them from re-entering, and told them to “get the f*** out of here.” So seven people loaded into Ms. Groh’s car and drove off. The driver was drunk and they got in an accident. One person in the car was killed, others were injured, and Ms. Groh suffered a traumatic brain injury.

Ms. Groh’s parents sued the Westin hotel for negligence, alleging that the hotel failed to exercise a minimum level of due care for her safety when they evicted her. The hotel moved for summary judgment. The majority of the Colorado Supreme Court affirmed a denial of this motion for summary judgment, holding that hotels must refrain from evicting an intoxicated guest into a foreseeably dangerous environment. The majority thought the case should proceed to trial to give the Grohs the chance to develop the facts about the freezing weather, the level of intoxication, and the availability of alternative transportation.

You wrote a dissent where you agreed that the hotel owed a duty not to evict a guest into an unreasonably dangerous environment, but you would have dismissed the case on summary judgment because in your view Ms. Groh and her friends could have just taken a taxi. You said in your dissent “there is no suggestion that she was so intoxicated that she could not call or get into a taxi.” You saw no material dispute of fact and said that in your view there was no concern with the freezing weather or Ms. Groh’s intoxication that would have precluded summary judgment. During your hearing, you said it was a “critical fact” that “the party walked by waiting cabs, and that was caught on videotape....and in my view, that was dispositive.”

However, the majority in this case did not view this as dispositive. The majority opinion said:

Video footage from hotel security cameras shows two taxis in the vicinity during the general timeframe of the eviction. No taxi is visible on screen during the time in which the group exited the hotel and walked to the

parking lot en masse, but there is a police car parked at the entrance. It is unclear from the record whether the taxis visible at other times in the video were occupied or available for service, whether any member of the group saw the taxis, and whether the security guards evicting the group were aware if a taxi was immediately available. One of the people evicted testified at his own deposition that he tried to look for a cab outside the hotel but didn't see one.

- a. Do you believe it is clear from the record whether the taxis visible in the video were available for service?

Response: As stated in my dissent, “the group discussed taking a taxi, Groh’s brother told her to take a taxi, video footage shows Groh and her companions walking by two taxi cabs on the way to her car, and there is no suggestion that Groh was so intoxicated that she could not call or get into a taxi.”

- b. Do you believe it is clear from the record whether any member of the group saw the taxis you referenced?

Response: As stated in my dissent, “the group discussed taking a taxi, Groh’s brother told her to take a taxi, video footage shows Groh and her companions walking by two taxi cabs on the way to her car, and there is no suggestion that Groh was so intoxicated that she could not call or get into a taxi.”

- c. Do you believe it is clear from the record that Ms. Groh and her group were not so intoxicated that they would be unable to identify whether a nearby cab were available for service?

Response: As stated in my dissent, “the group discussed taking a taxi, Groh’s brother told her to take a taxi, video footage shows Groh and her companions walking by two taxi cabs on the way to her car, and there is no suggestion that Groh was so intoxicated that she could not call or get into a taxi.”

- d. Why did you not want to allow this case to proceed to trial to resolve these questions of fact?

Response: As stated in my dissent, “[b]ecause undisputed evidence demonstrates that Groh was evicted into an environment where alternative transportation was available, summary judgment” was appropriate.

- e. You said in your dissent that

[T]he majority fails to look at the larger picture, which is that its reasoning would apply to impose a duty to provide safe transportation for evicted guests on the entire Colorado hotel industry....While it is not possible to precisely quantify the burden

that the majority is placing on Colorado businesses at this stage, surely it is not the trivial obligation the majority makes it out to be.

When you considered the burdens that the decision in this case would place on the hotel industry, did you also consider the burdens that the decision would place on these young adults and their families?

Response: As stated in my dissent, the above-quoted passage was made in response to the majority's suggestion that "ensuring that evicted guests actually take alternative transportation off the property would be a '[r]elatively low-cost option []."'

2. You wrote a dissent in the 2014 case *City of Brighton v. Rodriguez*. This case involved Helen Rodriguez, a city employee who was walking to her office in the basement of City Hall when she fell down the stairs to her office and hit her head. She ended up with multiple injuries, including four aneurysms in her brain for which she needed surgery.

The City argued that these injuries were not compensable under the Colorado Workers' Compensation Act, saying that the cause of Ms. Rodriguez's fall was unexplained and that the fall did not arise out of her employment. The majority of the Colorado Supreme Court held that Ms. Rodriguez's fall was compensable, because the fall would not have occurred but for the fact that her obligations of employment placed her in the position where she was injured.

You dissented, arguing that unexplained injuries like Ms. Rodriguez's fall should not be treated the same as injuries with neutral or known causes. You said "by holding that unexplained injuries are compensable, the majority significantly expands the scope of workers' compensation coverage in Colorado." You would have ruled in favor of Ms. Rodriguez's employer in the case and denied Ms. Rodriguez compensation for the extensive injuries she suffered.

- a. Why do you think the majority of the Court disagreed with you?

Response: As stated in the majority opinion, the majority concluded that "when the cause of any employee's fall is truly unknown, it necessarily arises from a neutral risk" and is therefore compensable.

- b. The majority wrote that when injuries are unexplained, "demanding more precision about the exact mechanism of a fall is inconsistent with the spirit of a statute that is designed to compensate workers for workplace accidents regardless of fault." Did you feel it was inappropriate for the majority to reference the spirit of the statute?

Response: As stated in my dissent, "the majority's position extends" the scope of the statute, and such "expansion is an issue best left to the legislature."

3. In the 2017 case *People v. Boyd*, the Colorado Supreme Court considered the prosecution of Pamela Boyd for possessing a small amount of marijuana. Ms. Boyd had been arrested in 2011 for possessing less than one ounce of marijuana and she was found guilty in August 2012 of possession and attempt to distribute. She was sentenced in November 2012.

Then, on December 10, 2012, Amendment 64 became effective. This was a Colorado citizen initiative that legalized the possession of up to one ounce of marijuana for personal use. Ms. Boyd then filed a timely notice of appeal and argued that because Amendment 64 legalized possession while she still had a pending right to appeal, her conviction for possession should be vacated.

The Colorado Supreme Court majority found for Ms. Boyd, holding that Amendment 64 deprived the State of its power to continue to prosecute cases where there was a non-final conviction of possession and where there was a pending right to appeal when the Amendment became effective.

You dissented, criticizing the majority's decision as "retroactive" and saying that the majority's ruling meant that "criminal acts committed prior to Amendment 64's effective date will go unprosecuted and unpunished." You said that in your view there was no indication that the voters intended the Amendment to apply retroactively.

- a. How could the State prosecute Ms. Boyd on appeal after December 10, 2012 based on a marijuana possession statute that was no longer operative?

Response: As stated in my dissent, "Because marijuana possession 'constitute[d] an offense' prior to the effective date of Amendment 64, the defendants are properly subject to prosecution for that offense."

- b. Why did you call the majority's decision "retroactive" when it simply required the State to apply the Amendment to cases that were still pending?

Response: As stated in my dissent, the majority opinion held the Amendment to be retroactive because under its decision "criminal acts committed prior to Amendment 64's effective date will go unprosecuted and unpunished."

4. In the 2012 case *Larson v. Sinclair Transportation Company*, the Colorado Supreme Court majority held that the legislature did not grant the power of eminent domain to companies for the purpose of building oil pipelines.

In this case the oil company, Sinclair, sought to condemn a portion of the Larson family's property to put down an oil pipeline. Sinclair cited a statute that gave electric companies the power of eminent domain for rights-of-way. The Supreme Court majority ruled against Sinclair, noting that "neither the word petroleum nor the word oil is found anywhere" in the relevant statute. The majority noted that precedent required them to narrowly construe statutes that confer condemnation power upon private entities, and they held that this statute

neither expressly nor impliedly gave eminent domain authority for companies to lay down oil pipelines.

You dissented. You construed the language of the eminent domain statute more broadly to include oil pipelines. Basically, you and the majority disagreed on the interpretation of the statute, and your reading would have favored the oil company while the majority's reading favored the Larson family.

How do you think the majority read the same text as you and came up with a different outcome in the case?

Response: As stated in the majority opinion, the majority interpreted the statutory term "pipeline" to refer "to pipes involved in delivering electric power through the power grid, such as those pipes encasing underground electric wiring." As stated in my dissent, "I agree with the majority that we should not lightly infer the grant of condemnation authority in this, or any, condemnation case," but that the plain meaning of term "pipeline" would include a pipe "carry[ing] liquid petroleum."

5. You note in your questionnaire that in 1999 you served as the chair of Colorado Senator Wayne Allard's Federal Judicial Selection Committee.
 - a. Please describe the work you did on Senator Allard's committee.

Response: The Committee received applications, interviewed candidates, and made recommendations to the Senator.

- b. Do you think Senate Judicial Selection Committees perform an important function when it comes to vetting candidates for judgeships?

Response: I believe it is better left to others, including the President who is responsible for nominating candidates, and Senators who are tasked with approving nominees, to determine whether such committees perform an important function.

6. You say in your questionnaire that you have been a member of the Federalist Society since 1988. Are you aware that President Trump publicly thanked the Federalist Society for helping compile his Supreme Court shortlist? For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

Response: Yes, I have read press accounts of the statements to which you refer.

7. What message does it send to young lawyers and law students, like the students you've taught at the University of Colorado Law School, when the President designates interest groups like the Federalist Society as gatekeepers for judicial selection?

Response: I am not aware of any of my students' reactions to the press accounts of the above-referenced statements.

8. Why do you think you made the list of 21 Supreme Court candidates that the Federalist Society helped assemble for President Trump?

Response: I do not know.

9. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting President Trump's Circuit Court nominees, including Justice Joan Larsen.

- a. Justice Eid, do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?

Response: To my knowledge, no such efforts have been made.

- b. Will you condemn any attempt to make undisclosed donations on behalf of your nomination?

Response: To my knowledge, no such efforts have been made.

- c. Will you call for any such undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?

Response: To my knowledge, no such efforts have been made.

- 10.

- a. Can a president pardon himself?

Response: As a nominee for federal judicial office and a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me.

- b. Can an originalist view of the Constitution provide the answer to this question?

Response: As a nominee for federal judicial office and a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me.

- c. If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?

Response: A judge may also look to history and tradition.

11. Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?

Response: I have made no effort to investigate the basis for the President's assertion and any answer I would provide would be mere speculation. More importantly, as a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, I do not get involved in politics.

**Nomination of Allison Eid
To the U.S. Court of Appeals for the Tenth Circuit Questions for the Record
Submitted September 27, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

a. Do you agree with Justice Roberts’s metaphor? Why or why not?

Response: Yes. It is the responsibility of a judge to interpret the law, not make the law.

b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

Response: It is up to the legislative branch to consider the practical consequences of laws it enacts.

2. In your confirmation hearing, you acknowledged that judges will sometimes refuse to construe a statute in a way that leads to an absurd result.

a. Do you agree that whether a particular result is “absurd” is necessarily a subjective determination?

Response: The “absurd results doctrine” I referenced in my hearing is a well-established canon of statutory construction that holds that a court should apply the plain meaning of a statute except in rare cases where the plain meaning would provide a result that is clearly at odds with the intent of the drafters. See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 225, 243 (1989). The determination that a particular result is “absurd” is not the subjective determination of the reviewing judge, rather it is based on a comparison between the drafter’s intent and the plain text of a statute.

b. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” requires a judge to make a subjective determination?

Response: Federal Rule of Civil Procedure 56 requires a judge to determine whether a genuine dispute as to any material fact exists. A judge does not make a subjective determination (i.e., one guided by the feelings or intuition of the judge) that such a dispute exists. Rather, a judge evaluates the allegations and factual assertions made by each party, takes into consideration precedent and prior decisions involving analogous facts, and decides whether summary judgment is

appropriate based on this evaluation

3. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

a. What role, if any, should empathy play in a judge's decision-making process?

Response: None.

b. What role, if any, should a judge's personal life experiences play in his or her decision-making process?

Response: None.

c. Do you believe you can empathize with "what it's like to be a young teenage mom," or understand what it's like to be "poor or African-American or gay or disabled or old"? If so, what life experiences do you draw on that lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Response: It is not appropriate to allow personal feelings to influence my judicial determinations.

4. In response to a question from Senator Grassley about how your involvement in the community has impacted your view as a judge, you responded that judges also wear an "administrative hat where we are really looking at the system and we're looking at how the system impacts people's lives." In response to a question I asked, you suggested that it would be inappropriate for a judge to consider the practical consequences of a decision, and should leave that task to the legislature.

a. If it is inappropriate for a judge to consider the practical consequences of his or her decisions, why is it appropriate for a judge to wear an "administrative hat" and "look[] at the system and . . . how the system impacts people's lives"? How do you reconcile those positions?

Response: In my response to Senator Grassley, I was referring to my administrative assignments as a justice on the Colorado Supreme Court. As a justice I serve as liaison to a number of Colorado Supreme Court committees including committees responsible for drafting rules of practice and procedure utilized by Colorado courts. When drafting such rules it is appropriate to evaluate the practical consequences of the proposed rules.

b. In your dissent in *Taxpayers for Public Education v. Douglas County Board of Education*, a case regarding parents' use of school vouchers for religious education, you wrote that the plurality's interpretation was "so broad that it would invalidate the use of

public funds to build roads, bridges, and sidewalks adjacent to such [religious] schools, . . . as such schools ‘rely on’ state-paid infrastructure to operate their institutions.” Would you agree that your dissent is an example of you considering a decision’s impact on peoples’ lives in reaching your legal conclusion?

Response: In *Emerson v. Board of Educ. of Ewing Tp.*, 330 U.S. 1, 17-18 (1947), the United States Supreme Court noted that it is “obviously not the purpose the First Amendment” to require states to deprive religious schools of “general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.” As I stated in my dissent in *Taxpayers for Public Education v. Douglas County Board of Education*, I believe that the plurality’s interpretation would have done just that.

5. In response to a question from Senator Coons, you testified that the primary focus of your dissent in *Taxpayers for Public Education v. Douglas County Board of Education* was a critique of the majority for applying plain meaning analysis when interpreting the “no aid to religious schools” provision of the Colorado Constitution. You explained at your confirmation hearing that “You can’t in a religious clause case simply apply the plain meaning; you have to go behind the words . . . you have to look at what’s going on here and what’s the intent behind the words.”

a. As a general matter, do you believe that judges should resolve legal questions by interpreting the plain meaning of the relevant constitutional or statutory text?

Response: Yes.

b. Why, in your view, can’t the “no aid to religious schools” provision of the Colorado Constitution be resolved through a plain meaning analysis?

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the United States Supreme Court directed courts that the “facial neutrality” of a statute or constitutional provision does not end the analysis of whether that statute or constitutional provision violates the Free Exercise Clause of the Constitution.

c. As a general matter, do you believe laws should be interpreted and applied in context?

Response: Yes.

d. Considering that law is often framed in very broad terms, when is it appropriate for judges to move away from strict textualism?

Response: A judge should always look first to the plain language of a statute. A judge should utilize other tools of interpretation including, for example, the canons of statutory construction in the event that the text alone does not resolve the legal issue at hand.

e. When analyzing the intent of constitutional text, what point in time do you use to interpret the text's meaning? Do you believe that our understanding of the Constitution's meaning evolves over time?

Response: The Supreme Court has held that certain provisions of the Constitution are to be interpreted according to the public meaning of a provision at the time it was enacted and has, for other provisions, suggested that a court evaluate post-enactment considerations. If confirmed I would follow the precedent of the Supreme Court and the Tenth Circuit regarding the methods to be employed when interpreting the Constitution.

6. President Trump claimed that his list of potential nominees for the Supreme Court, on which you were included, was decided based on who would "automatically" overturn *Roe v. Wade*.

a. Given President Trump's comments, what in your record do you believe led the President to believe you would "automatically" overturn *Roe* if given the opportunity?

Response: I do not know. At no time during this process has anyone asked me to make any commitments with respect to how I would rule on any case that were to come before me.

b. Would you follow *Roe* as it stands today if you are confirmed?

Response: If I am confirmed I will faithfully follow *Roe v. Wade* and all other Supreme Court precedent.

c. Whether or not you would follow *Roe*, do you believe *Roe* was correctly decided?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to whether *Roe v. Wade* was correctly decided.

d. Do you agree that there is a right to privacy under the U.S. Constitution and that this right limits the ways in which government can restrict individual rights?

Response: The Supreme Court has recognized such a right and I would faithfully apply all precedents where that right has been recognized.

e. Do you agree with the analysis of the majority of the Supreme Court in *Roe v. Wade* that the constitutional right to privacy encompasses a woman's decision whether or not to continue a pregnancy?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my

personal opinion as to whether *Roe v. Wade* was correctly decided. If I am confirmed I will faithfully follow *Roe* and all other Supreme Court precedent.

f. Have you been affiliated with any organization that has taken a public stance in opposition to *Roe v. Wade*?

Response: Not to my knowledge.

g. Do you believe any of the later cases relying on *Roe*, including *Casey*, *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), were rightly decided?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to whether these cases were correctly decided. If I am confirmed I will faithfully follow these precedents.

7. In *Lawrence v. Texas*, the Supreme Court held that the right to liberty under the Due Process Clause gives individuals the right to engage in private, adult, consensual sex without interference by the government. Your former boss, Justice Thomas, dissented from that decision, and indicated that he could find no “general right of privacy” or relevant liberty in the Constitution that would support the petitioner’s claim. Justice Scalia in his dissent likewise accused the Court of inventing a brand-new constitutional right. Do you share either Justice Thomas’ or Justice Scalia’s view of how the Court decided *Lawrence*?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to Justice Scalia and Justice Thomas’ dissents in *Lawrence v. Texas*. If I am confirmed I would faithfully apply *Lawrence* and all other Supreme Court precedent.

8. In *United States v. Windsor*, Justice Scalia wrote a dissent that Justice Thomas joined, in which he said that the Supreme Court had “no power under the Constitution” to invalidate a democratically adopted law limiting federal marital benefits to heterosexual couples. He expressed similar outrage over the Court’s decision in *Obergefell*, which struck down state laws preventing same-sex couples from marrying. Do you agree that the question of same-sex couples’ right to marry is one that should have been left to the democratic process?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to Justice Scalia’s dissent in *United States v. Windsor*. If I am confirmed I would faithfully apply *Windsor* and all other Supreme Court precedent.

9. You have written in support of “New Federalism,” a legal theory that advances a limited view of federal legislative authority.

a. Which areas of the law do you believe the federal government should legislate?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer an opinion as to which areas of the law the federal government should legislate.

b. You've argued that tort reform should be handled at the state level, but also supported President George W. Bush's efforts to pass federal tort reform legislation. How do you reconcile those views?

Response: My academic work regarding tort reform predates my time as a justice on the Colorado Supreme Court. As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer an opinion on tort reform legislation.

c. You suggest in your article *The Property Clause and New Federalism* that "New Federalism" limits the federal government's ability to involve itself in environmental protection, even praising the Supreme Court for striking down the EPA's migratory bird rule in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*. What role, if any, do you believe the federal government can have in enacting environmental legislation under principles of New Federalism?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer an opinion as to what environmental legislation the federal government can enact.

d. Do you believe the federal hate crimes statutes (e.g., 18 U.S.C. 247, 18 U.S.C. 249) are a legitimate exercise of Congress's Commerce Clause power?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer an opinion as to whether any statutes are a legitimate exercise of Congress's Commerce Clause power.

e. How do you reconcile your views on Federalism with your ruling against state medical marijuana laws? Why do you believe federal law should preempt state law when it comes to the use of medical marijuana?

Response: As a member of Colorado's Supreme Court, I have considered cases involving Colorado's Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14. In each case I have considered the Amendment's text as well as the Supremacy Clause of the United States Constitution. I have also considered and applied relevant precedent of the Colorado Supreme Court and precedent of the United States Supreme Court. Beyond the reported decisions of the Colorado Supreme Court in which I have participated, I believe it would be inappropriate for me to offer my view as to the relationship between federal law and Colorado law on this or any other subject matter.

f. In a 2001 article entitled *A Spotlight on Structure*, you suggest that *Baker v. Carr*, 369 U.S. 186 (1962) (finding jurisdiction over legislative apportionment issues) and *Reynolds Sims*, 377 U.S. 533 (1964) (requiring one-person-one-vote under the Equal Protection Clause) improperly paved the way for judicial intervention in elections. What role, if any, do you believe the judiciary should play in securing voting rights and ensuring fair elections?

Response: The appropriate role for a federal court in voting-rights matters is to resolve all cases and controversies that are properly before it consistent with the United States Constitution, federal law, relevant precedent of the United States Supreme Court, and any binding precedent of lower courts.

g. How do you believe the Court should approach redistricting cases?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer an opinion as to how the United States Supreme Court should approach redistricting cases.

h. Which factors should be most heavily weighed by courts in analyzing redistricting plans?

Response: As in every case, when analyzing redistricting plans, a lower court should apply all relevant statutes, precedent of the United States Supreme Court, and any binding precedent of lower courts.

10. You have consistently ruled against the exercise of eminent domain; the one exception seems to be the dissent you wrote in *Larson v. Sinclair Transportation Company*, where you argued that an oil company should be allowed to exercise eminent domain to build a petroleum pipeline. How do you reconcile your position in that case with your consistent opposition to government takings?

Response: In considering cases involving eminent domain I have sought to faithfully apply precedent of the United States Supreme Court and the Colorado Supreme Court.

Senate Judiciary Committee
“Nominations”
Questions for the Record
September 20, 2017
Senator Amy Klobuchar

Question for Allison Eid, Nominee to be U.S. Circuit Judge for the Tenth Circuit

In *Lobato v. State*, you joined an opinion upholding Colorado’s public school financing system after a trial court found that the system violated the state constitution. In that case, parents of school children sued the state, claiming that the public school system failed to provide sufficient funding to support a “thorough and uniform” system of free public schools as required by the state constitution. The dissenting Justices described the state’s education system as “fundamentally broken,” “plagued by underfunding,” and “marked by gross disparities among districts.” They also noted that the underfunding had prevented many schools from complying with the Americans with Disabilities Act.

- Can you explain how you reached your conclusion in this case, including how you interpreted the “thorough and uniform” funding standard to allow for broad disparities among different school districts?

Response: As stated in the majority opinion written by now-Chief Justice Rice, the majority examined the plain meaning of the phrase “thorough and uniform.” As described in the opinion, “thorough” “commonly refers to something of a quality that is ‘marked by completeness.’” The term “uniform” “connotes something that is characterized ‘by a lack of variation, diversity, [or] change in form’ or that is ‘consistent . . . in character.’” The majority concluded from this that a “thorough and uniform” system of public education “is of a quality marked by completeness, is comprehensive, and is consistent across the state.” The majority stated that this definition was supported by other provisions of the Colorado Constitution as well as by precedent. The majority determined that the rational basis test was the appropriate standard to apply, and ultimately concluded that the “current public school financing system is rationally related to the ‘thorough and uniform’ mandate because it funds a system of free public schools that is of a quality marked by completeness, is comprehensive, and is consistent across the state.” The majority ended its opinion by noting that it was its duty to “avoid making decisions that are intrinsically legislative.”

**Nomination of Justice Allison Eid, to be United States Circuit Judge for the Tenth Circuit
Questions for the Record
Submitted September 27, 2017**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

a. Would you consider whether the right is expressly enumerated in the Constitution?

Response: If I am confirmed, I would faithfully apply Tenth Circuit and Supreme Court precedent regarding what role the express enumeration of a right plays in constitutional interpretation.

b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Response: If I am confirmed, I would faithfully apply Tenth Circuit and Supreme Court precedent regarding whether to consider a right's roots in this nation's history and tradition and would rely on sources used by the Supreme Court.

c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Response: If I am confirmed, I would consider, and I would faithfully apply, Tenth Circuit and Supreme Court precedent. Although I would not be bound by the precedent of another court of appeals, I would certainly consider that precedent in arriving at a decision.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Response: If I am confirmed, I would consider, and I would faithfully apply, Tenth Circuit and Supreme Court precedent.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Response: If I am confirmed I will faithfully follow all Supreme Court precedent including *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

f. What other factors would you consider?

Response: If I were confirmed to this position, I would follow Supreme Court precedent

and Tenth Circuit precedent regarding any other factors to be considered.

2. Does the Fourteenth Amendment’s promise of “equal protection” guarantee equality across race and gender, or does it only require racial equality?

Response: The Supreme Court has held that “statutory classifications that distinguish between males and females are ‘subject to scrutiny under the Equal Protection Clause.’” *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to this issue. If I am confirmed I would faithfully apply Tenth Circuit and Supreme Court precedent regarding the application of the Equal Protection Clause to gender classifications.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Response: I do not know. If I were confirmed to this position, I would follow all Supreme Court precedent regarding the application of the Equal Protection Clause to gender classifications, including *United States v. Virginia*.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

Response: In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court held that there is a right to intimate relations between two consenting adults, and in *Obergefell v. Hodges*, 576 U.S. – , 135 S. Ct. 2584 (2015), the Court held that there is a right to same-sex marriage. If confirmed, I would follow these precedents, as I would follow all United States Supreme Court precedents.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Response: Significant disagreement on this question exists, federal courts have reached differing conclusions, and it is my understanding that cases are currently pending in the federal courts on this issue. As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my opinion on a question that may come before both the Tenth Circuit and the Colorado Supreme Court.

3. At your nominations hearing, we discussed privacy issues in the Fourth Amendment context, but there are also important privacy protections rooted in other portions of the Constitution.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

Response: In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the United States Supreme Court held that the use of contraceptives is protected by the right to privacy. If confirmed, I would follow that precedent.

b. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

Response: In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that obtaining an abortion is protected by the right to privacy, and, if confirmed, I would follow that precedent.

c. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Response: In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United Supreme Court held that there is a right to intimate relations between two consenting adults, and in *Obergefell v. Hodges*, 576 U.S. —, 135 S. Ct. 2584 (2015), the Court held that there is a right to same-sex marriage. If confirmed, I would follow these precedents.

d. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Response: Please see my responses to Questions 3.a. through 3.c. above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

Response: If I am confirmed, I would look to the Supreme Court's decisions for guidance on this question.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Response: If I were confirmed to this position, I would follow precedent regarding the appropriate use of sociology, scientific evidence, and data in judicial analysis.

5. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Response: *Brown v. Board of Education* is a fundamental, important, and longstanding precedent of the United States Supreme Court which I would follow if confirmed to this position.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited September 25, 2017).

Response: As a former full-time academic, I am generally familiar with the debate within the legal academy concerning various methodologies for interpreting the Constitution and the criticisms raised in the piece you cite. In my experience on the Colorado Supreme Court, judges do not describe themselves in terms of labels such as “originalist,” and therefore I eschew labels.

6. In your 2004 article entitled *The Property Clause and New Federalism*, you discuss a federalism-based approach to judicial review of congressional legislation under the Commerce Clause of the Constitution. In the article, you discuss *United States v. Morrison*, 529 U.S. 598, 613 (2000), a case in which the Court struck down portions of the Violence Against Women Act based on a determination that the regulated conduct was not “in any sense of the phrase, economic activity.”

a. Your article states, “The Court preserved the substantial effects test not necessarily because it was the right test; in fact, no one in the Court’s majority defended the test on any grounds other than precedent.” Do you agree with Justice Thomas’s view, expressed in his *Morrison* concurrence, that the substantial effects test is an incorrect approach to Commerce Clause jurisprudence?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to Justice Thomas' concurrence in *Morrison*. If I am confirmed I would faithfully apply the majority's holding in *Morrison* and all other Supreme Court precedent.

b. When, if ever, may Congress constitutionally regulate activity that is not inherently economic pursuant to the Commerce Clause?

Response: The Supreme Court has held that the Commerce Clause permits Congress to regulate only that activity which has a "substantial effect" on interstate commerce. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). If I am confirmed I will faithfully apply precedent in this area.

c. Congress has enacted important legislation pursuant to its authority under the Commerce Clause, including legislation to protect Americans' civil rights. If confirmed, what test would you apply to determine whether legislation is constitutional pursuant to Congress's authority under the Commerce Clause?

Response: The Supreme Court has held that the Commerce Clause permits Congress to regulate only that activity which has a "substantial effect" on interstate commerce. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). If I am confirmed I will faithfully apply precedent in this area.

7. In *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (Colo. 2015), the majority held that a county-funded school voucher program violated the state Constitution because the vouchers were nearly exclusively used at religious schools.

a. Both in your dissent and at your hearing, you cited *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), for the proposition that in a religious discrimination case, a court must look beyond the plain language of a statute or state constitutional provision to determine if the law was motivated by animus toward a particular religion. Do you agree that courts must look beyond the plain language of a statute or constitutional provision to determine whether facially neutral laws were motivated by discrimination on the basis of race, national origin, gender, sexual orientation, or gender identity?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow precedent of the United States Supreme Court and the Tenth Circuit.

b. Are these classifications entitled to heightened scrutiny?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow precedent of the United States Supreme Court and the Tenth Circuit.

c. Are there other contexts in which courts should look beyond the plain language of a statute to determine its meaning, and if so, which ones?

Response: Courts should always look first to the plain language of a statute. As the Colorado Supreme Court held in *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007), if “the plain language is ambiguous or conflicts with other provisions of the statute, we may look beyond the language of the statute to other factors,” including statutory context.

d. Do you agree that religious organizations and schools that receive government funds while providing services to the public must not discriminate against members of the public?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state’s code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow relevant precedent of the United States Supreme Court and the Tenth Circuit.

e. What, if any, limitations does the Constitution impose on government funding and government sponsorship of religious activity?

Response: As a nominee for federal judicial office and as a sitting justice on the Colorado Supreme Court bound by our state’s code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me. If I am confirmed, I would follow relevant precedent of the United States Supreme Court and the Tenth Circuit.

8. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court held that life without parole sentences are unconstitutional as applied to minors, but in *Lucero v. People*, you authored the opinion of the Colorado Supreme Court holding that *Miller* did not apply to aggregate term-of-years sentences that amounted to *de facto* life without parole. The concurrence, however, would not have reached this issue because the defendant in *Lucero* would be eligible for parole at age 57, and thus was not serving a *de facto* life sentence.

a. In your nomination hearing, I asked you why you reached the issue of whether an aggregate term-of-years sentence would violate *Miller* instead of declining to reach that issue because the defendant would be eligible for parole at age 57. You responded that you considered your approach to be the narrower one. However, your opinion is now a precedent in the State of Colorado for a categorical rule interpreting *Miller*, whereas the concurrence’s approach merely would have adjudicated *Lucero*’s appeal. Why did you consider deciding the categorical holding to be narrower than the factual determination that *Lucero*’s sentence did not constitute *de facto* life without parole?

Response: In his concurrence, Justice Gabriel did reach the question of whether *Graham* and *Miller* would apply to aggregate term-of-years sentence, concluding that “*Graham* and *Miller* apply to *de facto* LWOP sentences.” He went on to conclude, however, that *Lucero* had not “established that he, in fact, received a *de facto* LWOP sentence in this case.” Therefore, both the majority and concurrence addressed the question regarding the application of *Graham* and *Miller*, but, unlike the concurrence, the majority did not reach the factual issue addressed by the concurrence.

b. Is it ever appropriate for a judge to go beyond what is necessary to decide a specific case in order to interpret or make law?

Response: A judge should decide the case narrowly based on the facts and the law.

9. During your hearing, you stated that “there actually are no cases of first impression” and “there is always precedent.” However, many cases present novel issues, including in the context of the Fourth Amendment. What is your approach for evaluating whether there is a Fourth Amendment violation when precedent does not resolve the issue for the technology employed in the case?

Response: As the United States Supreme Court stated in *Riley v. California*, – U.S. –, 134 S. Ct. 2473 (2014), courts must respect privacy interests even when new technologies arise: “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life,’ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant.”

Questions for the Record for Justice Allison Eid
Submitted by Senator Richard Blumenthal
September 27, 2017

1. You have been listed on the expanded list of 21 possible nominees to the Supreme Court issued by then-candidate Trump on September 23, 2016. Trump has suggested that he has a litmus test for Supreme Court nominees, seeking nominees who are “pro-life” and who will “automatically” overturn *Roe v. Wade*.

- Why do you think President Trump believes you have passed his litmus test?

Response: I do not know. I was not aware of my name being on these lists until they were publicly announced. At no time has anyone associated directly or indirectly with the Trump campaign or the Trump Administration asked me to make any commitments with respect to how I would rule on any case that were to come before me.

- Would an observer look at your record and believe that you had passed President Trump’s litmus test?

Response: I do not know.

- Is there a right to privacy under the Constitution?

Response: The Supreme Court has recognized such a right and I would faithfully apply all precedents where that right has been recognized.

- If confirmed, will you adhere to Supreme Court precedent set by a line of case law—including *Roe*—that has determined that the Constitution guarantees a right to privacy?

Response: I would faithfully apply all precedents, including *Roe v. Wade*, where that right has been recognized.

Questions for the Record
Senator Mazie K. Hirono
September 27, 2017

Allison Eid, Nominee to the U.S. Court of Appeals for the Tenth Circuit

1. You have spent years involved with the Federalist Society. You listed your time as a faculty advisor on your Senate Judiciary Committee questionnaire, and you are listed on the Federalist Society website as one of their “experts.” According to the Federalist Society’s website:

“The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

I want to ask you about the influence of the Federalist Society on your thinking about the law and the Constitution.

a. What priorities within the legal system do you believe need reordering?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

b. Are there parts of the current “ordering” of priorities in the legal system with which you disagree? If so, what parts?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

c. How will that reordering of priorities operate to place a premium on individual liberty, traditional values, and the rule of law? Give an example.

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

d. How do define “traditional values”?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

e. How have you applied “traditional values” to the cases you’ve heard and decided? Give an example.

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

f. How will an application of “traditional values” apply to your work as a federal judge if you are confirmed?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

g. As a Justice on the Colorado Supreme Court, how has this desire to reorder priorities applied to the cases you’ve heard and decided? Give an example.

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

h. How has that reordering of priorities affected the litigants who argue before you?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

i. How will that reordering of priorities apply to your work as a federal judge if you are confirmed?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

2. In addition to being active with the Federalist Society, you have also written extensively about the so-called “New Federalism.” The way you describe it, New Federalism endorses the judiciary’s questioning, even usurping, of Congress’s role as fact-finder.

For example, I see the Supreme Court's decision in *Shelby County v. Holder*, gutting key parts of the Voting Rights Act, to be an imposition of the justices' policy preferences, in direct contradiction to the considered decision of the Congress, which held hearing after hearing and compiled a record of thousands of pages.

a. What is your view on federalism?

Response: In *Bond v. United States*, Justice Kennedy writing for the Court stated that:

Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

564 U.S. 211, 221-22 (2011) (internal citation omitted).

b. Are you an adherent of states' rights, as exemplified in the New Federalism?

Response: While serving as a full-time academic, I studied and published scholarly articles describing (at that time) recent decisions of the Supreme Court that dealt with what was at the time considered "New Federalism." I do not believe that "adherent" is an accurate description of my academic work. If I am confirmed I would faithfully apply Supreme Court and Tenth Circuit precedent in the area of federalism.

c. Does the *Shelby County* decision raise concerns about judicial activism?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to whether *Shelby County* was correctly decided or what, if any, concerns it may raise. If I am confirmed I will faithfully apply *Shelby County* and all other precedent of the Supreme Court.

d. Did the Court in *Shelby County* step outside of its judicial role and act as a legislative body?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to whether *Shelby County* was correctly decided. If I am confirmed I will faithfully apply *Shelby County* and all other precedent of the Supreme Court.

e. Would New Federalism be applied to Acts of Congress legislating on issues of national importance, such as the right to vote?

Response: In determining whether a decision of the Supreme Court (including a case involving “New Federalism”) is applicable to a case before me, I would review the arguments of the parties, consult with my colleagues, and conduct independent legal research.

f. How will you incorporate the New Federalism into your work on the federal appellate bench?

Response: In determining whether a decision of the Supreme Court (including a case involving “New Federalism”) is applicable to a case before me, I would review the arguments of the parties, consult with my colleagues, and conduct independent legal research.

g. What criteria will you use to analyze Congressional legislation challenged in your court?

Response: All analysis of legislation, including legislation enacted by Congress, involves a close reading of the text of the statute and prior cases interpreting that statute.

3. At his confirmation hearing, Chief Justice Roberts testified that:

“... one of the warning flags that should suggest to you as a judge that you may be beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings, because that doesn’t look like a judicial function. It’s not an application of analysis under the Constitution. It’s just another look at findings.”

a. Is Chief Justice Roberts’s description of the role of a judge consistent with your understanding of “New Federalism” as you described it in your writings?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to Supreme Court precedent. If I am confirmed I will faithfully apply the Supreme Court’s cases concerning federalism all other precedent of the Supreme Court.

b. Was the Supreme Court decision in *Shelby County* an example of “just another look at findings”?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to

whether *Shelby County* was correctly decided. If I am confirmed I will faithfully apply *Shelby County* and all other precedent of the Supreme Court.

c. Do you still believe that the New Federalism is not activist, as you wrote in your William and Mary law journal article?

Response: I have not revisited the conclusions in my article in William & Mary Bill of Rights Journal. I do not believe in my present capacity as a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, that I should offer any commentary on decisions of the Supreme Court.

4. Would you describe any of the opinions you have written or participated in to be New Federalist in nature? Give examples of which ones and why.

Response: As a member of a state court I have not had the opportunity to consider the issues raised in “New Federalism” cases.

5. In his memorandum opinion in response to a request for recusal in *Laird v Tatum*, Justice Rehnquist famously wrote the following about judges and their preconceived notions that will influence their legal interpretations on the Court:

“ [s]ince most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa would be evidence of lack of qualification, not lack of bias.”

You have been a Justice on the Colorado Supreme Court for over a decade, handing down numerous opinions, which set forth your interpretation of the law and constitution as it applied in those cases. And as a professor, you have published significant writing about the role of “New Federalism,” your understanding on the limits of the federal government’s powers in relationship to the states.

a. If all judges come to the bench, as Justice Rehnquist observed, with notions and opinions on constitutional issues that will influence how they would interpret the constitution, what does it mean when nominees tell the Committee that their personal views don’t matter because they will merely apply the law, as you did in your hearing?

Response: The fact that I have chosen not to offer my personal opinions with regard to issues of law does not mean that I am a “complete tabula rasa.” As a member of the Colorado Supreme Court I took an oath to support the Constitution of the United States and of the State of Colorado, and to faithfully perform the duties of a justice of the Colorado Supreme Court. These duties include an obligation on my part to set aside my personal views and decide cases on the law even if I disagree with the law or am

disappointed by the outcome. Litigants who come before the Colorado Supreme Court are entitled to know that the justices hearing their case will do no less.

b. What does Justice Rehnquist's observation suggest about reassurances from nominees that they will simply apply precedent, particularly in areas where many have strong convictions, such as abortion, or in circumstances where the facts of a case don't line up precisely with a precedent and a judge has discretion in what precedent to apply and how it would apply?

Response: I do not believe Justice Rehnquist's observation is applicable here. As I noted above, I have not suggested to this Committee that I have no personal opinions. As I stated above, I am not the "tabula rasa" Justice Rehnquist describes.

c. Would you agree that application of precedent is not always straightforward?

Response: The application of precedent to a case always involves reviewing the arguments of parties, consulting with colleagues (on a multi-judge court), and conducting independent legal research.

d. Don't the legal inclinations and interpretations you have set forth so clearly in your academic writing and as a Colorado Supreme Court Justice have a bearing on what they would do as a circuit court judge, and how you would apply the law?

Response: In my former capacity as a full-time academic, I was not bound by precedent. As a sitting member of the Colorado Supreme Court, I took an oath to follow the law, including following precedent. I would take a similar oath, and abide by it, if I were confirmed to the Tenth Circuit.

6. You testified at your confirmation hearing that in considering cases on your current bench you just "follow the law where it takes me." But not every case is unanimously decided.

a. So, are the judges who disagree with you not following the law?

Response: No.

b. If the law takes you one place and then another, why is that?

Response: Judges can disagree without being unfaithful to their obligation to uphold the law. The process of deciding a case involves reviewing the parties' arguments, consulting with colleagues, and conducting independent legal research. Judges can, and do, assess the strength of arguments differently and reach different conclusions based on their research.

c. If judges just have to "follow the law where it takes them", then why have people as judges at all and not just computers to apply the law to the facts at hand? Put another way, what do human beings add to judging?

Response: The process of deciding a case is not reducible to a computer exercise.

7. At your hearing, you testified that there “are no cases of first impression.” Can you clarify that answer?

Response: Senator Kennedy asked me a question in which he defined a case of first impression as one in which there was no precedent bearing on the question before the court. I responded that in my experience on the Colorado Supreme Court, parties always direct our attention to precedents that bear on the question before the court.

8. The person who nominated you does not have much respect for judges or courts. As a candidate for President and even now while in office, President Trump has belittled and berated judges who do not rubberstamp his views. He attacked Judge Curiel, his family’s heritage and his fairness while he was presiding over the Trump University fraud case. He sought to bully Judge Robart, who decided the first case challenging the constitutionality of his anti-Muslim travel ban. He sought to intimidate the Ninth Circuit, and more recently has belittled Judge Watson in Hawaii for ruling in the second round of travel ban cases. His pardon of Joe Arpaio shows he has little regard for the rule of law or the role of courts as a co-equal and independent branch.

What is your view of President Trump’s comments on judges?

Response: Federal judges are afforded life tenure in part to insulate them from popular sentiment. I have no opinion with respect President Trump’s comments.

9. You have not only been nominated by President Trump to the Tenth Circuit, but you were on his list of potential selections for the Supreme Court he set forth during his election campaign. President Trump has also made clear his litmus test for nominees in the context of the Supreme Court, stating that he would select nominees who would, for example, adhere to a broad view of the 2nd Amendment and who would overturn *Roe v Wade* “automatically.”

a. Are such litmus tests appropriate?

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion.

b. Were you selected based on Donald Trump’s litmus tests?

Response: I do not know why I was included on then-candidate Trump’s lists. At no time has anyone asked me to explain my view of the Second Amendment and no one has asked me to make any commitments with respect to how I would rule on any case that were to come before me.

10. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe* that the right to an abortion is constitutionally protected. The Court held that these decisions are protected because they are among “the most intimate and personal choices a

person makes in a lifetime.” Does the Constitution protect the right to make “intimate and personal” decisions?

Response: As the question indicates, the Supreme Court has held in *Planned Parenthood v. Casey*, that the Constitution offers such protection. If I am confirmed, I would apply all precedent of the Supreme Court including *Planned Parenthood v. Casey*.