Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. John Russell, nominee to be United States District Judge for the Northern District of Oklahoma

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 the statement. A judge's value judgment is not an acceptable basis on which to resolve constitutional issues. A judge should apply the law to the facts in a fair and impartial manner and follow binding precedent when answering constitutional questions.

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 quotation implies that the Judge consciously wrote opinions that were knowingly contrary to binding Supreme Court precedent. If this implication is correct, I do not agree that his approach was appropriate.

3. **Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be a disqualification for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes.

4. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes.

5. **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 statutes controlling federal habeas relief are found at 28 U.S.C. §§ 2241 – 2254. Section 2254 gives federal courts jurisdiction to review claims by a prisoner subject to a judgment in State court who claims to be "in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). The law governing habeas petitions under § 2254 is well developed. Subsection (d) states that an application of 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."

6. **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: A prisoner subject to a federal criminal judgment may seek relief from the judgment and sentence under several specific federal statutes: direct appeal of the federal judgment (28 U.S.C. § 1291); petition for writ of habeas corpus (28 U.S.C. § 2241); a motion to vacate, set aside, or correct a sentence (28 U.S.C. § 2255); a compassionate release motion for modification of a term of imprisonment (18 U.S.C. § 3582(c)). Each statutory provision carries with it an extensive body of law and precedent.

7. **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 applicants' race in offering admission to prospective students. The Supreme Court held that both schools' race-based admissions policies and processes failed strict scrutiny and violated the Equal Protection Clause of the Fourteenth Amendment.

8. **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 decisions in my role as a shareholder in the GableGotwals and Fellers Snider law firms. I also interviewed candidates for

positions at the U.S. Attorney's Office and at Bracewell & Patterson and provided feedback to those making the hiring decision.

9. **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.

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

    Response: No.

11. **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.

12. **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).

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

    Response: The Supreme Court held that a Colorado law violated the First Amendment free speech rights of a website designer. A business may refuse, on religious grounds, to provide website design services to same-sex couples when doing so would require the designer to create expressive designs that speak messages with which the designer disagrees.

14. **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: The Supreme Court cited part of this quotation in *303 Creative LLC v. Elenis*, 600 U.S. 570, 585 (2023). *Barnette* is good law and binding precedent.

15. **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 regulating 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); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022). In analyzing the question, 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. If the regulation "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny." *Id*. at 171

16. **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 is not protected by the First Amendment. *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 for threatening speech, the government must prove "that the defendant had some understanding of his statements' threatening character," and the prosecution need only prove "a recklessness standard" of *mens rea*. *Counterman v. Colorado*, 143 S. Ct. 2106, 2113 (2023).

17. **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 characterized facts as "questions of who did what, when or where, how or why." *E.g., U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). Black's Law Dictionary defines "fact" as "[s]omething that actually exists; an aspect of reality" or "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." Black's Law Dictionary (11th ed. 2019). It further defines "question of

law” as “[a]n issue to be decided by the judge, concerning the application or interpretation of the law.” Black’s Law Dictionary (11th ed. 2019).

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

    Response: I do not believe that any one of the four primary purposes of sentencing is more important than the others. A judge must consider the seven factors in 18 U.S.C. § 3553(a) to make an individualized decision to formulate a sentence that is “sufficient, but not greater than necessary” to achieve the four statutory sentencing purposes. The statute does not rank any one factor as more important than another. If confirmed, I would follow 18 U.S.C. § 3553(a) and apply binding precedent from the Supreme Court and the Tenth Circuit interpreting those factors.

19. **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 Canons of the Code of Conduct for United States Judges prohibit me from commenting on the quality of the reasoning of Supreme Court precedents. If confirmed, my duty would be to follow the binding precedent from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

20. **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 Canons of the Code of Conduct for United States Judges prohibit me from commenting on the quality of the reasoning of Supreme Court precedents. If confirmed, my duty would be to follow the binding precedent from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

    Response: Section 1507 of Title 18 provides that, “Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.”

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

    Response: I am not aware of any precedent of the Supreme Court or the Tenth Circuit holding that 18 U.S.C. § 1507 is constitutional on its face. I am aware that the Supreme Court rejected a challenge to a similar state statute in *Cox v. Louisiana*, 379 U.S. 559 (1965). As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit me from offering personal opinions about the constitutionality of a federal statute because that issue could come before me, and I do not want to prejudge any issue. If confirmed, my duty would be to follow the binding precedent from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

23. **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 in its analysis of constitutional interpretation. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316, 122 S. Ct. 2242, 2249 n. 21 (2002). If confirmed, I would follow the binding precedent from the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

24. **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 come before the courts again. I therefore believe it is permissible as a judicial nominee to state my opinion that the case was correctly decided.

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

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

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

       Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

Response: The Supreme Court overruled *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Dobbs* is binding precedent, and I will apply it faithfully and to the best of my ability.

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

Response: The Supreme Court overruled *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Dobbs* is binding precedent, and I will apply it faithfully and to the best of my ability.

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

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

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?**

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response: As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit commenting on cases and matters that may come before me if confirmed. If confirmed, my duty would be to follow binding precedents of the Supreme Court and the Tenth Circuit, and I pledge to do so faithfully and to the best of my ability.

25. **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 standard set forth in binding precedent of the Supreme Court and Tenth Circuit. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court established the following standard: "[w]hen 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.'" *Id*. at 2126.

26. **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?**
    b. **Are you currently in contact with anyone associated with Demand Justice? If so, who?**
    c. **Have you ever been in contact with anyone associated with Demand Justice? If so, who?**

    Response to all subparts: No.

27. **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?**
    b. **Are you currently in contact with anyone associated with the Alliance for Justice? If so, who?**
    c. **Have you ever been in contact with anyone associated with the Alliance for Justice? If so, who?**

    Response to all subparts: No.

28. **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?**
    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.**
    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.**
    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 to all subparts: No.

29. **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?**
    b. **Are you currently in contact with anyone associated with the Open Society Foundations? If so, who?**
    c. **Have you ever been in contact with anyone associated with the Open Society Foundations? If so, who?**

    Response to all subparts: No.

30. **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?**
    b. **Are you currently in contact with anyone associated with Fix the Court? If so, who?**
    c. **Have you ever been in contact with anyone associated with Fix the Court? If so, who?**

    Response to all subparts: No.

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

    Response: On March 16, 2023, I submitted my resume to Senator James Lankford to be considered for one of the two judicial vacancies in the Northern District of Oklahoma. On April 14, 2023, I interviewed with the Advisory Panel established by Senators Lankford and Mullin. On April 28, 2023, I interviewed with Senator Lankford. On June 5, 2023, Senator Lankford informed me that I had been recommended to the White House Counsel's Office as a potential candidate for nomination. On June 12, 2023, I interviewed with attorneys from the White House Counsel's Office. On August 26, 2023, the White House Counsel's Office informed me that I would be moving forward with the selection process. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On October

18, 2023, the President announced his intent to nominate me. On October 24, 2023, the President sent my nomination to the United States Senate.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

37. **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.

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

    Response: On June 12, 2023, I interviewed with attorneys from the White House Counsel's Office as a potential candidate for nomination. On August 26, 2023, I received communication from the White House Counsel's office that the nomination process would move forward, and I spoke with the Justice Department about the process. Since then, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice as well as attorneys from the White House Counsel's Office.

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

    Response: On November 22, 2023, I received questions from the Committee through the Department of Justice Office of Legal Policy. I drafted my answers, and, where necessary, conducted legal research. I reviewed my records where appropriate. I shared my draft with OLP, which provided feedback. I reviewed and considered OLP's feedback. I submitted my answers to the Committee.

Senator Mike Lee
Questions for the Record
John David Russell, Nominee for District Court Judge for the Northern District of Oklahoma

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

   Response: If confirmed as a district judge, my philosophy will be to apply the rule of law in all cases in a fair and impartial manner. In doing so, I will treat all parties and their counsel with respect. I will work diligently to ensure that all who come before me leave with the understanding that their case has been carefully considered and fairly decided. I will be fully prepared for every case.

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

   Response: In deciding a case turning on the interpretation of a federal statute, I would faithfully apply Supreme Court and Tenth Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends there. *Bostock v. Clayton County*, 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."). If the text is not clear, I would consult the sources authorized by Supreme Court and Tenth Circuit precedent, which include cases from other jurisdictions and recognized canons of statutory construction and interpretive principles. If the question remains unresolved, I would consider the types of legislative history that the Supreme Court and the Tenth Circuit have identified as reliable. *Id.* (noting that legislative history may be helpful "when interpreting *ambiguous* statutory language").

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

   Response: In deciding cases that turned on the interpretation of a constitutional provision, I would faithfully apply Supreme Court and Tenth Circuit precedent. In certain contexts, the Supreme Court has said that the first step of constitutional interpretation is to consider the text of the Constitution, applying the original public meaning of the text. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (interpreting the Second Amendment under the original public meaning). If there is no applicable precedent, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Tenth Circuit. For example, when evaluating a firearm regulation under the Second Amendment, the Supreme Court "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *New York State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

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

Response: The text and original public meaning are determinative of questions concerning the interpretation of certain constitutional provisions. *See, e.g., New York State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111, 2136-2137 (2022); *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2411 (2022). If confirmed, I would faithfully follow binding precedent from the Supreme Court and the Tenth Circuit when interpreting the Constitution.

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

Response: Please see the response to Question 2.

6. **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 enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I would faithfully follow binding precedent of the Supreme Court and the Tenth Circuit in determining the plain meaning of a statute or constitutional provision.

7. **What are the constitutional requirements for standing?**

Response: To establish standing, a plaintiff must suffer "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).

8. **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 Congress. Congress is limited to those powers enumerated in the Constitution. The Supreme Court has recognized, however, that the express grant of powers to Congress in the Constitution "necessarily implies the grant of all usual and suitable means for the execution of the powers granted," and that "Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it." *McCulloch v. Maryland*, 17 U.S. 316, 323-324 (1819).

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

Response: The Supreme Court has stated that "[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 Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012). I would

evaluate the constitutionality of such a law by following the procedure outlined in response to Question 3.

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

Response: Yes. The Supreme Court has held that the Due Process Clause protects fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997) (quotation marks and citations omitted). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

11. What rights are protected under substantive due process?

Response: Please see response to Question 10.

12. If you believe substantive due process protects some personal rights such as a right to contraceptives, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that a state law banning the use of contraceptives by married couples was a violation of substantive due process under the Constitution. The Court further held in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that the Constitution does not protect the economic rights at stake in *Lochner v. New York.* If confirmed, I will be bound to follow Supreme Court precedent.

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

Response: Congress's power is limited by Article I, Section 8. The Supreme Court has identified three categories of activity that Congress may regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities" and (3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995).

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

Response: A "suspect class" is defined as, "a statutory classification based on race, national origin, or alienage, and thereby subject to strict scrutiny under equal-protection analysis." Black's Law Dictionary (11th ed. 2019) The Supreme Court has

stated that "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

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

Response: The Supreme Court has stated that the "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch." *United States v. Lopez*, 514 U.S. 549, 552 (1995). "[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)).

16. 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: If confirmed, I would decide a case of this type in the same way I would decide all cases, by faithfully applying binding precedent from the Supreme Court and the Tenth Circuit in a fair and impartial manner to the facts presented. As an example, I would apply the Supreme Court's decision in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), holding that the President had no power to act except in those cases that are expressly or implicitly authorized by the Constitution or an Act of Congress. Please also see the responses to Questions 2, 3, 4, and 5.

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

Response: Judges must apply the law in a fair and impartial manner to the facts of each case. A judge's personal feelings, opinions, or beliefs are not proper in considering a case.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: A judge should avoid both outcomes; each is equally undesirable.

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

downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have not researched this data and judicial trends over history. I therefore do not have a basis to form an opinion on this subject. If confirmed, I will faithfully apply binding precedent of the Supreme Court and the Tenth Circuit in a fair and impartial manner.

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

Response: "Judicial review" is defined as "[a] court's power to review the actions of other branches or levels of government." Black's Law Dictionary (11th ed. 2019). "Judicial supremacy" is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019). *Marbury v. Madison*, 5 U.S. 137, 178 (1803) stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

21. 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: The question of how elected officials should balance their official obligations is one for policymakers and elected officials to consider. The Constitution requires government officials, elected and appointed, to take an oath to uphold the Constitution. U.S. Const. art. VI, §3. 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."). If presented with a case raising this question, I would faithfully follow binding precedent from the Supreme Court and the Tenth Circuit regardless of my personal views.

22. 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: Hamilton expressed his belief that the role of the federal courts is to interpret and apply the law, while the role of the legislative and executive branches is

to make or enforce the law. Judges must only decide the cases and controversies brought before them.

23. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If confirmed, I would apply binding precedent from the Supreme Court and the Tenth Circuit. If there is no controlling precedent, a district judge should decide the case in accordance with the Constitution and the precedents of the Supreme Court and the Tenth Circuit. These authorities will provide the proper analysis to follow and sources to consult to arrive at the correct outcome consistent with the rule of law.

24. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: A defendant's race, gender, nationality, sexual orientation, or gender identity play no role in a judge's sentencing analysis. The factors to be applied at sentencing include those set out in 18 U.S.C. § 3553(a), binding precedent from the Supreme Court and the Tenth Circuit, and the relevant provisions of the United States Sentencing Guidelines. The Sentencing Guidelines specifically state that race and national origin "are not relevant in the determination of a sentence." U.S.S.G. §5H1.10.

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

Response: I am not familiar with the statement by the Biden Administration referenced in the question, and I do not know the context in which it was made. "Equity" is defined as, among other things, "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). "Equality" is defined as, among other things, "[t]he quality, state, or condition of being equal; esp., likeness in power

or political status." *Id*. If presented with a question involving these terms, I would faithfully apply the binding precedent of the Supreme Court and the Tenth Circuit in a fair and impartial manner..

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

Response: Please see the response to Question 25.

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

Response: As noted above, I am not familiar with the Biden Administration's statement and its use of the term "equity" or the context in which the statement was made. The Equal Protection Clause of the Fourteenth Amendment provides that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not aware of any Supreme Court or Tenth Circuit precedent analyzing and applying the Equal Protection Clause to the definition provided in Question 25.

28. How do you define "systemic racism?"

Response: I do not have my own definition of this term. Racism is defined as, among other things, the "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." Black's Law Dictionary (11th ed. 2019). If the defined conduct occurs on a systemic basis, it could be defined as "systemic racism." Merriam-Webster's Dictionary defines systemic racism 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)." Merriam-Webster's Dictionary (2022). I am not aware of any Supreme Court or Tenth Circuit decision defining "systemic racism."

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

Response: I do not have my own definition of this term. It has been defined as, among other things, "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: Please see the responses to Questions 28 and 29.

Senator John Kennedy
Questions for the Record

John D. Russell

1. **Are there any circumstances under which it is justifiable to sentence a criminal defendant to death? Please explain.**

   Response: By federal statute, defendants convicted of certain offenses such as murder; attempted murder of a witness, juror, or court officer; treason; and large-scale drug trafficking can be sentenced to death. 18 U.S.C. § 3591. The procedure for courts to follow in determining whether death is the appropriate sentence are also set out by federal statute. 18 U.S.C. §§ 3591-3599. In cases where the government has provided notice that it intends to seek the death penalty, the jury that found guilt or the court must hear evidence of mitigating and aggravating circumstances, return special findings based on that evidence, and make findings on the appropriate sentence. 18 U.S.C. § 3593. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment further on this matter. If confirmed, I would faithfully follow binding precedent of the Supreme Court and the Tenth Circuit as well as the federal statutory procedure for sentencing defendants.

2. **Except when a statutory maximum controls, when is it appropriate for a sentencing judge to impose a sentence below the range provided by the Sentencing Guidelines?**

   Response: In every criminal case, a judge must consider the seven factors in 18 U.S.C. § 3553(a) to make an individualized decision to formulate a sentence that is "sufficient, but not greater than necessary" to achieve the four statutory purposes of sentencing. A court "must make an individualized assessment based on the facts" of each case, recognizing that a within-Guidelines sentence may be greater than necessary to serve the purposes of sentencing. *Gall v. United States*, 552 U.S. 38, 50 (2007); *Kimbrough v. United States*, 552 U.S. 85, 91 (2007). A court "may vary [from the Guidelines range] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 552 U.S. at 101. Variances are sentences outside of the guideline range that are not imposed within the Guidelines framework. A court can also depart downward from the applicable Guideline range if the facts support one of the departure grounds found in Chapter Five of the Sentencing Guidelines. Departures are sentences outside of the guideline range authorized by specific policy statements in the *Guidelines Manual*. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment further on this matter. If confirmed, I would faithfully follow the binding precedent of the Supreme Court and the Tenth Circuit, the federal statutory procedure, and the Sentencing Guidelines when sentencing defendants.

3. **Is the U.S. Supreme Court a legitimate institution?**

   Response: Yes.

4. **Is the current composition of the U.S. Supreme Court legitimate?**

   Response: Yes.

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

   Response: If confirmed as a district judge, my philosophy will be to apply the rule of law in all cases in a fair and impartial manner. In doing so, I will treat all parties and their counsel with respect. I will work diligently to ensure that all who come before me leave with the understanding that their case has been carefully considered and fairly decided. I will be fully prepared for every case.

6. **Is originalism a legitimate method of constitutional interpretation?**

   Response: "Originalism" is defined as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Black's Law Dictionary (11th ed. 2019). The original public meaning of the text of the Constitution as of the time of the ratification of the language in question controls the meaning of the Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (interpreting the Second Amendment under the original public meaning); *New York State Rifle & Pistol Ass'n, v. Bruen*, 142 S. Ct. 2111, 2136-2137 (2022); *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2411 (2022). If confirmed, I would faithfully follow the binding precedent of the Supreme Court and the Tenth Circuit as well as the original public meaning of the text when interpreting the Constitution.

7. **If called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the U.S. Courts of Appeals, to what sources of law would you look for guidance?**

   Response: If there is no controlling precedent to resolve a constitutional question, the Supreme Court has held that the original public meaning of the text of the Constitution as of the time of the ratification of the language in question controls the meaning of the Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (interpreting the Second Amendment under the original public meaning).

8. **Is textualism a legitimate method of statutory interpretation?**

Response: Textualism is defined as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Black's Law Dictionary (11th ed. 2019). The Supreme Court has held that the ordinary public meaning of a statute at the time of enactment controls its meaning. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I would faithfully follow the binding precedent of the Supreme Court and the Tenth Circuit as well as the ordinary public meaning of the text when interpreting a statute.

9. When is it appropriate for a judge to look beyond textual sources when determining the meaning of a statute or provision?

Response: In deciding cases turning on the interpretation of a federal statute, I would faithfully apply Supreme Court and Tenth Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends there. *Bostock v. Clayton County*, 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.") If the text is not clear, I would consult the sources authorized by Supreme Court and Tenth Circuit precedent, which include cases from other jurisdictions and recognized canons of statutory construction and interpretive principles. If the question remains unresolved, I would consider the types of legislative history that the Supreme Court and the Tenth Circuit have identified as reliable. *Id.* (noting that legislative history may be helpful "when interpreting *ambiguous* statutory language").

a. Should a judge ever look beyond textual sources when a statute's meaning is clear? Please explain.

Response: Please see the response to Question 9.

10. Does the meaning (rather than the applications) of the U.S. Constitution change over time? If yes, please explain in detail the circumstances under which the U.S. Constitution's meaning changes over time and the relevant constitutional provisions.

Response: No. The Constitution has a fixed meaning, and its provisions can only be modified through the amendment process in Article V.

11. What is the role of legislative history in determining a statute's meaning?

Response: Please see the response to Question 9.

12. When is it appropriate for a district judge to issue a nationwide injunction? Please also explain the legal basis for nationwide injunctions and the relevant factors a district judge should consider before issuing one.

Response: Generally, Federal Rule of Civil Procedure 65 governs the issuance of injunctions by federal courts. Injunctions that have nationwide effect and applicability have been issued by federal courts. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Neither the Supreme Court nor the Tenth Circuit has issued binding precedent as to the precise circumstances in which a nationwide injunction may be authorized. The Tenth Circuit has stated in *dicta* that an individual class representative may not have standing to seek a nationwide injunction in her own right over actions not directly affecting her. *See Colorado Cross Disability Coalition v. Abercrombie & Fitch*, 765 F.3d 1205, 1212 (10th Cir. 2014).

13. **After the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), a federal district judge in Washington, DC suggested that the Thirteenth Amendment may provide a basis for a constitutional right to abortion.**

    a. **Do you agree?**

    Response: I am not aware of the case referenced in this question. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment further on this matter.

    b. **Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?**

    Response: Lower court judges must apply binding precedent of the Supreme Court and the Tenth Circuit.

14. **Is there ever an appropriate circumstance in which a district judge may ignore or circumvent or seek to undermine a precedent set by the circuit court under which it sits or the U.S. Supreme Court?**

    Response: No.

15. **Would you faithfully apply all precedents of the U.S. Supreme Court?**

    Response: Yes.

16. **Would you faithfully apply the U.S. Supreme Court's decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), including any dicta, *see Utah Republican Party v. Cox*, 892 F.3d 1066, 1079 (10th Cir. 2018)?**

    Response: Yes.

17. **Please describe the analysis you would use to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).**

    Response: I would apply the standard set forth in binding precedent of the Supreme Court and the Tenth Circuit. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court established the following standard: "[w]hen 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.'" *Id*. at 2126.

18. **When should a district judge deem a previously unrecognized unenumerated right to be "fundamental" and therefore entitled to protection under the Fourteenth Amendment?**

    Response: The Supreme Court established a test to determine whether a claimed right is among the unenumerated rights protected by the Due Process Clause: the asserted right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed, I will faithfully apply Supreme Court and Tenth Circuit precedent.

19. **Please identify any unrecognized unenumerated rights that could plausibly be worthy of fundamental status.**

    Response: The Supreme Court has held that the Due Process Clause protects fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997) (quotation marks and citations omitted). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923). As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit me from opining on unenumerated, unarticulated rights in the Constitution because those questions could come before me if confirmed. If confirmed, I will faithfully apply Supreme Court and Tenth Circuit precedent.

20. What is the difference between judicial review and judicial supremacy?

Response: "Judicial review" is defined as "[a] court's power to review the actions of other branches or levels of government." Black's Law Dictionary (11th ed. 2019). "Judicial supremacy" is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019). *Marbury v. Madison*, 5 U.S. 137, 178 (1803) stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

21. Should a district judge give deference to an agency's interpretation of a statute that imposes criminal penalties? Please explain in detail.

Response: In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984), the Supreme Court established a two-part test for reviewing a regulatory agency's construction of a statute: first, courts must ask "whether Congress has directly spoken to the precise question at issue [and if] the intent of Congress is clear, that is the end of the matter"; second, if the statute is ambiguous, courts will defer to the administrative agency's interpretation if it is reasonable and "based on a permissible construction of the statute." The Supreme Court recently expressed concern that an agency's interpretation of an ambiguous statute "gives rise to serious vagueness concerns in light of the [Clean Water Act's] criminal penalties. Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Sackett v. EPA*, 598 U.S. 651, 680-681 (2023) (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016). If confirmed, I will faithfully apply Supreme Court and Tenth Circuit precedent.

22. Please describe how courts determine whether an agency's action violates the Major Questions Doctrine.

Response: Please see the response to Question 21.

23. Please identify one federal judge or justice, current or former, whose service on the bench most inspires you and explain why.

Response: In my 35 years practicing law, I have had the good fortune of appearing before many outstanding federal judges around the United States, and from each I have taken some wisdom that I would employ if confirmed. There is one judge, however, before whom I appeared in a number of cases, the Honorable Thomas R. Brett, who demonstrated every day on the bench the right way to handle a case. Judge Brett knew how to get to the core issue quickly, and he knew how to move cases while showing respect for the parties and their counsel. Judge Brett was known for his homespun

sayings that had a way of getting to the point quickly. In all events, every litigant came away from his court knowing they had been treated fairly and impartially.

24. You have been nominated to serve as a federal district judge. To the best of your recollection, please list up to 10 cases in which you served as lead counsel in a case tried before a jury in federal district court.

Response:
United States v. Clifton, Case No. 95-CR-36-TCK (N.D. Okla.)
United States v. Knox, Case No. 95-CR-41-TCK (N.D. Okla.)
United States v. O'Brien, Case No. 96-CR-26-TCK (N.D. Okla.)
United States v. Walker, Case No. 96-CR-84-HDC (N.D. Okla.)
United States v. Lorson, Case No. 97-CR-135-TCK (N.D. Okla.)
United States v. Revis, Case No. 99-CR-68-CVE (N.D. Okla.)
United States v. Hooks, Case No. 00-CR-149-K (N.D. Okla.)
United States v. Marshall, Case No. 00-CR-155-TRB (N.D. Okla.)
United States v. Bumblis, Case No. 05-CR-187-CMH (E.D. Va.)
United States v. Pasillas-Castenon, Case No. 06-CR-175-HDC (N.D. Okla.)
United States v. Koch, Case No. 10-CR-48-CVE (N.D. Okla.)

25. To the best of your recollection, please list all instances in which you presented oral argument before a U.S. Court of Appeals panel.

Response:
United States v. Knox, Case No. 95-5274 (10th Cir.)
United States v. Clifton, Case No. 96-5018 (10th Cir.)
United States v. O'Brien, Case Nos. 96-5228, 96-5229, and 96-5230 (10th Cir.)
United States v. Viefhaus, Case No. 97-5207 (10th Cir.)
United States v. Martin, Case No. 98-5066 (10th Cir.)
United States v. Le, Case No. 98-5088 (10th Cir.)
United States v. Hicks, Case No. 98-5178 (10th Cir.)
United States v. Brown, Case No. 98-5206 (10th Cir.)
United States v. Moore, Case No. 98-5238 (10th Cir.)
United States v. Pasillas-Castenon, Case No. 07-5101 (10th Cir.)
Oldenkamp v. United American Ins. Co., Case Nos. 09-5032 & 09-5039 (10th Cir.)
United States v. Koch, Case No. 10-5135 (10th Cir.)

26. At the Committee's November 15, 2023, hearing, you indicated that you would give Senator Kennedy a copy of the materials provided to you by the White House to prepare you for questioning. Please provide those materials or confirm how and when you will be providing them.

Response: The Department of Justice has advised me that the White House will be addressing this question under separate cover.

Questions from Senator Thom Tillis
for John David Russell to be United States District Judge for the Northern District of Oklahoma

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 and background are irrelevant to interpreting and applying the law.

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

   Response: Impartiality is an expectation for a judge. Canon 3 of the Code of Conduct for United States Judges requires judges to perform the duties of the office fairly, impartially, and diligently.

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

   Response: "Judicial activism" is defined 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." Black's Law Dictionary (11th ed. 2019). I do not consider judicial activism 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: When a judge faithfully interprets the law, the outcome may conflict with the judge's personal views. But cases must be decided based on the rule of law without bias or prejudice. Canon 3(A)(1) of the Code of Conduct for United States Judges states that a judge "should not be swayed by partisan interests, public clamor, or fear of criticism." If confirmed, I will faithfully follow the law and apply it impartially to the facts of the case before me.

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 follow and apply binding precedent interpreting the Second Amendment, including the Supreme Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n 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: In any case presenting the defense of qualified immunity, I would faithfully apply binding precedent of the Supreme Court and the Tenth Circuit. Under recent Tenth Circuit authority, "[t]he 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*, 79 F.4th 1153, 1162 (10th Cir. 2023) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam); *Pearson v. Callaham*, 555 U.S. 223, 231 (2009)). 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 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: Please see the response to Question 7. If confirmed, I will faithfully apply binding precedent from the Supreme Court and the Tenth Circuit governing qualified immunity. The Canons of the Code of Conduct for United States Judges prohibit me from offering a personal opinion on the legal doctrine.

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

Response: Please see the 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: Congress has the power under the Intellectual Property Clause to grant authors and inventors exclusive rights in their writings and discoveries. U.S. Const. art. I, § 8. Courts should enforce intellectual property rights granted by Congress to authors and inventors. *See Golan v. Holder*, 565 U.S. 302 (2012); *see also*, *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339-1340 (Fed. Cir. 2007) ("Unquestionably, a patentee who holds all the exclusionary rights and suffers constitutional injury in fact from infringement is one entitled to sue for infringement in its own name."). If a holder of intellectual property rights believes that those

rights have been violated, the holder can seek to enforce those rights by bringing a case in federal district court. If the holder brings a suit, the court will resolve the case based on the claims and defenses raised in the case. If confirmed, I will faithfully apply binding precedent from the Supreme Court, the Tenth Circuit, and the Federal Circuit on intellectual property issues that 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: I have heard of the practice of filing suit in a division of a district court to secure a particular judge, but I have not heard of any inappropriate conduct. The Northern District of Oklahoma has only a single division, and cases filed in the Northern District are randomly assigned to one of four magistrate judges or one of four active and senior district judges who hear civil cases.

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: If confirmed, I pledge to faithfully apply binding legal precedent from the Supreme Court and the Tenth Circuit on any patent eligibility issues that would come before me. As a judicial nominee, the Canons of the Code of Conduct for United States Judges prohibit me from commenting on the quality of the reasoning of Supreme Court precedents. If confirmed, my duty would be to follow binding precedent from the Supreme Court, the Tenth Circuit, and the Federal Circuit, and I pledge to do so faithfully and to the best of my ability.