Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Richard E.N. Federico
Nominee to be United States Circuit Judge for the Tenth Circuit
September 13, 2023

1. **You received your commission to be a Navy JAG Officer during your final year of law school and have served the Navy as a prosecutor and defense attorney at various duty stations across the country and abroad dating back to 2003. Since 2019, you have served as a military judge in the Navy-Marine Corps Trial Judiciary.**

   a. **Please share what motivated you to serve your country in this capacity.**

   Response: I come from a family of U.S. Navy Sailors: my dad was an enlisted Sailor in Vietnam; my grandfather was a Navy Officer who served on surface ships in WWII; my other grandfather was an engineering mechanic on Navy ships in WWII; my uncle was a Rear Admiral (Upper Half) when he retired from active duty. Although I had met with Navy JAG recruiters and began exploring the Navy as a career option while in law school, it was the September 11 terrorist attack (my 3L year of law school) that super-charged my motivation to seek a Commission because, like thousands of other Americans, I felt strongly it was my duty to serve in our armed forces. The expertise I brought to the Navy was as a legal professional and leader, and I am grateful for the opportunities the Navy afforded me as a Judge Advocate to serve as a prosecutor, defense counsel, appellate defense counsel, staff judge advocate, preliminary hearing officer, and military judge.

   b. **How has your work as a Navy prosecutor and defense attorney shaped the way you approach cases as a military judge?**

   Response: My experiences as both a prosecutor and defense counsel help me understand the perspective, tactics, and equities as an advocate in those respective positions. I also understood that my duty as an advocate was similar in both positions – to zealously represent my client's position within the bounds of the law. When I became a military judge, I was able to depart from my role as an advocate but also to rely upon my experiences to better understand the evidence and arguments presented by the parties. My hope is that my past experiences on both sides of the courtroom also gave the parties who appeared before me more confidence in the quality and fairness of the proceedings because they knew that I had previously served in both positions.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Richard E. N. Federico Nominee to the United States Circuit Court of Appeals for the Tenth Circuit

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

   Response: I disagree with that statement. Judges must reach answers and judgments about the Constitution based upon the text and binding precedent, not their own value judgments or preferred outcomes.

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

   Response: I am not familiar with that statement or the context in which it was made. The implication from this quotation seems to be that the Judge acknowledged he wrote opinions that he knew were contrary to binding Supreme Court precedent. Assuming that implication is accurate and forms the basis of this question, I do not agree that is an appropriate approach for a federal judge to decide cases.

3. **Do you believe it is appropriate for the Tenth Circuit to grant a petition for rehearing en banc because the relevant panel decision made a factual error?**

   Response: "En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of [the Tenth Circuit]." 10th Cir. R. 35.1A; Fed. R. App. P. 35(a). Without prejudging any potential future petitions for en banc review, I note that a claim of factual error must still meet this exacting standard.

4. **Do you believe it is appropriate for the Tenth Circuit to grant a petition for rehearing en banc because the relevant panel decision reached an undesirable policy outcome?**

   Response: Please see my response to Question 3.

5. **In *United States v. Gann*, you filed a sentencing memorandum requesting a sentence below the guidelines recommendation for the crime to which your client pled guilty – Distribution of Child Pornography. Please explain the context of this request.**

   Response: Mr. Gann entered into a plea agreement with the government pursuant to Federal Rule of Criminal Procedure Rule 11(c)(1)(B). One term of his agreement set

forth the range of the parties' sentencing recommendations, which were to be based upon a percentage of the court's determination of the sentencing range under the US Sentencing Guidelines. The court sustained an objection raised by Mr. Gann to the applicability of one specific offense characteristic under § 2G2.2(b)(3)(B) of the Guidelines and made a finding that the total offense level was 34 and a criminal history category I, resulting in an advisory guideline sentencing range of 151 to 188 months, not the 210 to 240 months as originally calculated in the presentence report. The sentence Mr. Gann sought was both a percentage reduction from the low end of the guideline range (anticipating his objection to the proposed Guidelines range would be sustained) and reflective of the evidence submitted in mitigation, consistent with 18 U.S.C. § 3553(a).

Prior to the sentencing hearing, the government filed a sentencing memorandum that recommended 189 months. However, at the hearing, which was held on November 27, 2018, the court sustained Mr. Gann's objection to the sentencing range under the Guidelines, so the government likely lowered its sentencing recommendation to 135 months to comply with the plea agreement. There is no transcript from this hearing to confirm my recollection because there was no appeal filed (Mr. Gann waived his right to appeal as a term of his plea agreement). It is common in federal court and as part of the adversarial system that counsel for the defendant will recommend a lower sentence than counsel for the government. As stated in the plea agreement and understood by both parties as a matter of law, the sentence determination was made solely by the court. The court sentenced Mr. Gann to 165 months, which was a sentence within the Guidelines range.

6. **In one Federal Public Defender Blog post, you offered legal advice to aliens facing civil removal proceedings from the United States. Please explain the context of this article.**

   Response: As best I can recall, I was asked to write a blog post by my supervisory attorney to address questions raised to the federal public defenders' office about the difference between criminal immigration cases and removal proceedings, and to briefly discuss rights persons involved in both may have under the law. The blog post took no position on immigration policy. The post also said it was "not meant to be, and should not relied upon, as legal advice regarding immigration matters. If you are in need of legal advice regarding any immigration matter, we highly recommend you seek counsel from an attorney with subject matter expertise on immigration law."

7. **Please describe the relevant law governing when a federal court may entertain and grant a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court.**

   Response: The statutory scheme is set out in 28 U.S.C. §§ 2241 – 2254, with a specific statute, 28 U.S.C. § 2254, most on point. It provides federal courts with jurisdiction to

review claims made by prisoners from a judgment in State court who raise a claim they are "in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). There is an extensive body of law that governs these types of habeas petitions. Subsection (d) specifically requires a petitioner "in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

8. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

   Response: Federal statutes provide several ways a prisoner may seek relief from a judgment and sentence handed down in a federal criminal case, such as: direct appeal of the federal judgment (28 U.S.C. § 1291); petition for writ of habeas corpus (28 U.S.C. § 2241); federal specific habeas, by a motion to vacate, set aside, or correct a sentence (28 U.S.C. § 2255); motion for modification of imposed term of imprisonment (compassionate release) (18 U.S.C. § 3582(c)). Each of these statutory schemes and provisions carries with it an extensive body of law that analyzes and provides precedent on questions such as jurisdiction, timing of petitions, burdens of proof, and possible remedies.

9. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

   Response: The University of North Carolina and Harvard College both considered the race of the applicant in their admissions processes. The Supreme Court held that these university admissions policies and processes violated the Equal Protection Clause of the Fourteenth Amendment.

10. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

    If yes, please list each job or role where you participated in hiring decisions.

    Response: I participated in hiring and application review while on active duty in the Navy and serving as the Officer in Charge, Defense Service Office Southeast, Detachment Mayport / Branch Office Jacksonville, Florida. I was not the decider of any employment decisions, but a participant in the review and interview process of civilian positions. I also participated as a certified structured interviewer of applicants seeking a commission as a Navy Judge Advocate Officer.

11. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

    Response: No.

12. **Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?**

    Response: No.

13. **Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

    If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

    Response: No.

14. **Under current Supreme Court and Tenth Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?**

    Response: Yes. *See, e.g., Students for Fair Admissions v. Harvard College*, 143 S. Ct. 2141, 2162 (2023); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008).

15. **Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.**

    Response: In *303 Creative LLC v. Elenis*, the Supreme Court held that a Colorado law violated the First Amendment Free Speech rights of a website designer because it forced her to create expressive designs speaking messages with which she disagreed.

16. **In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."**

Is this a correct statement of the law?

Response: *Barnette* remains good law and a portion of the language quoted in this question ("[i]f there is any fixed start in our constitutional constellation") was cited favorably last term by the Supreme Court in *303 Creative LLC v. Elenis*.

17. **How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?**

Response: A law that regulates speech is "content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 163 (2015). The Supreme Court has supplied the key questions to this analysis. The first step is to determine "whether the law is content neutral on its face," which must be decided 'before turning to the law's justification or purpose.'" *Id*. at 165-166. *Reed* also sets out how courts should evaluate regulations to determine whether they are content-neutral or content-based, with considerations such as whether the law "cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys." *Id*. at 164 (internal citations omitted). If the court determines the regulation "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny." *Id*. at 171.

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

Response: Speech that is a true threat of violence lies outside the bounds of the First Amendment's protection. *See Virginia v. Black*, 538 U.S. 343, 359 (2003); *United States v. Heineman*, 767 F.3d 970, 976 (10th Cir. 2014). In a criminal prosecution, the government "must prove in true-threats cases that the defendant had some understanding of his statements' threatening character," and "that a recklessness standard" of mens rea is sufficient. *Counterman v. Colorado*, 143 S. Ct. 2106, 2113 (2023).

19. **Under Supreme Court and Tenth Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: The Supreme Court has discussed the three possibilities of questions: "(1) questions of law, (2) fact, or (3) the combination of both terms to encompass mixed questions." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020). It has also acknowledged "the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Facts are generally the answers to "questions of who did what, when or where, how or why." *U.S.*

Bank Nat. Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 966 (2018). The type of question is important to the standard of review applied by the Tenth Circuit. *See United States v. Abouselman*, 976 F.3d 1146, 1153–54 (10th Cir. 2020) ("When faced with a question of law, our review is de novo; when faced with a question of fact, our review is for clear error. However, '[o]ur review of mixed questions of law and fact will be 'under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles.'") (internal citations omitted).

20. **Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?**

Response: Congress set forth the law, principles, and purposes of federal sentencing in 18 U.S.C. § 3553, but it did not weigh or rank those factors. Rather, the district court is required to consider all the § 3553(a) factors in making an individualized decision to formulate a sentence that is "sufficient, but not greater than necessary" to achieve the statutory sentencing purposes. If confirmed as a circuit judge, I would routinely be called upon to decide cases on appeal that challenged or called into question the sentencing decisions made by district court judges. To avoid the appearance that I have prejudged any of those cases or challenges, I respectfully follow Congress's lead and have not weighed or ranked these purposes.

21. **Please identify a Supreme Court decision from the last 50 years that you think is particularly well reasoned and explain why.**

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from commenting on the quality of the reasoning of Supreme Court precedents. If confirmed, my duty would be to follow the reasoning, rules, standards, and interpretations from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

22. **Please identify a Tenth Circuit judicial opinion from the last 50 years that you think is particularly well reasoned and explain why.**

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from commenting on the quality of the reasoning of Tenth Circuit precedents. If confirmed, my duty would be to honor horizontal stare decisis, when appropriate, and to follow the reasoning, rules, standards, and interpretations from Supreme Court and Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

Response: This statute, titled "picketing or parading," prohibits a person, "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence," punishable by a fine imprisonment not more than one year, or both.

24. **Is 18 U.S.C. § 1507 constitutional?**

Response: I am aware that the Supreme Court rejected a challenge to a similar state statute in *Cox v. Louisiana*, 379 U.S. 559 (1965). However, as a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from opining on the constitutionality of a statute, as that question may possibly come before me on the court, should I be confirmed. If a case were to present this question before me, I would decide the case based upon Supreme Court and Tenth Circuit precedent, the text of the statute, the facts before the court, and the arguments of the parties.

25. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

Response: The Supreme Court has on very limited occasions discussed foreign law during its analysis of constitutional interpretation. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316, 122 S. Ct. 2242, 2249 n. 21 (2002). It is always appropriate for a circuit judge to follow the Supreme Court's rules, standards, and interpretations of the Constitution.

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

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

Response: Yes. The constitutionality of racial segregation in schools is not likely to ever come before the courts again, so I believe it is permissible as a judicial nominee to state my opinion that this case was correctly decided.

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

Response: Yes. The constitutionality of interracial marriage is not likely to ever come before the courts again, so I believe it is permissible as a judicial nominee to state my opinion that this case was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**

f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**
l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**
m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response for subparts c to m: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit commenting on cases and matters that may possibly come before me on the court, should I be confirmed. If confirmed, my duty would be to follow binding precedents from Supreme Court and Tenth Circuit, and I pledge to do so faithfully and to the best of my ability. I note that *Roe* and *Casey* were expressly overturned by *Dobbs*.

27. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: I would apply the standards set forth in binding Supreme Court and Tenth Circuit precedent. In 2022, the Supreme Court held "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

28. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

Response: Several years ago, likely in 2021, I had one phone call with Mr. Kang to talk generally about the nominations process. It was not specific to any vacancy and there was no follow-up or subsequent contact.

29. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

30. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

Response: No.

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

Response: No.

31. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

32. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

Response: No.

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

Response: No.

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

Response: On February 10, 2023, I received a phone call from the state director for Senator Jerry Moran about my interest in being considered for this vacancy. My understanding is that the White House Counsel's Office discussed a potential interview with Senator Moran's office. I interviewed with the state director on February 15, 2023. On February 20, 2023, I met with several Kansas lawyers at the request of Senator Moran's office to talk generally about the vacancy. On March 25, 2023, I interviewed with Senator Moran. On April 13, 2023, I interviewed with lawyers from the White House Counsel's Office. On April 27, 2023, I interviewed with counsel for Senator Roger Marshall. Since May 3, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On July 21, 2023, I met with Senator Marshall to discuss my potential nomination. On July 27, 2023, my nomination was submitted to the Senate.

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

Response: I did not and am not aware that anyone did so about me or on my behalf.

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

Response: I did not and am not aware that anyone did so about me or on my behalf.

36. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated**

with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: I did not and am not aware that anyone did so about me or on my behalf.

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

Response: I did not and am not aware that anyone did so about me or on my behalf.

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

Response: I did not and am not aware that anyone did so about me or on my behalf.

39. **Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?**
    a. **If yes,**
        i. **Who?**
        ii. **What advice did they give?**
        iii. **Did they suggest that you omit or include any particular case or type of case in your questionnaire?**

Response: No. The decision about which cases to list was entirely my own, as was the substance and description of the cases listed. In preparing my Senate Judiciary Questionnaire responses, I discussed and received edits on my draft responses from the Department of Justice, Office of Legal Policy, which were almost entirely about formatting and style.

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

Response: On April 13, 2023, I interviewed with lawyers from the White House Counsel's Office (WHCO). Beginning on May 3, 2023, I have been in contact with officials from the Department of Justice, Office of Legal Policy (OLP) concerning an extensive background check and vetting. I interviewed with an OLP vetting attorney on May 12 and 23. In June, the WHCO informed me they received a request from Senator Roger Marshall's Office for an interview with the Senator, which led to some short communication about contact information that I could use to arrange that meeting (which was held on July 21). I was called on July 26 by WHCO and informed that the President was going to announce my nomination the following day, July 27.

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

Response: I received the questions on the evening of Wednesday, September 13. I reviewed the questions and drafted responses. I also reviewed guidance provided by the Department of Justice, Office of Legal Policy that was mostly concerning the format for preparing responses but also limited feedback on substance. I then finalized and submitted my responses.

Senator Hirono's Written Questions for Richard E. N. Federico
Nominee to the United States Circuit Court for the Tenth Circuit
September 6, 2023

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Richard E. N. Federico, Nominee to the United States Circuit Court of Appeals for the Tenth Circuit

1. How would you describe your judicial philosophy?

Response: My philosophy has three pillars. The first is respect – to have and demonstrate respect for all persons involved in the appellate process, the lawyers, parties, judges, staff, and public. The second is integrity – to bring integrity to my decision-making process. This means that I must be fully prepared, keep an open mind and maintain impartiality, and be fully engaged with each case. The third is narrowness – when there is jurisdiction, to decide the issues presented and preserved on appeal solely upon the record facts and the law as written, and no more.

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

Response: The first source is the text of the statute. *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.*, 598 U.S. 449, 463 (2023) ("Interpretation of a statute both 'begins with the statutory text, and ends there as well' if the text is 'unambiguous.'") (quoting *National Assn. of Mfrs.* v. *Department of Defense*, 583 U.S. 109, 127 (2018)). The second source is Supreme Court and Tenth Circuit precedent that establishes rules and meaning for the relevant text of the statute at issue in the appeal. The precedent should also be reviewed to determine what other sources should be considered to interpret the statute in the context of the appeal, such as the rules for statutory construction and other interpretative principles and sources. Opinions from other federal Courts of Appeal may also be useful as persuasive authorities, if there is no Supreme Court or Tenth Circuit precedent on point.

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

Response: The Constitution's text is always first. *See Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring) ("And even though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution's text."). If confirmed, I would faithfully follow and apply the binding precedents, as I would be required to do. I would first look to Supreme Court and Tenth Circuit precedent to review the rules, standards, and interpretations established for the constitutional provision at issue in the appeal or construing analogous constitutional provisions. Another source would be opinions from other federal Courts of Appeals that have interpreted the provision.

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

Response: The Supreme Court has ruled that text and original meaning are determinative of questions concerning the interpretation of certain constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court evaluated the text of the Second Amendment by looking to the original public meaning at the time of ratification.

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

Response: My approach is consistent with the response to Question 2.

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: The Supreme Court has said that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: To establish standing, a plaintiff must demonstrate it "suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).

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

Response: Article I of the Constitution enumerates the powers of the Congress. One enumerated power, the Necessary and Proper Clause, grants broad authority, but it is also limited to matters that are within the scope of the Constitution. *See, e.g., McCulloch v. Maryland*, 17 U.S. 316, 420-21 (1819).

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

Response: The Supreme Court has said, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of power which it undertakes to exercise." *Nat'l Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2598 (2012). I would evaluate the constitutionality of a statute consistent with my responses to Question 3.

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

Response: Yes. The Supreme Court set forth a test to determine whether unenumerated rights are protected by the Constitution's Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has also determined that several unenumerated rights are protected; these include: the right to marry (*Loving v. Virgina*, 388 U.S. 1 (1967)), the right to obtain contraceptives (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), the right to make decisions about the education and upbringing of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)).

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

Response: Congress's power is limited by the text of Article I, Section 8. The Supreme Court has also identified three broad categories of activity that Congress may regulate under its commerce power: the use of the channels of interstate commerce; to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce; and to regulate those activities having a substantial relation to interstate commerce, such as those activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: Black's Law Dictionary (11th ed. 2019) defines a "suspect class" as those belonging to a "suspect classification," which is defined as, "a statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." To reach the determination that race, religion, national origin, and alienage are suspect classes, the Supreme Court looked to whether a class possesses, "an immutable characteristic determined solely by the accident of birth." *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

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

Response: Checks and balances are critical for our Constitution and government of the people to endure. "[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.").

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

Response: Please see my responses to Questions 2, 3, and 4. If confirmed, I would decide this type of case the same way I would decide all cases brought before me, based upon the record facts, written law, and binding precedent.

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

Response: Circuit judges must decide cases based upon the record facts and applicable law, not empathy. However, empathy can be a valuable tool to foster a respectful judicial temperament.

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

Response: Both outcomes are equally undesirable.

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

Response: Although I have not extensively studied this data and judicial trends over our history, I find it relevant to note that the jurisdiction of federal courts expanded to federal-question jurisdiction by the Judiciary Act of 1875. This jurisdictional expansion may have helped establish federal courts as the preeminent forum to evaluate constitutional rights when cases or controversies are brought before it. I do not subscribe to either judicial aggressiveness or passivity – federal courts must only decide the cases and issues brought before them, when jurisdiction exists, the matters are properly preserved, and the legal doctrines dictate a decision shall be rendered.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" as, "[a] court's power to review the actions of other branches or levels of government; … The constitutional doctrine providing for this power. … A court's review of a lower court's or an administrative body's factual or legal findings." *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) (declaring it is "the province and duty of the judicial department to say what the law is."). Black's Law Dictionary (11th ed. 2019) defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially U.S. Supreme Court

interpretations, are binding on the coordinate branches of the federal government and the states."

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

Response: Elected officials must follow duly rendered judicial decisions. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. … No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."). Elected officials can also take action and measures, consistent with the Constitution, to countermand judicial decisions that elected officials determine are undesired (e.g. pass statutes).

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

Response: Judges do not make the law. Judges must only decide the cases and controversies brought before them that require the law to be interpreted. All judges have a duty to honor that principle.

20. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "fairness; impartiality; evenhanded dealing." How equity is best defined is a question for policy makers and elected officials.

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

Response: Please see my response to Question 20. Black's Law Dictionary (11th ed. 2019) defines "equality" as "[t]he quality, state, or condition of being equal." "Equality" may also invoke the legal doctrine of the Equal Protection Clause.

22. Does the 14th Amendment's Equal Protection Clause guarantee "equity" as defined by the Biden Administration? (Listed above in question 20).

Response: Please see my responses to Questions 20 and 21. I am not aware of any Supreme Court or Tenth Circuit precedent analyzing and applying the Equal Protection Clause to the definition you provided.

23. How do you define "systemic racism?"

Merriam-Webster Dictionary defines it as, "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)."

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

Response: Black's Law Dictionary (11th ed. 2019) defines it as, "1. A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism. 2. The body of work produced by adherents to this theory."

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

Response: Please see my responses to Questions 23 and 24.

26. In your 2019 Kansas Federal Public Defender blog post, you exceeded the scope of your employment and provided "practical tips" for individuals seeking to avoid deportation. Do you find it appropriate for an officer of the court to instruct the public on methods for avoiding the dictates of the law?

Response: I respectfully disagree that I "exceeded the scope of my employment" and instructed members of the public to avoid deportation. As best I can recall, I was asked to write that blog post by my supervisory attorney, as part of my employment, to address questions raised to the office about the difference between criminal immigration cases and removal proceedings, and to briefly discuss rights persons may have under the law. The blog post took no position on immigration policy, nor did it instruct members of the public to avoid following the law. The post also said it was "not meant to be, and should not relied upon, as legal advice regarding immigration

matters. If you are in need of legal advice regarding any immigration matter, we highly recommend you seek counsel from an attorney with subject matter expertise on immigration law."

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

Questions for the Record for Richard Federico, nominated to be United States Circuit Judge for the Tenth Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Racial discrimination is also illegal under federal law. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

2. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from opining on unenumerated, unarticulated rights in the Constitution, as those questions and matters may possibly come before me on the court, should I be confirmed. If confirmed, my duty would be to follow the reasoning, rules, standards, and interpretations from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability. For the question of unenumerated rights, I would apply the test set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Response: My philosophy has three pillars. The first is respect – to have and demonstrate respect for all persons involved in the appellate process, the lawyers, parties, judges, staff, and public. The second is integrity – to bring integrity to my decision-making process. This means that I must be fully prepared, keep an open mind and maintain impartiality, and be fully engaged with each case. The third is narrowness – when there is jurisdiction, to decide the issues presented and preserved on appeal solely upon the record facts and the law as written, and no more. I have not studied the judicial philosophies of all the Supreme Court Justices from those Courts to determine which Justice's philosophy is most analogous with my own philosophy.

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted" and, more specifically, as "the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I do not characterize myself with labels.

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

Response: *Black's Law Dictionary* (11th ed. 2019) defines the term "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I do not characterize myself with labels.

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

Response: I would be bound by the interpretive method for interpreting the provision, even if the specific question before me was of first impression. I would faithfully do so, to include the application of the original public meaning of the provision, if clear and applicable to resolve the issue of the case. Where the Supreme Court or Tenth Circuit has set forth a method of interpretation of the provision, such as looking to the original public meaning of the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004), I would faithfully apply that interpretative method to the case before me.

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

Response: If confirmed, I would be bound to follow Supreme Court and Tenth Circuit precedent to determine the meaning of the Constitution or a statute. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (interpreting the Second Amendment under the original public meaning); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 574 (2002) (applying contemporary community standards when assessing obscenity under the First Amendment). If that precedent considered the public's current understanding, I would faithfully do the same, as I would be duty-bound to do.

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

Response: The Constitution does not change; it endures as society changes.

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

Response: Yes, it is binding precedent.

a. **Was it correctly decided?**

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from commenting on whether a case was correctly decided, as there will likely be litigated matters arising from that case that may possibly come before me on the court, should I be confirmed. If confirmed, my duty would be to follow binding precedent from the Supreme Court and the Tenth Circuit, including *Dobbs*, and I pledge to do so faithfully and to the best of my ability.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: Yes, it is binding precedent.

a. **Was it correctly decided?**

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from commenting on whether a case was correctly decided, as there will likely be litigated matters arising from that case that may possibly come before me on the court, should I be confirmed. If confirmed, my duty would be to follow binding precedent from the Supreme Court and the Tenth Circuit, including *Bruen*, and I pledge to do so faithfully and to the best of my ability.

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

Response: Yes, it is binding precedent.

a. **Was it correctly decided?**

Response: Yes. The constitutionality of racial segregation in schools is not likely to ever come before the court again, so I believe it is permissible as a judicial nominee to state my opinion that this case was correctly decided.

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

Response: The statute, 18 U.S.C. § 3142(e), sets out the types of offenses that trigger a presumption in favor of pretrial detention. An example of a charged offense that commonly gives rise to the detention presumption is an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 *et seq*.). Other offenses that trigger the presumption are certain firearms offenses, certain offenses involving minor victims, offenses involving slavery and human trafficking, and federal crimes of terrorism.

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

Response: The statute does not say the policy rationales, and I am not aware of any precedent that explains the policy rationales.

13. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes, there are both constitutional limits under the First Amendment Free Exercise Clause and statutory limits under the Religious Freedom Restoration Act. *See, e.g., Church of the Lukumi Bablua Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.") (internal citations omitted); *Tandon v. Newsom*, 141 S.C. 1294 (2021) (per curiam).

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

Response: The Free Exercise Clause of the First Amendment bars government departure from neutrality on matters of religion. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1731 (2018) (quoting *Church of the Lukumi Bablua Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993)). If a law or policy burdens religion and is not "neutral and of general applicability," the government must establish that the law or policy satisfies strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: In *Cuomo*, the Court held that New York's restrictions on gatherings within certain zones were not facially neutral, and were thus subject to, and failed to meet strict scrutiny, so the plaintiffs were entitled to emergency injunctive relief.

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

Response: In *Tandon*, the Court held that California's restrictions on private gatherings were not facially neutral because they treated comparable secular activity more

favorably than religious activity, and were thus subject to, and failed to meet strict scrutiny, so the plaintiffs were entitled to emergency injunctive relief.

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

Response: Yes.

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

Response: In *Masterpiece Cake*, the Court held that a Colorado Commission's ruling against a baker who refused to bake a wedding cake for a same-sex marriage violated the First Amendment Free Exercise Clause.

19. **Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?**

Response: Yes. The Supreme Court has explained that so long as religious beliefs are sincere, they are protected, even if they are not based on teachings of the faith tradition to which they belong. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 720 (2014); *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 834 (1989); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**
b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response to a and b: Please see my response to Question 19.

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

Response: I do not speak for the Catholic Church and would not presume to be an appropriate source to declare its official positions.

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

Response: In *Our Lady of Guadalupe School*, the Court applied the ministerial exception, ground in the First Amendment's Religion Clauses, to reach the holding described in the question. The Court declared that although religious institutions are not immune from compliance with secular laws, the First Amendment does protect their autonomy with respect to internal management decisions that are essential to the institution's central, religious purposes.

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

Response: In *Fulton*, the Court held that the City of Philadelphia's foster care policy burdened the organization's religious beliefs because it was not generally applicable, so the policy was subject to, and failed to meet the strict scrutiny standard, and was held to be a violation of the Free Exercise Clause.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson*, the Court held that Maine's tuition assistance program, under which parents living in districts without a public high school could direct state-funded subsidies to secular private schools but not to religious private schools, violated the Free Exercise Clause of the First Amendment.

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

Response: In *Kennedy*, the Court held that a school district's punishment of the football coach who engaged in brief, personal religious observance on the football field violated the coach's rights under the Free Speech and Free Exercise Clause of the First Amendment.

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

Response: In his concurrence, Justice Gorsuch wrote that the lower courts had not properly applied the strict scrutiny test required by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a).

25. **Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment**

right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from opining on the interpretation of a statute as posed in this hypothetical, as those questions and matters may possibly come before me on the court, should I be confirmed. If confirmed, my duty would be to follow binding precedent from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

a. **One race or sex is inherently superior to another race or sex;**

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

27. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: Yes.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

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

Response: Political appointments are the prerogative of the person vested with the authority to make the appointment, but appointments must still follow the Constitution and relevant statutes. As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from opining on the constitutionality of the considerations posed in this hypothetical, as those questions and matters may possibly come before me on the court, should I be confirmed.

30. **If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?**

Response: The Supreme Court has identified some circumstances where showing that a program or policy has a racially disparate impact can be used as evidence of illegal discrimination. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009). If confirmed, my duty would be to follow binding precedent from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

31. **Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: That is a question left to Congress. If confirmed as a Circuit Judge, my duty would be to follow the rules, standards, and interpretations laid out in binding Supreme Court precedent, not to opine about the number of justices that sit on the Court.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: The Supreme Court held that the Second Amendment protects an individual right to bear arms for self-defense, both in the home and in public. *See District of Columbia v. Heller*, 554 U.S. 50 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: *Heller* held that a DC law prohibiting the possession of firearms in the home for purposes of self defense violated the Second Amendment. *McDonald* reviewed a similar handgun possession ban in Chicago and incorporated the Second Amendment to the States by the Fourteenth Amendment's Due Process Clause. *Bruen* invalidated a New York law that was not a "shall issue" jurisdiction for a firearm permit. In *Bruen*,

the Supreme Court explained "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

Response: Yes, please see my response to Questions 33 and 34.

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

Response: No, *McDonald* and *Bruen* make clear "the constitutional right to bear arms in public for self-defense is not second-class right, subject to an entirely different body of rules than the other Bill or Rights guarantees." *Bruen*, 142 S. Ct. at 2156.

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

Response: No, *McDonald* and *Bruen* make clear "the constitutional right to bear arms in public for self-defense is not second-class right, subject to an entirely different body of rules than the other Bill or Rights guarantees." *Bruen*, 142 S. Ct. at 2156.

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

Response: The Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has explained that the Executive Branch has discretion in enforcement matters. *See, e.g., United States v. Texas*, 143 S. Ct. 1964, 1970-72 (2023).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Substantive administrative rule changes are the promulgation of agency regulation that has the force of law, subject to the restrictions and requirements imposed by applicable laws, such as binding precedent and the Administrative Procedures Act, 5 U.S.C. §§ 551-559.

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

Response: No, the death penalty is authorized by several federal statutes. The President does not have the authority to change statutes, but the President does have the power under Article II, § 2 to grant reprieves and pardons.

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

Response: In *Alabama Association of Realtors*, the Court vacated the nationwide moratorium of evictions that had been promulgated by the Centers for Disease Control (CDC) during the pandemic. The Court concluded the petitioners were likely to succeed on the merits of their claim, that the CDC did not have authority under the statute, and the court would expect "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." 141 S. Ct. 2485, 2489 (2021).

42. **Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?**

Response: As a judicial nominee, it is not appropriate for me to comment on the actions and conduct of prosecutors.

43. **You served at the Military Commission as Ramzi Bin-al-Shibh's defense counsel, and have wrote about how the Uniform Code of Military Justice should not be applied to noncapital cases. Is the death penalty an appropriate sentence for terrorism that resulted in the mass murder of thousands of innocent Americans?**

Response: I have never written "about how the Uniform Code of Military Justice should not be applied to noncapital cases," and do not understand what is meant by that phrase. Congress has the authority to prescribe penalties for criminal offenses, and the death penalty is an authorized punishment for the charged offense of terrorism under the Military Commissions Act of 2009, 10 U.S.C. § 950t(24), 123 Stat. 2610 (2009). The case against Mr. Bin al Shibh remains pending, and he is my former client, as I was his detailed military defense counsel, as required by statute. As such, it is not appropriate for me to opine about what is an appropriate disposition of his case.

44. **You have defended multiple fentanyl distributors during your tenure with the Public Defenders Office. Do you think there is a fentanyl crisis in America?**

Response: Federal and State health officials, law enforcement officials, and elected officials have declared that fentanyl is a deadly and addictive substance and have declared fentanyl use and abuse to be a crisis in America:

US Surgeon General: https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-naloxone/index.html

US Drug Enforcement Administration: https://www.dea.gov/fentanylawareness

State of Kansas: https://governor.kansas.gov/governor-kelly-signs-bipartisan-bill-to-decriminalize-fentanyl-test-strips-in-kansas/

State of Texas: https://www.hhs.texas.gov/services/mental-health-substance-use/mental-health-substance-use-resources/fentanyl-one-pill-kills

a. **What is the leading cause of death of Americans aged 18 to 45?**

Response: According to the DEA Administrator, the leading cause of death for Americans aged 18 to 45 is fentanyl overdose. *See* https://www.dea.gov/fentanylawareness

45. **You wrote several opinion pieces for the *Indiana Daily Student* in 1999. Some of these articles discussed President Bill Clinton's impeachment.**

a. **Do you think the media always holds each president to the same standard in refusing to let the chief executive "get away" with the "crimes" he committed?**

Response: I have not studied any data or analysis as to the standards the media holds towards presidents.

b. **What were the "crimes committed" by President Clinton?**

Response: The House of Representatives passed articles of impeachment against President Clinton that included perjury and obstruction of justice.

46. **In a different column, you endorsed Michael Jordan for President, noting your "disgust" for American politics. You remarked "[w]atching the impeachment trial, it became clear that President, soon to be ex-president, Clinton is a liar. Although I still respect the office of president, I have little respect for those who have held that office in recent times. I think it is time that we get a true leader in the oval office. Someone who we the public can all be proud of."**

a. **Please list the reasons you believe former President Clinton is a liar. Please be specific.**

Response: The House of Representatives passed articles of impeachment against President Clinton that included perjury and obstruction of justice.

b. **Is President Biden a "true leader in the oval office"?**

Response: That question is a determination to be made by the American people in the political process.

c. **Is President Biden someone the public can all be proud of?**

Response: That question is a determination to be made by the American people in the political process.

47. **At your September 6, 2023 nomination hearing, you repeatedly avoided squarely answering Sen. Kennedy's question as to whether minorities in America today needed special help to succeed. By my count, he posed the question to you at least four times, with you providing a non-responsive answer each and every time.**

a. **Yes or no, do minorities in America today need special help to succeed? (Your answer should be yes or no. If you care to elaborate beyond that, you may, but your answer should begin with either a yes or a no).**

Response: That question is complex, requires definitions, and cannot be properly answered by a yes or no answer. I stand by my responses to Senator Kennedy that I think that all persons in this country, who work hard and no matter what community they come from, should have equal opportunity to succeed.

Senator Josh Hawley
Questions for the Record

Richard Federico
Nominee, U.S. Circuit Judge for the Tenth Circuit

1. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**
   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

Response: No

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

Response: The Supreme Court has ruled that the original public meaning of the Constitution is integral to the analysis of claims of infringement upon several constitutional rights. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment). If confirmed, I will follow binding Supreme Court and Tenth Circuit precedent that require a court to consider and analyze original public meaning when interpreting the Constitution.

3. **Do you consider legislative history when interpreting legal texts?**
   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

Response: In interpreting legal texts, the Supreme Court commands that I would I first look to the plain text. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). If the text is unclear or ambiguous and there is no judicial precedent on point, then I may turn to legislative history, but only to the extent the Supreme Court and Tenth Circuit allows it. *Id.* (noting that legislative history may be helpful "when interpreting *ambiguous* statutory language").

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

Response: The Supreme Court has on limited occasions discussed foreign law during its analysis of constitutional interpretation. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316, 122 S. Ct. 2242, 2249 n. 21 (2002). It is always appropriate for

a circuit judge to follow the Supreme Court's rules, standards, and interpretations of the Constitution.

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

   Response: To establish an Eighth Amendment violation for the execution protocol, a plaintiff must show that the "the conditions presenting the risk must be *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers." *Baze v. Rees*, 553 U.S. 35, 49–50 (2008) (emphasis in original); *Warner v. Gross*, 776 F.3d 721, 729 (10th Cir. 2015), *aff'd sub nom. Glossip v. Gross*, 576 U.S. 863 (2015); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019) ("*Glossip* expressly held that identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims" alleging cruel pain.' And just as binding as this holding is the reasoning underlying it. Distinguishing between constitutionally permissible and impermissible degrees of pain, *Baze* and *Glossip* explained, is a *necessarily* comparative exercise.") (internal citations omitted).

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

   Response: Please see my response to Question 4.

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

   Response: The Supreme Court has explained there is not a constitutional right to obtain postconviction access to the State's evidence for DNA testing. *See Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009). I am not aware of any Tenth Circuit case law that has a recognized a constitutional right to DNA analysis for habeas corpus petitioners seeking to prove their innocence.

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

   Response: I have no doubt.

8. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially**

neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.

Response: In *Kennedy v. Bremerton School District*, the Supreme Court explained that "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable." 142 S. Ct. 2407, 2421-22 (2022) (internal quotations and citations omitted). Laws that incidentally burden religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. *See Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021) (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)).

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

Response: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.,* 508 U.S. 520, 532 (1993). A state law that discriminates against a religious group or belief requires a strict scrutiny analysis. That "'stringent standard,' is not 'watered down but really means what it says.' To satisfy it, government action 'must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (internal citations omitted).

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

Response: The First Amendment protects the exercise of sincerely held religious beliefs. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1738 (2018) ("But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise."). A plaintiff has the burden to establish a substantial burden on a religious belief that is sincerely held. *See Thiry v. Carlson*, 78 F.3d 1491, 1494 (10th Cir, 1996). Such beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" in order to be sincerely held. *Welsh v. United States*, 398 U.S. 333, 339 (1970). The Tenth Circuit adopted a multi-factor test, where none of the factors are dispositive, to determine whether a belief is a religion, and not just a philosophy or way of life, and sincerely held. *See United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

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

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

Response: In *Heller*, the Supreme Court held that the Second Amendment conferred an individual right to keep and bear arms, and that the law banning handgun possession in the home for purposes of self-defense violated the Second Amendment.

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

Response: No.

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

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

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

Response: Justice Holmes' dissent in *Lochner* was generally about judicial restraint in the face of majority rule-making authority. Although *Lochner* was rejected and abrogated by subsequent Supreme Court cases, the Code of Conduct for United States Judges and the Canons listed therein prohibit commenting on cases and matters that may possibly come before me on the court, should I be confirmed.

13. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: I understand this phrase to reflect the Supreme Court's view that the *Korematsu* case was wrongly decided.

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

a. If so, what are they?

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

Response: The Supreme Court has made it clear to Courts of Appeal, that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *United States v. Maloid*, 71 F.4th 795, 808 (10th Cir. 2023) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). As a judicial nominee to the Tenth Circuit, it is not appropriate for me to proclaim whether Supreme Court precedent is no longer good law. If confirmed, I will faithfully apply Supreme Court precedent in deciding cases.

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

a. Do you agree with Judge Learned Hand?

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

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

Response: "Though market-share percentages bear on the existence of monopoly power, they are not ordinarily conclusive." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1123 (10th Cir. 2014). As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from commenting or opining on market share percentages in this hypothetical. If confirmed, my duty would be to follow the reasoning, rules, standards, and interpretations from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law."

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

Response: "[T]he views of [a] state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). If confirmed, I would follow binding Supreme Court, Tenth Circuit, and State Supreme Court precedent if confronted with a question about a state constitution.

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

Response: Please see my response to Question 17.

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

Response: "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

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

Response: Yes. The constitutionality of racial segregation in schools is not likely to ever come before the courts again, so I believe it is permissible as a judicial nominee to state my opinion that this case was correctly decided.

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

Response: Federal Rule of Civil Procedure Rule 65 provides the general power for a court to issue an injunction. Injunctions that have nationwide effect and applicability have been issued by federal courts, *see, e.g*., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), while also drawing skepticism from several Supreme Court Justices. *Id*. at 2425 (Thomas, J., concurring) ("No statute expressly grants district courts the power to issue universal injunctions."); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case.").

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federalism" as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." The Supreme Court has explained that the "federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: There are several doctrines of abstention, or when a federal court may abstain from deciding a case even though it has jurisdiction to do so. Generally, "[a]bstention rarely should be invoked, because the federal courts have a virtually unflagging obligation … to exercise the jurisdiction given to them." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (internal quotations and citations omitted). Abstention doctrines include, *inter alia*:

(1) the *Younger* abstention doctrine, named for *Younger v. Harris*, 401 U.S. 37 (1971), wherein a federal court may abstain when there is an ongoing state proceeding, that implicates important state interests are "uniquely in furtherance of state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013).

(2) the *Pullman* abstention doctrine, which "is that federal courts should avoid premature constitutional adjudication," and "federal-court error in deciding state-law questions antecedent to federal constitutional issues, by allowing for parties to adjudicate disputes involving unsettled state-law issues in state courts." *Caldara v. City of Boulder*, 955 F.3d 1175, 1178 (10th Cir. 2020) (internal quotations and citations omitted).

(3) the *Burford* abstention doctrine, which "is concerned with preventing the disruption of state efforts to establish a coherent policy with respect to a matter of substantial public concern, …" *Grimes v. Crown Life Ins. Co.,* 857 F.2d 699, 707 (10th Cir. 1988) (internal quotations and citations omitted); *Burford v. Sun Oil Co*., 219 U.S. 315 (1943) (discussing federal abstention to review a state court's decision in cases involving regulatory scheme and sensitive areas of state concern).

(4) the *Colorado River* abstention which is based on the policy of conserving judicial resources in situations involving the contemporaneous exercise of concurrent jurisdictions. *Grimes v. Crown Life Ins. Co.,* 857 F.2d 699, 707 (10th Cir. 1988); *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976).

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

Response: Generally, damages are intended to redress a past harm and injunctive relief is to prevent future harm. What type of relief to grant in a case, if any, requires a case-party-fact-specific inquiry. As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from opining on possible legal relief as a hypothetical, to avoid even the appearance that I could not be impartial if this issue were to come before me, should I be confirmed.

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

Response: Substantive due process arises from the Fifth and Fourteenth Amendments. The Supreme Court explained "an established method" of substantive due process analysis to be, first, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," and, second, due process cases require a "careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted).

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

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

Response: The Free Exercise Clause is a fundamental right. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Please also see my response to Questions 8, 9, and 10.

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

Response: The Supreme Court has held that the Free Exercise Clause protects "freedom of worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: I would faithfully apply the standards and tests set forth by the Supreme Court. For example, government regulations are not neutral and generally applicable whenever they treat any secular activity more favorably than religious exercise. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Please see my response to Questions 8, 9, and 10.

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

Response: Please see my response to Questions 8, 9, and 10.

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

Response: No.

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

Response: In the Tenth Circuit, the legal burden of "beyond a reasonable doubt" is set forth in Criminal Pattern Jury Instruction § 1.05 (2021). It is not defined by a numerical answer and providing one would be a misstatement of the law.

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

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

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by

definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

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

Response: As a judicial nominee, the Code of Conduct for United States Judges and the Canons listed therein prohibit me from opining on whether there is a circuit split or what may constitute a valid habeas claim, as that may call into question my impartiality, should I be confirmed and a case come before me that includes these questions, even in part. If confirmed, I would not prejudge these questions, as my duty would be to follow the reasoning, rules, standards, and interpretations from the Supreme Court and the Tenth Circuit, which I pledge to do so faithfully and to the best of my ability.

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

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

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

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

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

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

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

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

Response: Tenth Circuit Rule 32.1 allows for unpublished decisions and circuit case law sets out requirements for citations to unpublished decisions and their persuasive value, if any. As a judicial nominee to the Circuit, it is not appropriate for me to prejudge any issue or to opine about the appropriateness, or not, of a circuit rule currently in place and part of the circuit precedent. If confirmed, I would follow the circuit rule and cases that discuss the precedential value of unpublished decisions.

29. In your legal career:

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

Response: 25.

b. How many have you tried as second chair?

Response: Seven.

c. How many depositions have you taken?

Response: I estimate five to ten.

d. How many depositions have you defended?

Response: I estimate less than five.

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

Response: I have represented 39 clients on appeal and been on brief before the Supreme Court of the United States, Tenth Circuit, Ninth Circuit (orally argued), D.C. Circuit, Court of Appeals for the Armed Forces, and Navy-Marine Corps Court of Criminal Appeals.

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

Response: Zero.

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

Response: Zero. I am not counting Navy administrative boards. If those are counted, I estimate that I have appeared before approximately 25 boards.

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

Response: I estimate 50 to 100.

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

Response: I estimate 100 to 200.

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

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

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

Response: I have not had a previous job that required me to track billable hours.

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

a. What do you understand this statement to mean?

Response: I think Justice Scalia meant that judges interpret the law to decide cases and controversies that are brought before them, but they do not decide cases to reach outcomes they find personally desirable.

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

a. What do you understand this statement to mean?

b. Do you agree or disagree with this statement?

Response: I think Chief Justice Roberts meant that judges interpret the law to decide cases and controversies that are brought before them, but they do not make law and are not charged with executing it. Assuming my interpretation is accurate, I agree with Chief Justice Roberts.

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

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

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

Response: I think Justice Holmes meant that judges interpret the law to decide cases and controversies that are brought before them, but they do not make law and are not charged with executing it. Assuming my interpretation is accurate, I agree with Justice Holmes.

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

a. If yes, please provide appropriate citations.

Response: I can only recall two cases wherein I took that position. In both, I argued the Military Commissions Act of 2006 was an unconstitutional exercise of Congress's power under the Define and Punish Clause: *In re al Shibh*, No. 09-1238 (D.C. Cir. 2009) and *In re Kamin*, No. 09-1294 (D.C. Cir. 2009).

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

Response: No.

36. What were the last three books you read?

Response: *To Risk it All: Nine Conflicts and the Crucible of Decision* by Admiral James Stavridis, USN (Ret.); *The People Debate the Constitution, 1787 – 1788* by Pauline Maier; *The Bomber Mafia* by Malcom Gladwell.

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

Response: I believe the United States of America is the greatest country in the world. On numerous occasions as a military officer and lawyer, I have taken an Oath to support and defend the Constitution. I have put that Oath to action, in the courtroom and while serving in our Navy around the country, overseas, at sea, and in active combat zones. I also believe that Americans can continuously work to form a more perfect Union for all citizens while acknowledging our nation's history of slavery and *de jure* racism.

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

Response: I am most proud of cases as a public defender where I have been able to not only achieve the client's objective for the legal representation, but where I was also able to act as a counselor and help the client redirect their life towards sobriety, law-abidingness, and productivity.

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

Response: Yes. During my service as a public defender, I have represented hundreds of indigent persons charged with crimes. As a Navy JAG Officer and lawyer, I was assigned by my military superiors to represent detainees charged with war crimes and being tried before military commissions. My representation of those clients "does not constitute an endorsement of the client's political, economic, social or moral values or activities." D. Kan. Rule 83.6.1; Kan. Rules Prof. Conduct Rule 1.2(b).

a. How did you handle the situation?

Response: I did my best, as it was my duty to do, under the rules of professional responsibility to zealously represent my client within the bounds of the law.

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

Response: Yes.

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

Response: Although I frequently read legal scholarship, I do not read individual law professors' works with enough frequency to name the three professors that I read most often.

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

Response: The Federalist Papers contribute to an analysis of the original meaning of the Constitution because they were written with the objective to promote the ratification of the Constitution by the State of New York. They are interesting and hold tremendous

historical value. I cannot say that one Federalist Paper over any other has most shaped my view of the law.

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

Response: I endeavor to learn, read critically, and thoughtfully absorb these materials when I read them. I cannot point to one specific opinion or article that made me change my mind.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court returned the issue of abortion to the people and their elected representatives and further held that voters (not judges or judicial nominees) may decide whether "fetal life" constitutes "an unborn human being." 142 S. Ct. 2228, 2243 (2022).

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

Response: As detailed in 12.c. of my Senate Judiciary Questionnaire, I testified as a witness on behalf of the Navy JAG Corps before the Judicial Proceedings Panel Subcommittee created by the Secretary of Defense pursuant to Section 576(d) of the National Defense Authorization Act for Fiscal year 2013. The Report of the Subcommittee, which references my testimony, and a partial transcript of that testimony was included as an attachment to my questionnaire.

On October 9, 2018, I testified in a hearing in *United States v. Black (Carter)*, No. 16-cr-20032-02-JAR in the U.S. District Court for the District of Kansas, as a witness for the defense to explain the methodology and conclusions reached from a voluminous data review and meta-analysis of attorney-client phone calls recorded and accessed from a pretrial detention facility. The transcript from my testimony can be found in Docket Entry 673.

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

- **a. *Roe v. Wade,* 410 U.S. 113 (1973)?**
- **b. The Supreme Court's substantive due process precedents?**
- **c. Systemic racism?**
- **d. Critical race theory?**

Response: No to all.

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

- **a. Apple?**

b. Amazon?
c. Google?
d. Facebook?
e. Twitter?

Response: No to all.

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

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

Response: I have worked in trial offices for twenty years and acted as supervisory counsel for many years. In that capacity I have edited hundreds of briefs and motions that were filed in military and federal courts but not filed in my name. It would be impossible for me to identify those cases. However, one that comes immediately to mind is a motion that I helped author within the past month. It is titled, "Defendant's Motion for Correction of the Judgment Nunc Pro Tunc," and was filed in *United States v. Burge*, No. 19-cr-40024-HLT (D. Kan.), Docket Entry 34.

48. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I have been a practicing trial lawyer for twenty years and am certain that I have made and "confessed" errors during my two decades in court. I am unable to recount every specific time that may have happened. However, one circumstance that comes to mind was several years ago during a detention hearing in the District of Kansas before the Honorable Angel Mitchell, U.S. Magistrate Judge. The detention hearing was held during the Rule 5 proceeding, wherein I stated my belief that one of my client's prior convictions did not qualify as a "crime of violence" for purposes of the Bail Reform Act, 18 U.S.C. § 3142(f)(1)(A). The Court took a recess to consider the presentations and arguments of counsel, during which time I found a Tenth Circuit case that held my client's prior conviction was a "crime of violence," as that term is defined by law. When we went back on the record, I immediately brought that case to the attention of the court and withdrew my prior argument that was in error. The court acknowledged and stated its appreciation for me bringing that case to her attention and proceeded to make a ruling on the question of detention. Due to the high number of initial appearances and detention hearings I have participated in as a public defender, I am not able to recall the name of the case, nor the date this event occurred.

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

Response: Judicial nominees take an oath to tell the truth prior to testifying before the Senate Judiciary Committee. My firm belief is that oaths matter and have significance.

Nominees must be faithful to that oath when stating their views to all questions posed to them.

Questions from Senator Thom Tillis
for Richard E. N. Federico, nominee to the US Circuit Court of Appeals for the Tenth Circuit

1. **Can a judge's personal views and background benefit them in interpreting and applying the law, or would you say that they are irrelevant?**

   Response: A judge's personal views are irrelevant to interpreting and applying the law. The judge's background, meaning their experience and understanding of the duties of a judge, can benefit their ability to interpret and apply the law.

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

   Response: Impartiality is more than an expectation for a judge, it is their duty. The duty for a judge to be impartial is set out in the statutory oath (28 U.S.C. § 453) and is replete throughout the Code of Conduct for United States Judges.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." I do not consider judicial activism to be appropriate.

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

   Response: No.

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

   Response: Judges must faithfully interpret and apply the law to decide the cases brought before them and must not decide cases upon what they perceive to be a desirable outcome. As a judge, it is easy to reconcile that because a judge must not give thought to a desirable outcome of a case but must render a decision that is required based upon the record facts and written law.

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

   Response: If confirmed, I will faithfully apply binding Supreme Court and Tenth Circuit precedent to ensure that all constitutional rights are protected, including Supreme Court

binding precedent on Second Amendment rights, recently decided and analyzed again in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: I would faithfully apply Supreme Court and Tenth Circuit precedent to the record facts to determine whether qualified immunity applies in any case before me. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Andersen v. DelCore*, No. 22-1130, 2023 WL 5313974, at *4 (10th Cir. Aug. 18, 2023) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam); *Pearson v. Callaham*, 555 U.S. 223, 231 (2009)). Generally, when a law enforcement defendant "asserts qualified immunity, this affirmative defense creates a presumption that the defendant is immune from suit." *Id*. (internal citations omitted). If confirmed, I would follow the process and analysis of this binding precedent.

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

Response: As a judicial nominee, I pledge to faithfully apply binding legal precedent from the Supreme Court and Tenth Circuit on qualified immunity issues that would come before me. However, the Code of Conduct for United States Judges and the Canons listed therein dictate that I cannot, and should not, offer an opinion on the legal doctrine generally to scrupulously avoid even the appearance that I have prejudged any issue or case that may come before me that presents a qualified immunity claim. Finally, I note that the scope of qualified immunity is a question that could also be properly addressed by law and policy makers.

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

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

10. What are your thoughts regarding the importance of ensuring that all IP rights are in fact enforced?

Response: The Intellectual Property Clause empowers Congress to grant authors and inventors exclusive rights in their writings and discoveries. U.S. Const. art. I, § 8; *see also Golan v. Holder*, 565 U.S. 302, 325 (2012) ("the Clause 'empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause.'") (internal citation omitted). Under Article III, judges must decide only the cases and controversies brought before them and that they have jurisdiction to decide, by applying

the written law and binding precedent. It is the duty of the parties and litigants to seek to enforce intellectual property rights, like all other rights, by bringing the cases before the courts. As a judicial nominee, I pledge to faithfully apply binding legal precedent from the Supreme Court and Tenth Circuit on intellectual property issues that would come before me.

11. **In the context of patent litigation, in some judicial districts plaintiffs are allowed to request that their case be heard within a particular division. When the requested division has only one judge, this allows plaintiffs to effectively select the judge who will hear their case. What are your thoughts on this practice, which typically is referred to as "forum shopping" and/or "judge shopping?"**

    Response: The Supreme Court has described "forum shopping" as "gamesmanship." *See, e.g., Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 65 (2013). It is disfavored and could undermine public confidence in the judicial system.

12. **The Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in shambles. What are your thoughts regarding the Supreme Court's patent eligibility jurisprudence?**

    Response: As a judicial nominee, I pledge to faithfully apply binding legal precedent from the Supreme Court and Tenth Circuit on any patent eligibility issues that would come before me, if confirmed, noting that jurisdiction over patent appeals is conferred by statute to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(1). However, the Code of Conduct for United States Judges and the Canons listed therein dictate that I cannot, and should not, offer an opinion on the Supreme Court's jurisprudence in this area of the law to scrupulously avoid even the appearance that I have prejudged any issue or case that may come before me.

Senate Judiciary Committee Hearing
"Nominations"
Questions for the Record for Richard Federico
to be United States Circuit Judge for the Tenth Circuit

QUESTIONS FROM SENATOR BLACKBURN

1. **Regarding your involvement in *United States v. Gann*, you noted during your confirmation hearing that you advocated for a sentence far below both what the Federal Sentencing Guidelines and the government recommended. The guideline range for Mr. Gann's sentence was 210–240 months, and the government recommended a sentence of 189 months, a 10% reduction from the bottom-end of the guideline range.**

   a. **Is it accurate that you advocated for a 105-month sentence?**

      Response: In my capacity as court-appointed counsel for Mr. Gann, I filed a sentencing memorandum that recommended the court sentence Mr. Gann to 105 months (8 years, 9 months) imprisonment and five years of supervised release.

   b. **What was your justification for advocating for a sentence that was substantially lower than both the guidelines' and the government's recommendations?**

      Response: Mr. Gann entered into a plea agreement with the government pursuant to Federal Rule of Criminal Procedure Rule 11(c)(1)(B). One term of his agreement set forth the range of the parties' sentencing recommendations, which were to be based upon a percentage of the court's determination of the sentencing range under the US Sentencing Guidelines. The court sustained an objection raised by Mr. Gann to the applicability of one specific offense characteristic under § 2G2.2(b)(3)(B) of the Guidelines and made a finding that the total offense level was 34 and a criminal history category I, resulting in an advisory guideline sentencing range of 151 to 188 months, not the 210 to 240 months stated above (and as originally calculated in the presentence report). The sentence Mr. Gann sought was both a percentage reduction from the low end of the guideline range (anticipating his objection to the proposed Guidelines range would be sustained) and reflective of the evidence submitted in mitigation, consistent with 18 U.S.C. § 3553(a).

      Prior to the sentencing hearing, the government filed a sentencing memorandum that recommended 189 months. However, at the hearing, which was held on November 27, 2018, the court sustained Mr. Gann's objection to the sentencing range under the Guidelines, so the government likely lowered its sentencing recommendation to 135 months to comply with the plea agreement. There is no transcript from this hearing to confirm my recollection because there was no appeal filed (Mr. Gann waived his right to appeal as a term of his plea agreement). It is common in federal court and as part of the adversarial system that counsel for the defendant will recommend a lower sentence than counsel for the government. As stated in the plea agreement and

understood by both parties as a matter of law, the sentence determination was made solely by the court. The court sentenced Mr. Gann to 165 months, which was a sentence within the Guidelines range.

c. According to the government's sentencing memo, Mr. Gann "used multiple mediums to access, obtain, and distribute depictions of child rape, bondage, and sexual exploitation" and used "dating websites to meet people offering children for sex." Given this unconscionable conduct, do you have any regret in requesting such a low sentence?

Response: I was appointed by the court to represent Mr. Gann because he was unable to afford counsel, pursuant to the Sixth Amendment and 18 U.S.C. § 3006A. As a court-appointed defense lawyer, it was my duty under the rules of professional responsibility to zealously represent my client within the bounds of the law. Also, my representation of Mr. Gann "does not constitute an endorsement of the client's political, economic, social or moral values or activities." D. Kan. Rule 83.6.1; Kan. Rules Prof. Conduct Rule 1.2(b). As a former military prosecutor, I have prosecuted many cases with similar charges to this case and worked with victims of these crimes. The trauma these crimes inflict upon victims is horrific, deep, and long-lasting. In this case, my duty was to represent the interests of Mr. Gann and make a presentation to the court on his behalf that included other aspects of his life beyond his crimes. The district judge had the duty to weigh all evidence to determine the appropriate sentence that was "sufficient but not greater than necessary" to achieve the statutory factors set forth in 18 U.S.C. § 3553(a).

I believe strongly in our Constitution and the rights and values it enshrines. On numerous occasions as a military officer and lawyer, I have taken an Oath to support and defend the Constitution. I have put that Oath to action, in the courtroom and while serving in our Navy around the country, overseas, at sea, and in active combat zones. I stand by my representation in this case.