

Response of Brian Morris
Nominee for the United States District Court for the District of Montana
To Questions for the Record from Senator Chuck Grassley

- 1. Please explain your views on the importance of judges to follow precedent and your commitment to doing so.**

Response: Court precedents and the legal analysis contained in them allow people, businesses, and institutions to order their affairs in a manner that comports with the controlling law. This reliance drives the need for our courts to render decisions that strive for consistency and promote continuity in the law and society. I have been committed to this philosophy during my more than eight years on the Montana Supreme Court and the opinions that I have authored and the opinions that I have joined reflect this commitment.

- 2. At your hearing, I asked about the *Western Tradition Partnership* case in which you joined a majority opinion that ignored the ruling by the Supreme Court of the United States in *Citizens United*. Part of your response was that “We thought that, given this record, there was a possibility that that statute could conform to the mandates of *Citizens United*.” Even if one thought that the Montana law was narrowly tailored and the case warranted a special exception to *Citizens United*, there still is a problem with the majority opinion. Your colleague pointed out - “The problem, however, is that regardless of how persuasive I may think the Attorney General’s justifications are, the Supreme Court has already rebuffed each and every one of them.” The dissent also stated “Like it or not, *Citizens United* is the law of the land as regards corporate political speech. There is no Montana exception.” The majority opinion you joined indicates that you believe there are situations, particularly when you do not agree with Supreme Court precedent, that precedent can be ignored.**

- a. Can you explain why you thought there was a “Montana exception”?**

Response: I do not believe that a “Montana exception” exists for the *Citizens United* decision or any other decision of the United States Supreme Court. The United States Supreme Court in *Citizens United* determined that laws that burden political speech should be subjected to strict scrutiny. Strict scrutiny requires the government to prove that a law that restricts free speech furthers a compelling state interest and is narrowly tailored to that interest. The Montana Supreme Court in *Western Tradition Partnership* faced the question of whether the State of Montana had presented evidence of a compelling state interest and evidence of narrow tailoring to justify the restrictions on free speech contained in the Corrupt Practices Act. The State of Montana introduced evidence of corruption at the time that the Corrupt Practices Act was enacted to establish what the Montana Supreme Court believed to be a compelling state interest. In our opinion, the evidence in the record further demonstrated that the limits on free speech contained in the Corrupt Practices Act had not materially limited the political speech of the appellees. The Montana Supreme Court believed that the Corrupt Practices

Act could survive strict scrutiny under these unique circumstances. As a result, the Montana Supreme Court believed that its opinion and analysis in *Western Tradition Partnership* fully comported with the principles set forth by the United States Supreme Court in *Citizens United*.

The United States Supreme Court clarified that the Montana Supreme Court in *Western Tradition Partnership* had not applied properly its analysis in *Citizens United*. If confirmed as a federal district judge I would follow this precedent and any other precedent of the United States Supreme Court.

b. Why were you unable to join in this dissent, which clearly recognized the need to follow precedent?

Response: I did not join this dissent due to my belief that the State of Montana had presented evidence in the record of a compelling state interest and sufficient narrow tailoring of the Corrupt Practices Act to survive strict scrutiny under the standards set forth by the United States Supreme Court in the *Citizens United* decision. The United States Supreme Court clarified, however, that the Montana Supreme Court in *Western Traditions Partnership* had not applied properly its analysis in *Citizens United*. If confirmed as a federal district judge I would follow this precedent and any other precedent of the United States Supreme Court.

3. In a 2004 interview you stated that “the court can reflect changes in society.” Is this still a part of your judicial philosophy? And can you explain your judicial philosophy after eight years on the Montana Supreme Court?

Response: The interview that this question references quotes me as saying that “the court can reflect changes in society in some cases, like privacy law, which has changed over the years. But overall, the high court should strive for consistency.” This statement still comports with my view that some areas of the law, such as the notion of privacy, change over time to reflect advances in technology. For example, the United States Supreme Court recently held that the use by police of a GPS tracking device on a suspect’s car for a month violated the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945 (2012).

My judicial philosophy seeks to apply the law fairly to all litigants. The courts have a limited role in our constitutional system and I recognize the need to issue a narrow ruling that resolves the particular issues presented in a case without the need to comment on extraneous matters.

4. You wrote the majority opinion in *Kulstad v. Maniaci* which granted a parental interest to a third party despite the adoptive parent being fit and capable. This decision is especially troubling to me and I would like to ask you to clarify some issues.

a. What is your understanding of parental constitutional rights?

Response: The United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000), affirmed that parents have “a fundamental liberty interest in the care, custody, and management of their children.”

- b. How does a third party’s relationship with a child overcome, constitutionally, a fit and capable parent’s right to raise the child?**

Response: Montana’s nonparent statute, set forth at Mont. Code Ann. § 40-4-228, requires a third party to have more than merely a relationship with a child to overcome a fit and capable parent’s right to raise a child. The statute allows a third party to overcome a parent’s constitutional right to raise the child only where the third party can establish that the parent has acted contrary to the parent-child relationship. The third party then must meet numerous criteria that reflect the fact that the third party has assumed a parental role for the care of the child.

- c. The dissent characterized your decision in this way: “The Court adopts an equitable, case-by-case inquiry to determine if a third party should be granted a parental interest of a child that must be balanced against a natural parent’s rights.” Do you disagree with this characterization?**

Response: No.

- d. If not, under what circumstances should a fit natural parent’s rights be balanced against the desires of another interested adult?**

Response: The Montana legislature has determined that a fit natural parent’s rights should be balanced against the desires of another interested adult only under the unusual circumstances where the parent has acted contrary to the parent-child relationship and the other interested adult can meet detailed standards to establish a parent-child relationship. The Montana legislature requires a party who seeks to establish a child-parent relationship, pursuant to Mont. Code Ann. § 40-4-228, first to demonstrate that the parent has acted contrary to the parent-child relationship, and then to meet numerous specific criteria. These criteria include a showing that the party has provided for the physical needs of the child by supplying food, shelter, and clothing; (2) that the party has provided the child with necessary care, education, and discipline; (3) that the party’s relationship with the child existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfilled the child’s psychological needs for a parent as well as the child’s physical needs; and finally (4) that the party has met the child’s need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home. Mont. Code Ann. § 40-4-228.

- e. The dissent said that the opinion of the court removed the “jurisdictional prerequisite” that has “protected parents against the claims of third parties, and thereby opens wide the door to such claims...potentially against all**

parents.” Why did you join an opinion that removed such an important jurisdictional prerequisite?

Response: The Montana legislature included no jurisdictional prerequisite in the nonparent statute. In fact, the statute specifically provides that it is “not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section.” Mont. Code Ann. § 40-4-228.

f. The consequences of your opinion seem far reaching. The dissent pointed out that the decision “will open a Pandora’s Box of potential attacks upon the right of fit and capable parents to raise their own children.” What if, any, consequences do you see coming from this opinion?

Response: I foresee few consequences arising from this opinion as the Montana Supreme Court has applied the nonparent statute only three times in the four years since the decision in *Kulstad v. Maniaci*. In the case with which I am most familiar, *In re M.M.G.*, 2012 MT 228, 366 Mont. 386, 287 P.3d 952 (Mont. 2012), M.M.G.’s biological mother “gave” one year-old M.M.G. to a woman at a gas station one day in 2001, after the woman had complimented the biological mother on her beautiful child. The woman did not know the biological mother. The woman and her husband cared for M.M.G. until she was 10 years old. The biological mother occasionally took M.M.G. for short visits. The biological mother failed to return M.M.G. from a weekend visit in 2010 and instead informed the couple that she was moving to Wyoming with M.M.G.

The district court dismissed the couple’s petition for a parenting plan on the basis that the biological mother had not been adjudicated as unfit. I wrote an opinion that reversed the district court’s dismissal of the couple’s petition for a parenting plan because Montana law places no restriction on the type of parenting plan that a non-parent may seek after the non-parent has established a child-parent relationship. The opinion remanded the case to the district court to conduct a hearing to determine whether the couple had established a child-parent relationship, pursuant to the criteria set forth in Mont. Code Ann. § 40-4-228.

5. What is the most important attribute of a judge, and do you possess it?

Response: The ability to apply the law fairly and impartially to all parties represents the most important attribute that a judge can possess. I believe that I have demonstrated my ability and commitment to remaining impartial and treating all parties fairly during my more than eight years on the Montana Supreme Court.

6. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should possess an even-tempered and respectful demeanor. A judge also should exercise patience with all parties who appear before the court. Each element plays an equally important role in a successful judge. I believe that I have demonstrated that I possess each of these attributes during my eight years on the Montana Supreme Court.

- 7. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Reliance on precedent helps ensure that our legal system delivers predictable and fair results for all parties. My own personal feelings, if any, regarding the correctness of a decision of the United States Supreme Court or the United States Court of Appeals for the Ninth Circuit would have no bearing on my obligation to follow the precedent of these courts if I were confirmed as a federal district court judge.

- 8. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: First I would look to any relevant statute to review its plain language. Unambiguous language in a controlling statute would resolve the dispute. The presence of ambiguous language would require me to apply the existing standards or canons of statutory construction, or potentially consider ancillary sources. Relevant ancillary sources would include relevant statutory findings and binding precedent of the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United States District Courts. Finally, I would consider non-binding, but persuasive decisions, from other United States Courts of Appeal or other United States District Courts.

- 9. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would apply the precedent established by the United States Supreme Court or the United States Court of Appeals for the Ninth Circuit.

- 10. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: A court must start with the presumption that all statutes passed by Congress are constitutional. A court should declare a statute enacted by Congress to be unconstitutional only where the statute violates an express provision of the United States Constitution or

where Congress clearly has exceeded its authority to act under the United States Constitution.

- 11. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution? Please explain.**

Response: No.

- 12. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: I have served as a justice on the Montana Supreme Court for more than eight years. During that time, I have authored nearly 500 opinions, and joined thousands of other opinions that have remained grounded in precedent and faithful to the language of the statute at issue. No underlying political ideology or motivation played any role in the opinions that I authored, or the opinions of others that I joined.

- 13. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: I have authored nearly 500 opinions during my service as a justice on the Montana Supreme Court that have addressed legal issues that range from criminal law, to commercial litigation, to property and water disputes, to family law, and to dependent and neglect cases. Any personal views of mine have played no role in the outcome of these cases.

- 14. If confirmed, how do you intend to manage your caseload?**

Response: The parties deserve a prompt and fair resolution of their dispute. The Federal Rules of Civil Procedure mandate a pre-trial conference shortly after the filing of a complaint and an answer and full disclosure of all relevant information by the parties. I would use this pre-trial conference to establishing clear deadlines for the filing of motions, anticipate possible discovery disputes, and to set a firm and realistic trial date. I would supplement this pre-trial conference through the use of regular status conferences with the parties and counsel to ensure that the case stays on schedule.

- 15. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: The judge plays a crucial role in controlling the pace and conduct of litigation in the federal courts. I would seek to render prompt decisions on motions filed by the parties, including motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Next I would seek to keep cases on track pursuant to the schedules

developed through the pre-trial conference. And finally, I would seek to use magistrate judges effectively to resolve pre-trial issues and civil cases.

- 16. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.**

Response: I look first to the order of the trial court to understand the issues presented there, the trial court's resolution of the issues presented on appeal, and any findings of fact or credibility determinations made by the trial court. I then read the briefs filed by the parties and the relevant statutes and case law cited by the parties. And finally I review the record from the trial court to understand any disputed factual issues raised by the parties in their briefs.

- 17. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees".**

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

- 18. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on July 31, 2013. I drafted my responses to the questions. I reviewed my responses with lawyers from the Department of Justice. I asked lawyers for the Department of Justice to submit my responses on my behalf.

- 19. Do these answers reflect your true and personal views?**

Response: Yes.

Response of Brian Morris
Nominee for the United States District Court for the District of Montana
to Questions for the Record from Senator Ted Cruz
“Judicial Nominations” Hearing – 7/24/13

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: My judicial philosophy seeks to apply the law fairly to all litigants. The courts have a limited role in our constitutional system and I recognize the need to issue narrow rulings that resolve the particular issues presented in a case without the need to comment on extraneous matters. I had the privilege of serving as a law clerk to Chief Justice William H. Rehnquist. This opportunity also exposed me directly to the work and work habits of other members of the United States Supreme Court. I have sought to model the way I approach deciding cases, the limited scope of my opinions, and importance of judicial efficiency from what I observed of Chief Justice Rehnquist.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: The United States Supreme Court has looked to original intent and original public meaning to interpret various constitutional provisions when the plain language has proven ambiguous or insufficient. I would apply all relevant precedents when deciding cases, including the United States Supreme Court’s precedents that rely on original intent and original public meaning, if I were confirmed as a federal district judge.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: As a federal district court judge, I would have no authority to overrule the precedents of the United States Supreme Court or of the United States Court of Appeals for the Ninth Circuit. There are no circumstances under which I would attempt to overrule the precedents of these courts if I were confirmed as a federal district judge.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: The excerpt from *Garcia v. San Antonio Metro Transit Authority* remains binding precedent and represents one form of protection of state sovereign interests. Other protections include express limits on federal power contained in the United States Constitution and judicial interpretations of the United States Constitution that have limited federal power. *See, e.g., Printz v. United States*, 521 U.S. 898 (U.S. 1997). If I were confirmed as a federal district court judge, I

would apply *Garcia* and all other decisions of the United States Supreme Court regardless of my own personal feelings.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The United States Supreme Court recognized in *United States v. Lopez*, 514 U.S. 549 (1995), three broad categories of activity where Congress has the authority to regulate: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce;" and (3) "activities having a substantial relation to interstate commerce." I would apply these precedents if called upon to review Congress's authority to regulate non-economic activity.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The United States Supreme Court recognized the judicially enforceable limits on the President's power in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The United States Supreme Court determined that the President's power to issue executive orders or action "must stem either from an act of Congress or from the Constitution itself." I would apply these precedents if called upon to review the President's ability to issue executive orders or executive actions.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The United States Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997), described fundamental rights as those rights "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (Quotations and internal citations omitted). The United States Supreme Court has recognized several fundamental rights for purposes of the substantive due process doctrine, including the right to marry, to have children, to direct the education and upbringing of one's children, and to marital privacy. *Glucksberg*, 521 U.S. at 720. I would apply these precedents if I were confirmed as a federal district judge.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The United States Supreme Court has determined that a classification should be subjected to heightened scrutiny under the Equal Protection Clause when it involves a fundamental right, such as the right to vote or to travel, or when it involves a suspect class, such as race, alienage, national origin, or gender. I would apply these precedents if I were confirmed as a federal district judge.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: I have no specific expectations on this issue. If confirmed, I will apply all relevant precedents to any case that might involve racial preferences in public higher education.