Senator Chuck Grassley, Ranking Member
Questions for the Record
Charlotte Sweeney
Judicial Nominee to the United States District Court for the District of Colorado

1. **As a lawyer, you have been very active in opposing employment discrimination. You have done this through cases you have taken, through your work on Colorado's Equal Pay Equal Work Act, and through media appearances. You've worn a lot of hats as an advocate. I would appreciate hearing whether you have worn any hats as a neutral decision maker. And whether or not you have, please describe the difference you see between being an advocate and being a neutral judge on the bench.**

   Response: I have previously served as a neutral. I was jointly selected by the parties to be the chief arbitrator of a three-person arbitration panel in 2018. This matter involved claims asserted by a former employer against its former employee related to an alleged breach of contract and breach of the Colorado Uniform Trade Secrets Act. Primarily, the employer claimed that a former employee had contacted the employer's clients and taken customers to the employee's new employer. The panel found in favor of the employer on four counts and in favor of the employee on 28 counts.

   The role of judge as entirely distinct from an advocate. A judge must remain impartial, objective, and dedicated to the rule of law. A judge cannot be guided by personal opinion, sympathy, or public pressure. As an advocate for over 26 years, I can assure you that I respect and honor the role of the impartial judge. It is critical to maintain and foster the public's faith in the judiciary system and serves the parties' best interests as well. I am confident in my ability to leave my role as an advocate behind and assume the neutral role of judicial officer.

2. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

   Response: I am unfamiliar with the term "super precedent." If confirmed, I will follow all precedent of the Supreme Court without hesitation or reservation.

3. **You can answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Gonzales v. Carhart* correctly decided, and is it settled law?**
   f. **Was *District of Columbia v. Heller* correctly decided, and is it settled law?**
   g. **Was *McDonald v. City of Chicago* correctly decided, and is it settled law?**

h. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided, and is it settled law?

i. Was *Sturgeon v. Frost* correctly decided, and is it settled law?

j. Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided, and is it settled law?

Response: The cases listed above are all binding precedent that I will faithfully uphold without reservation, regardless of my personal opinion about whether they were "correctly decided." In general, it is inappropriate for a judicial nominee to comment about the merits of Supreme Court decisions, but because the holdings in these cases are beyond dispute and unlikely to ever come before me if I were to be confirmed, I will state that the following cases listed above were correctly decided: *Brown v. Board of Education* and *Loving v. Virginia*.

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

Response: I am not familiar with the above comment. I do not use the term "living constitution."

5. 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: If confirmed, I will follow precedent of the Supreme Court and the Tenth Circuit regardless of my own "independent value judgment," as that is the responsibility and obligation of a U.S. District Judge.

6. Is whether a specific substance causes cancer in humans a scientific question?

Response: I am not clear about the context, but causation of a medical condition is generally the subject of expert testimony.

7. Is when a "fetus is viable" a scientific question?

Response: The determination of when a fetus can survive outside the womb is generally a medical question, though I am aware of the religious considerations at issue.

8. Is when a human life begins a scientific question?

Response: Please see my response to Question 7.

9. Does the president have the power to remove senior officials at his pleasure?

Response: The President's power is likely governed by the applicable constitutional and statutory provisions, as well as applicable precedent. I would follow the precedent of the Supreme Court and Tenth Circuit on this, and any other, issue.

10. Is a social worker qualified to respond to a domestic violence call where there is an allegation that the aggressor is armed?

Response: The answer to this question would depend on the facts applicable to an individual case and individual social worker.

11. Do you believe that local governments should defund police departments and law enforcement or otherwise reallocate funds away from police departments to other support services? Please explain.

Response: As a judicial nominee, I do not feel it would appropriate to comment on this issue, as the question of the appropriate allocation of resources is the subject of ongoing public debate and legislative action.

12. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: In recognizing the existence of a Second Amendment right of an individual to keep and bear arms in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court did not establish the appropriate level of scrutiny that applies to claims of infringement of such right. If confirmed, I would apply Supreme Court and Tenth Circuit precedent. The Tenth Circuit has applied intermediate scrutiny in several Second Amendment cases. *See, e.g., United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) (noting that *Heller* did not specify an applicable level of scrutiny but did conclude that the rational basis test is not appropriate for Second Amendment challenges and "we must apply some level of heightened scrutiny and, in doing so, must look to analogous cases for guidance on precisely what level to apply"); *Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015).

13. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

Response: I do not believe the Supreme Court has decided this issue yet. As such, it would be inappropriate for me to answer this question as it is the subject of ongoing public and legislative debate and may come before me if confirmed.

14. Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?

Response: Please see my response to Question 13.

15. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: RFRA prohibits the federal government from substantially burdening an individual's exercise of religion unless the government can demonstrate that the law or regulation furthers a compelling government interest and is the least restrictive means of furthering that interest. A court should defer to the individual when determining whether a religious belief is sincerely held, and its narrow function is to determine whether the asserted religious belief reflects an "honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

b. How is a burden deemed to be "substantial[]" under current caselaw? Do you agree with this?

Response: In *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141 (1987), the Supreme Court defined a substantial burden may be found where there is "substantial pressure on an adherent to modify his behavior and violate his beliefs." Whether or not I agree with precedent is irrelevant; I will faithfully uphold the precedent of the Supreme Court.

16. Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?

Response: I am not familiar with the above quote nor Judge Reinhardt's legal philosophy. If confirmed, I will steadfastly follow the Code of Judicial Conduct and will approach each case individually in accordance with my own set of judicial standards. Judges owe a primary duty to the law and a secondary duty to the parties that appear before them. With respect to the former duty to the law, a judge must uphold the Constitution and the laws of the United States. In any case involving constitutional or statutory interpretation, the text and binding precedent govern. With respect to the latter duty to the parties, I believe in absolute preparedness, thorough review of the record and legal authority, and concise but thorough decision-making and drafting. In addition, all parties must be treated fairly, impartially, and with an open mind.

17. What is the operative standard in the Tenth Circuit for determining whether a statement is not protected speech under the "fighting words" doctrine?

Response: The Tenth Circuit has explained that "fighting words" are epithets "(1) directed at the person of the hearer, (2) inherently likely to cause a violent reaction, and (3) playing no role in the expression of ideas." *Cannon v. City & County of Denver*, 998 F.2d 867, 873 (10th Cir. 1993). *Klen v. City of Loveland*, 661 F.3d 498, 509 (10th Cir. 2011).

18. What is the operative standard in the Tenth Circuit for determining whether a statement is not protected speech under the true threats doctrine?

Response: The true threats doctrine requires proof that a reasonable person would understand the communication to be a threat. *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015). Under the reasonable person standard, "[t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made." *United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015) (a statement is a true threat "so long as a reasonable recipient could conclude, based on the language of the communication and the context in which it is delivered, that this was in fact a veiled threat of violence by the defendant"). The Tenth Circuit does not rigidly construe the communication requirement and "[a] defendant cannot escape potential liability simply by using the passive voice or couching a threat in terms of 'someone' committing an act of violence . . . ." *Id.* at 1201. The content inquiry includes consideration of where a statement was made and how an audience reacted. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (finding that statements made at political protest and at which the audience laughed were "political hyperbole" and not true threats); *Wheeler*, 776 F.3d at 743 (recognizing a recipient's reaction to a message is relevant)."

19. 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: Yes. I spoke with Chris Kang on two or three occasions in the spring of 2021 (dates unknown). Our conversations were limited to the explanation of the judicial nomination process and what steps were to be expected in applying for the District Court position in Colorado. During our last call, Mr. Kang also congratulated me on my nomination.

20. 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 Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No.

21. 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.

22. **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.

23. **Fix the Court is purportedly a "non-partisan, 501©(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.

24. 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: In response to the vacancy announcement for an opening on the U.S. District Court for the District of Colorado, I submitted my application materials to the office of Senator Bennet on April 16, 2021. On May 7, 2021, I was invited to interview with Senator Bennet and Senator Hickenlooper's District Court Advisory Committee. That interview occurred on May 11, 2021. On May 13, 2021, I was contacted by Senator Bennet's scheduler to set up an interview with Senator Bennet and Senator Hickenlooper. That interview occurred on May 16, 2021. On May 22, 2021, I was contacted by the White House Counsel's Office to schedule an interview, which took place on May 25, 2021. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On August 5, 2021, the President announced his intent to nominate me.

25. 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: Yes. I spoke with Chris Kang on two or three occasions in the spring of 2021 (dates unknown). Our conversations were limited to the explanation of the judicial nomination process and what steps were to be expected in applying for the District Court position in Colorado. During our last call, Mr. Kang also congratulated me on my nomination.

26. 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.

27. 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.

28. 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.

29. 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.

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

Response: Please see my response to Question 24. Following my initial interview with White House Counsel's office, I have additional communication with White House Counsel's office and the Office of Legal Policy regarding completing and submitting my financial disclosure records, my Senate Judiciary Questionnaire, what to expect at the hearing, and my need to appear at the hearing remotely.

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

Response: I received these questions via email on October 27, 2021. I thereafter prepared my written response after conducting research where necessary. I submitted my responses to the Office of Legal Policy for feedback and then finalized my responses.

Senator Marsha Blackburn
Questions for the Record to Charlotte N. Sweeney
Nominee for the District of Colorado

1. **How would you describe your judicial philosophy? Would you describe yourself as an originalist?**

   Response: My judicial philosophy is that judges owe a primary duty to the law and a secondary duty to the parties that appear before them. With respect to the former duty to the law, a judge must uphold the Constitution and the laws of the United States. In any case involving constitutional or statutory interpretation, the text and binding precedent govern. With respect to the latter duty to the parties, I believe in absolute preparedness, thorough review of the record and legal authority, and concise but thorough decision-making and drafting. In addition, all parties must be treated fairly, impartially, and with an open mind.

2. **Is it ever proper for judges to indulge their own policy preferences in determining what the law means?**

   Response: No. All determinations must be based solely on the facts of each case and the applicable governing law.

Nomination of Charlotte N. Sweeney
to be United States District Judge for the District of Colorado Questions for the Record
Submitted October 27, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: As a general matter, it is inappropriate for a judicial nominee to give an opinion about whether a Supreme Court case was correctly decided. If confirmed, I will follow all Supreme Court precedent without reservation.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: The Second Amendment right to keep and bear arms is an individual right belonging to individual persons. *District of Columbia v. Heller*, 554 U.S. 570, 578-79 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (extending applicability of *Heller* to the states).

5. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).**

   Response: In *Tandon v. Newsom*, the Supreme Court held that a law or regulation is not "neutral and generally applicable" when it treats "any comparable secular activity more favorably than religious exercise" and is therefore subject to strict scrutiny under the Free Exercise Clause of the First Amendment. The Court also concluded that the determination of whether two activities are comparable must be judged against the justification asserted by the government to justify the law or regulation at issue.

6. **Please describe what you believe to be the Supreme Court's holding in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).**

   Response: In *Brnovich v. Democratic National Committee*, the Supreme Court held that Arizona's election regulations at issue did not violate the Voting Rights Act of 1965 and were not imposed for a racially discriminatory purpose. The regulations at issue required in-person voters to vote in their assigned precincts and, for mail-in voters, required that ballots be collected by only certain individuals.

7. **Please describe what you believe to be the Supreme Court's holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).**

   Response: In *Jennings v. Rodriguez*, the Supreme Court held that the Ninth Circuit erred in interpreting three provisions of Immigration and Nationality Act by adopting implausible interpretations of the statutory language. As such, the Court reversed the Ninth Circuit and remanded the case for further proceedings consistent with its opinion. The three provisions at issue involved the detention of aliens during immigration proceedings. While agreeing that when statutory language is susceptible of multiple meanings, a court may shun an interpretation that raises constitutional doubts, the Supreme Court concluded that a court may not rewrite the language.

8. **Do federal drug scheduling actions pursuant to the Controlled Substances Act preempt state or local laws that purport to 'legalize' substances contrary to their federal drug control status?**

   Response: The above issue has been, and continues to be, the subject of dispute both in judicial and political arenas. It would therefore by improper for me to offer a response to this question. The Supreme Court has upheld Congress' authority to prohibit the local cultivation and use of marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005). I am further aware of the Controlled Substances Act and specifically its provision stating that it does not preempt state law unless there is a "positive conflict" between the state law and CSA such that the two "cannot consistently stand together." 21 U.S.C. § 903.

9. **What is your view of arbitration as a litigation alternative in civil cases?**

   Response: As an advocate, I have participated in arbitrations and was also asked by two parties to serve as the chief arbitrator on a three-judge arbitration panel so I have some experience with arbitration. In general, as a judicial nominee, it would be inappropriate for me to comment further on the merits of arbitration in civil cases. I will faithfully apply the applicable law precedent with respect to the use of arbitration in civil litigation.

10. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

Response: I received these questions via email on October 27, 2021. I thereafter prepared my written response after conducting research where necessary. I submitted my responses to the Office of Legal Policy for feedback and then finalized my responses.

11. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

    Response: No.

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

Questions for the Record for Charlotte Noelle Sweeney, Nominee for the District of Colorado

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. In 2018, you signed a letter to Senator Gardner that opposed Justice Kavanaugh's Supreme Court nomination. Your letter specifically noted: "Judge Kavanaugh raged at and attacked senators for doing their constitutionally-mandated duty of questioning him. *He expressed disgust with one party in our two-party system*." It further expressed displeasure that he would arrive at the court "in a posture of extreme partisanship" and that he "evaded and refused to answer serious questions asked of him." Now, over the last few years alone, you have actively donated to Democrat candidates for national public offices, criticized Republican nominees to

courts, and been a member of multiple organizations that actively promote Democrats and leftwing policies while attacking conservatives. The Matthew Shepard Foundation, for which you are the treasurer, has published a series of articles calling Republicans the newest religious cult, saying they hate a female conservative commentator, accusing President Trump of doing the "opposite" of working against gun violence, and calling a new Coloradan Republican House member a "shill."

a. **This letter raises questions whether you would arrive to the court "in a posture of extreme partisanship," and whether you hold "intense disgust for one party in our two-party system," that encompasses tens of millions of your fellow citizens. Why should litigants who appear in front of you have faith that you will be impartial toward them on the bench?**

Response: Partisanship has no role in the judicial system and I have a deep respect for all parties in our political system. All litigants can be assured that if confirmed, I will come to the bench with a profound respect for the law, precedent, the Supreme Court, and the parties that appear before me. I value, respect, and agree with the obligations and responsibilities set forth in the Code of Judicial Conduct for United States Judges and am fully prepared to abide by and uphold those Canons if confirmed. I am aware that Canon 5 notes that a judge should not engage in political activity. I would also note that as interim treasurer and board member of the Matthew Shepard Foundation, I had no role in authoring, reviewing, or approving the articles to which you refer above.

b. **Do you still believe that Justice Kavanaugh does not have, as your letter said, "the integrity, honesty, impartiality, or judicial temperament required of a Supreme Court justice"?**

Response: As a judicial nominee, it would be inappropriate for me to personally comment on any particular judge or justice. I fully respect the authority of Justice Kavanaugh, as well as the other Justices, and will faithfully follow precedent of the Supreme Court without reservation or hesitation.

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

Response: Yes. If referring to the federal government, the Religious Freedom Restoration Act of 1993 prohibits the federal government from placing a substantially burden on a person's exercise of free religion unless the government proves that the regulation or law at issue is the least restrictive means to further a compelling government interest. This is true regardless of whether the regulation or law is a neutral law of general applicability. In

Burwell v. Hobby Lobby, the Supreme Court recognized that a for-profit corporation was entitled to the protection of RFRA.

Regarding limits for both state and federal governments, the Supreme Court has identified several constitutional limits. While a government may incidentally infringe on the right of Free Exercise by enacting a neutral law of general applicability (*see Empl. Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), strict scrutiny will apply in the absence of neutrality or general applicability. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).

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

Response: Should a government enact a law that discriminates against religious organizations or religious people, it will be subject to strict scrutiny. *See, e.g., Church of the Lukumi Babalu Aye*, 508 U.S. 520 (1993); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).

4. 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: The Supreme Court held that the religious entity-applicants were entitled to a preliminary injunction because the executive order at issue treated houses of worship less favorably than comparable secular entities and therefore violated the Free Exercise Clause.

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

Response: In *Tandon v. Newsom*, the Supreme Court held that a law or regulation is not "neutral and generally applicable" when it treats "any comparable secular activity more favorably than religious exercise" and is therefore subject to strict scrutiny under the Free Exercise Clause of the First Amendment. The Court also concluded that the determination of whether two activities are comparable must be judged against the justification asserted by the government to justify the law or regulation at issue.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop*, the Supreme Court found that while Colorado could infringe on the free exercise of religion by enacting a neutral law of general applicability, the Colorado Civil Rights Division demonstrated an overt and impermissible hostility to religion through its enforcement of the law and therefore violated the Free Exercise Clause.

8. Explain your understanding of Judge Tymkovich's dissenting opinion in *303 Creative v. Elenis*, recently issued by the Tenth Circuit.

Response: In *303 Creative*, Judge Tymkovich articulated his opinion that strict scrutiny applied to the Colorado law at issue (the Colorado Anti-Discrimination Act) and that the law essentially compelled expressive speech, and/or discriminated against speech based on its viewpoint, in violation of the defendant's First Amendment right. Noting that such infringements were subject to strict scrutiny, he concluded that the law was not narrowly tailored to further a compelling state interest.

9. 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, provided such beliefs are sincerely held. *See Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989).

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: As a judicial nominee, it would be inappropriate to offer an opinion about an issue that may come before me. I would follow all applicable Supreme Court and Tenth Circuit precedent on any such issue.

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: As a judicial nominee, it would be inappropriate to offer an opinion about an issue that may come before me. I would follow all applicable Supreme Court and Tenth Circuit precedent on any such issue.

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

Response: I do not believe so.

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

Response: Under Article II of the U.S. Constitution, the President has the obligation to "take care that the laws be faithfully executed."

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

Response: Prosecutorial discretion is the authority of an agency charged with enforcing a law to decide whether or how to enforce, or not to enforce, the law against an individual or entity. It allows an agency to make case-by-case determinations on enforcement by considering various circumstances that the agency deems relevant. A substantive administrative rule change, on the other hand, requires compliance with full notice-and-comment rulemaking and commits the agency to a certain action.

12. Describe how you would 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: I have not compared my judicial philosophy with that of the above Justices. My judicial philosophy is that judges owe a primary duty to the law and a secondary duty to the parties that appear before them. With respect to the former duty to the law, a judge must uphold the Constitution and the laws of the United States. In any case involving constitutional or statutory interpretation, the text and binding precedent govern. With respect to the latter duty to the parties, I believe in absolute preparedness, thorough review of the record and legal authority, and concise but thorough decision-making and drafting. In addition, all parties must be treated fairly, impartially, and with an open mind.

13. Please briefly describe the interpretative method known as originalism.

Response: While subject to many different definitions, I consider this interpretative method of statutory or constitutional construction to involve giving words the meanings they had at the time of adoption.

14. Please briefly describe the interpretive method often referred to as living constitutionalism.

Response: While subject to many different meanings, I consider this interpretative method of statutory or constitutional construction to involve giving words the meanings they acquire over time.

15. 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 first look to the text of the provision and Supreme Court precedent interpreting the provision. As the Supreme Court has considered most constitutional provisions, I suspect the above would resolve the issue. If not, I would review related precedent from the Supreme Court or the Tenth Circuit regarding similar language. If the above has not provided adequate guidance for the provision at issue, I would look to any particular approach or method recognized by the Supreme Court as relevant to the particular provision. For example, the Supreme Court has recognized the value and importance of looking to the original public meaning in the context of both Second Amendment and Sixth Amendment contexts. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

16. 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: I would follow all applicable precedent of the Supreme Court and Tenth Circuit on this issue. The Supreme Court has determined that in some circumstances, the original meaning of a constitution provision may be affected by contemporary values. *See Brown v. Board of Education*, 347 U.S. 483 (1954).

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

Response: Although the Constitution is an enduring document, the meaning of the Constitution can change through the amendment process and through interpretation by the Supreme Court. I will follow all precedent of the Supreme Court, including that involving constitutional interpretation.

18. President Biden has created a commission to advise him on reforming the Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: As a judicial nominee, it would be inappropriate to offer an opinion about this issue, which is subject to ongoing political debate. If confirmed, I will follow all applicable Supreme Court and Tenth Circuit precedent.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: If confirmed, I would follow all Supreme Court and Tenth Circuit precedent. Each constitutional right must be viewed in the context of existing precedent. The Supreme Court has concluded that the right to bear arms is a fundamental individual right, s*ee District of Columbia v. Heller*, 554 U.S. 570 (2008), but it did not decide the level of applicable scrutiny that laws infringing upon such right must satisfy.

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

Response: If confirmed, I would follow all Supreme Court and Tenth Circuit precedent. Each constitutional right must be viewed in the context of existing precedent. The Supreme Court has concluded that the right to bear arms is a fundamental individual right, s*ee District of Columbia v. Heller*, 554 U.S. 570 (2008), but it did not decide the level of applicable scrutiny that laws infringing upon such right must satisfy.

22. If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will 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: I am not aware of any human resources training that may occur should I be confirmed to the U.S. District Court for the District of Colorado. I would assume and expect that any training would not be in violation of federal or state law.

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

Response: I am not aware of any human resources training that may occur should I be confirmed to the U.S. District Court for the District of Colorado. I would assume and expect that any training would not be in violation of federal or state law.

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

Response: I am not aware of any human resources training that may occur should I be confirmed to the U.S. District Court for the District of Colorado. I would assume and expect that any training would not be in violation of federal or state law.

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

Response: I am not aware of any human resources training that may occur should I be confirmed to the U.S. District Court for the District of Colorado. I would assume and expect that any training would not be in violation of federal or state law.

23. 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: I am not aware of any human resources training that may occur should I be confirmed to the U.S. District Court for the District of Colorado. I would assume and expect that any training would not be in violation of federal or state law.

24. Is the criminal justice system systemically racist?

Response: I have not conducted any research into this issue. As a general matter, I am aware of various legislative bodies addressing the disparate sentencing that has occurred in the area of criminal sentencing. If confirmed, I would treat all litigants the same, regardless of race.

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

Response: If confirmed and called upon to resolve a question addressing the above issue, I would review Supreme Court and Tenth Circuit precedent and apply the same.

26. Does the President have the authority to abolish the death penalty?

Response: Under federal law, the death penalty is available under certain circumstances. *See* 18 U.S.C. § 3591. To alter the statute, Congress would have to act.

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

Response: In a per curiam opinion, the Supreme Court vacated the stay at issue, which resulted in the enforcement of the underlying district court judgment. The district court had concluded that the Center for Disease Control's extension of the eviction moratorium (and subsequent congressionally approved extensions) imposed on certain properties by the Coronavirus Aid, Relief, and Economic Security Act was an unlawful exercise of authority. The Supreme Court agreed that the CDC had acted beyond the power granted by Congress and further concluded that any extension of the eviction moratorium must be done by an act of Congress.

28. Are students accused of sexual misconduct entitled to due process?

Response: The Supreme Court has recognized that a student's right to public education is a property and liberty interest that cannot be taken away without some "minimum" due process required by the 14th Amendment's Due Process clause. This includes notice and an opportunity to be heard but more may be required depending upon the alleged violation at issue. *See Goss v. Lopez*, 419 U.S. 565 (1975).

29. In *Carpenter v. United States*, what criteria did the U.S. Supreme Court use to distinguish between phenomena that are covered by the Fourth Amendment Third Party Doctrine and those that are not?

Response: In *Carpenter*, the Supreme Court concluded that the government must obtain a warrant (and thereby establish probably cause) before obtaining a person's cell phone location information (CSLI) from a third-party. The Court distinguished the line of cases interpreting the scope of the third-party doctrine by noting several differences: 1) the information allowed to be obtained by the Court's third-party doctrine was of a limited personal nature and did not contain personal location information; and 2) while an individual has a reduced expectation of privacy in information knowingly shared with a third-party, CSLI is collected without an affirmative act by the user other than turning on the cell phone.

30. Do Americans have a privacy interest in their financial affairs?

Response: The Right to Financial Privacy Act of 1978 protects the confidentiality of personal financial records from the federal government and creates a statutory Fourth Amendment protection for bank records. The Act also includes exceptions to the Notice and Certification Requirements.

31. Are there any limitations on the Third Party Doctrine as applied to an individual's banking records? What are they?

Response: The Right to Financial Privacy Act of 1978 protects the confidentiality of personal financial records from the federal government and creates a statutory Fourth Amendment protection for bank records. The Act also includes exceptions to the Notice and Certification Requirements.

32. 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: The Court held that the government requirement at issue (that foster care providers agree not to reject prospective parents based on their sexual orientation) was not a law of generally applicability and was therefore subject to strict scrutiny. Because the government retained the power to grant discretionary exemptions under the law, the law could not be considered "generally applicable," even where the government had never exercised its discretion.

33. In *Americans for Prosperity Foundation v. Bonta,* the Court's majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to such cases. Explain your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: As I understand the majority opinion, Chief Justice Roberts would apply "exacting scrutiny" to disclosure requirements, which would require "a substantial relation between the disclosure requirement and a sufficiently important government interest." He further would require the requirement to be narrowly tailored to the asserted government interest but it need not be the least restrictive means to achieve that interest. *Bonta*, 141 S. Ct. 2373, 2383-84. Justice Thomas, on the other hand, would apply strict scrutiny and require the government to demonstrate that the requirement was the least restrictive means to further a compelling government interest. *Id.* at 2391. Given the lack of a uniformity in the scrutiny to be used in such cases, lower courts should apply the narrowest holding of the concurring members of the Court, which would be Chief Justice Roberts' opinion.

Senator Josh Hawley
Questions for the Record

Charlotte Sweeney
Nominee, U.S. District Court for the District of Colorado

1. **Justice Thurgood Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

    a. **Do you agree with that philosophy?**

    Response: That is not my philosophy.

    b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

    Response: If confirmed, I will steadfastly follow the Code of Judicial Conduct and will approach each case individually in accordance with my own set of judicial standards. Judges owe a primary duty to the law and a secondary duty to the parties that appear before them. With respect to the former duty to the law, a judge must uphold the Constitution and the laws of the United States. In any case involving constitutional or statutory interpretation, the text and binding precedent govern. With respect to the latter duty to the parties, I believe in absolute preparedness, thorough review of the record and legal authority, and concise but thorough decision-making and drafting. In addition, all parties must be treated fairly, impartially, and with an open mind.

2. **What is the standard for each kind of abstention in the court to which you have been nominated?**

    Response: There are several kinds of abstention doctrines that require federal courts to abstain from ruling on a case that is being litigated in state court. The Rooker-Feldman doctrine dictates that absent specific authorization by Congress, lower federal courts shall not sit in direct review over state court decisions. The Pullman abstention doctrine may warrant a federal court abstaining from hearing a case until a disputed issue of state law is ruled upon by the state court. The Younger abstention doctrine dictates that federal courts should abstain from hearing a case when there is an ongoing state proceeding, state interests are impacted, and there will be a sufficient opportunity for the litigant to raise the issue in the state court proceeding. There may be other abstention doctrines applicable in any given case. I will faithfully apply and follow Supreme Court and Tenth Circuit precedent in this area.

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

Response: I do not believe so.

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

Response: Not applicable.

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

Response: In interpreting the language of the Constitution, I would first look to the text of the provision and Supreme Court precedent interpreting the provision. If the text was ambiguous, I would review related precedent from the Supreme Court or the Tenth Circuit regarding similar language. If the above has not provided adequate guidance for the provision at issue, I would look to any approach or method recognized by the Supreme Court as relevant to the particular provision. For example, the Supreme Court has recognized the value and importance of looking to the original public meaning in the context of both Second Amendment and Sixth Amendment contexts. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

5. Do you consider legislative history when interpreting legal texts?

Response: In interpreting statutory or constitutional text, I would first look to the actual text of the statute and if the text is clear, no further sources need be consulted. If the text is ambiguous, I would look to relevant Tenth Circuit and Supreme Court precedent to guide my determination. In the rare case where no precedent exists, I would follow the appropriate rules of statutory construction. This may include a review of cases involving similar language used in other statutes and/or sources that the Supreme Court has recognized as persuasive authority. This may also include a review of legislative history.

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 any given situation, some legislative history may be on point than others. History that directly reflects the intention of the legislative body is more probative than general history.

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

Response: I cannot think of a circumstance in which the above would be appropriate.

6. **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: The Tenth Circuit has recognized and followed Supreme Court precedents on the issue of Eighth Amendment method of execution claims. Thus, a prisoner must demonstrate that there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain" and that the government has refused to adopt such method without a logical reason. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1225 (2019); *United States v. Guillen*, 995 F.3d 1095, 1120 (10th Cir. 2021).

7. **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 6 above.

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

   Response: Please see my response to Question 2 above.

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

   Response: Absent a specific fact pattern and applicable law, I cannot provide a meaningful answer to this question.

10. **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: No. *See Huey v. Kunzweiler*, 847 Fed. Appx. 530 (10th Cir. 2021) (citing *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009) for the proposition that so such right exists).

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

    Response: No.

12. 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 right to keep and bear arms is an individual right belonging to individual persons. *District of Columbia v. Heller*, 554 U.S. 570, 578-79 (2008)

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.

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

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

Response: I am not familiar with Social Statics and therefore do not know exactly what Justice Holmes meant by the above statement.

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

Response: As a judicial nominee, my opinions as to whether a Supreme Court case was decided correctly is irrelevant. If confirmed, I am bound to apply Supreme Court precedent regardless of my personal opinions. I would note that *Lochner* was largely undermined by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

14. 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: The above quote in the majority opinion was responded to an argument by the dissent that *Korematsu* had some application to the case at hand. In rejecting that notion, the majority asserted that *Korematsu* involved an objectively unlawful policy of forcibly relocating U.S. citizens because of their race and was entirely distinguishable from the

policy at issue in Trump, which involved a "facially neutral policy denying certain foreign nationals the privilege of admission." 138 S. Ct. at 2423.

15. 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?

Response: My personal beliefs are irrelevant. If confirmed, I will faithfully apply Supreme Court precedent to all cases before me. I have no belief as to any particular case that is "no longer good law."

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

Response: Yes.

16. 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?

Response: I have no opinion as to whether Judge Learned Hand is correct in the above statement. If confirmed, I will faithfully apply Supreme Court precedent to the issues before me.

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

Response: Not applicable.

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: Please see my response to Question 16.a. above.

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

Response: Federal common law is law that is derived not from federal statutes, but from federal judicial decisions. While most common law exists at the state level, there is a small body of federal law that has developed over time.

18. 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: State constitutions can, and do, sometimes provide identical or greater constitutional protections. This is appropriate if the state constitutional provision does not conflict with, or diminish, rights provided by the U.S. Constitution.

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

Response: Not necessarily. A state court is free to interpret a state constitutional provision separate and apart from federal law.

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

Response: In the sense that states are free to provide greater rights, yes.

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

Response: While I believe it is generally appropriate to refrain from commenting on the merits of Supreme Court precedent, there are a few cases that are beyond dispute and are highly unlikely to be revisited. *Brown v. Board of Education* is one such case, and yes, I believe it was correctly decided.

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

Response: The Supreme Court has held that a state government may infringe upon the free exercise of religion if the law or regulation at issue is a neutral one of general applicability. *See Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). If the law does not meet this standard, strict scrutiny will apply. A law or regulation will not be considered "generally applicable" where it provides for discretionary exemptions. *See Fulton v. City of Philadelphia*, 593 U.S. ___ (2021). A law or regulation is not neutral where the state demonstrates hostility and intolerance to religion, *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018), or where it treats any comparable secular activity more favorable than religious activity, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). The Tenth Circuit has followed Supreme Court precedent on this issue. *See, e.g., Yellowbear v Lampert*, 741 F.3d 48 (10th Cir. 2014).

21. 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: The Supreme Court has repeatedly concluded that laws that discriminate against religion are subject to strict scrutiny and has further struck such laws as unconstitutional. *See, e.g., Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2263 (2020); *Trinity Lutheran v.* Comer, 137 S. Ct. 2012 (2017); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

22. 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 Tenth Circuit has concluded that inquiry into whether an individual's religious beliefs are sincerely held is a simple one: the court must merely conclude that the individual actually holds the beliefs that he or she claims to hold. *See Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014).

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

Response: Several federal courts have issued nationwide injunctions. There is an ongoing debate about the issuance of such injunctions. *See U.S. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). However, the Supreme Court has upheld such injunctions in limited circumstances. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017). However, an injunction is an extraordinary remedy and the relief granted in such a case must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

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

Response: The source of the legal authority is a source of ongoing debate and it would be improper for me to offer my opinion. I will note that some courts have cited the Administrative Procedure Act as the source of the authority. *See* also my response above. The Supreme Court has not yet issued a defining opinion on the issue.

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

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

24. 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 responses to Questions 23 and 23a.

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

Response: The Supreme Court has recognized a number of rights pursuant to the Fifth and Fourteenth Amendments. In addition to the rights expressly enumerated in the Constitution, the Supreme Court has recognized the right to marital privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); the right to marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)), the right to raise and direct the education of one's child (*Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); the right to use contraception (*Eisenstadt v. Baird*, 405 U.S. 438 (1972); and the right to abortion (*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). The Supreme Court has specifically held that the Fifth and Fourteenth Amendments protect those rights that are "deeply rooted in this Nation's history" and are "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702 (1997).

26. 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 right to the free exercise of religion is a fundamental right in our Nation. As set forth in my responses to Questions 21 and 22 above, the scope of the right has been well-defined by the Supreme Court and I will faithfully follow all applicable precedent.

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 freedom of worship encompasses the freedom to believe, while the general term of free exercise of religion also encompasses the right to practice and act in furtherance of one's religion. While both are protected by the Free Exercise Clause, the Supreme Court has maintained a distinction between belief and action.

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

Response: Please see my responses to Questions 20 and 21 above. In addition, to the extent federal government action is involved, the Religious Freedom Restoration Act is applicable and provides heightened scrutiny to government laws or regulations that substantially burden the free exercise of religion regardless of whether the law is neutral and generally applicable.

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: A court should defer to the individual when determining whether a religious belief is sincerely held, and its narrow function is to determine whether the asserted religious belief reflects an "honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Similarly, the Tenth Circuit has concluded that inquiry into whether an individual's religious beliefs are sincerely held is a simple one: the court must merely conclude that the individual actually holds the beliefs that he or she claims to hold. *See Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014).

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: As the relationship between the Religious Freedom Restoration Act and other federal laws in a current subject of litigation in several courts, it would be inappropriate for me to offer my personal understanding of the issue. The Circuit Courts have issued conflicting opinions as to the interplay of RFRA and other laws such as Title VII and the Age Discrimination in Employment Act. The Supreme Court has yet to resolve this conflict.

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.

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

Response: The standard of "beyond a reasonable doubt" is the burden of proof applicable in criminal cases. The Supreme Court not ruled that any exact percentage of confidence is necessary to find proof beyond a reasonable doubt.

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

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

Response: As a judicial nominee it would not be appropriate for me to opine on an issue that may come before me.

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

Response: As a judicial nominee it would not be appropriate for me to opine on an issue that may come before me.

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

Response: Not applicable.

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

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

Response: As a judicial nominee it would not be appropriate for me to offer an opinion on this issue. If confirmed, I would be obligated to follow 10th Cir. R. 32.1.

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

Response: Please see my response to Question 29a.

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

Response: Please see my response to Question 29a.

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

Response: Please see my response to Question 29a.

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

Response: Please see my response to Question 29a.

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

Response: Please see my response to Question 29a.

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

Response: Please see my response to Question 29a.

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

Response: Federalism plays a large role in our constitutional system. The idea that there are two governments (state and federal) co-existing and dividing powers among them. Both the Ninth and the Tenth Amendments to the U.S. Constitution reflect the importance of federalism and the respect of state governments.

31. In your legal career:

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

Response: Eleven.

b. How many have you tried as second chair?

Response: Nine.

c. How many depositions have you taken?

Response: I have taken hundreds of depositions.

d. How many depositions have you defended?

Response: I have defended hundreds of depositions.

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

Response: I believe I have argued 5-8 cases to a federal appellate court.

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

Response: None.

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

Response: I have appeared before the U.S. Equal Employment Opportunity Commission between 20-30 times due to my representation of federal sector employees in equal employment opportunity cases.

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

Response: I estimate that I have argued around 20-30 dispositive motions before trial courts. I have briefed approximately 30-40 dispositive motions.

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

Response: I estimate that I have argued around 20-35 evidentiary motions before trial courts.

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

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

Response: None of my previous jobs required me to track billable hours.

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

Response: While I have engaged in substantial pro bono work, such hours were not tracked in accordance with any billable hour tracking system.

33. 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 believe Justice Scalia was commenting on the fact that no judge will always reach a result that is personally satisfying, and nor should they. Judges are called upon to apply the applicable law to the individual case at issue, regardless of personal likes and dislikes.

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

a. What do you understand this statement to mean?

Response: It my opinion, the statement of Justice Roberts reflects the fundamental notion that judges do write laws, they apply the laws to individual cases at hand. It is the function of legislative bodies to create laws.

b. Do you agree or disagree with this statement?

Response: I agree with my understanding of the statement as described above.

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

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

Response: Though I am unfamiliar with the context in which Justice Holmes uttered this reply, I believe he was indicating that the job of a judge is to apply the law regardless of personal opinion, sympathy, or result.

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

Response: I agree that the job of judge requires a steadfast and consistent application of case law and precedent regardless of the perceived "fairness" or popularity of the result.

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

Response: I do not recall ever taking such a position.

a. If yes, please provide appropriate citations.

Response: Not applicable.

37. 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.

38. What were the last three books you read?

Response: The Four Winds (Kristin Hannah), The Bean Trees (Barbara Kingsolver), and The Midnight Library (Matt Haig).

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

Response: I have not conducted any research into this area and would not opine on it. I am aware of research on which various legislative bodies have relied to conclude that some aspects of the criminal sentencing process have had a disparate impact on people of

color. If confirmed, my role will be limited to addressing the cases and parties before me and reaching an impartial result regardless of race or any other protected characteristic.

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

Response: Due to the complex legal issues involved, and the merits of my client's case, I am most proud of my representation in the case of *Vanech v. U.S. Department of Labor*, Civil Action No. 13-cv-00168-RPM (D. Colo.).

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

Response: I have handled hundreds of cases over my twenty-six years in private practice. As an advocate, my role was to represent the interests of my clients regardless of my personal views and I did not evaluate my clients' respective claims through that lens.

a. How did you handle the situation?

Response: Not applicable.

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

Response: Yes.

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

Response: There are no law professors whose work I read regularly. In my legal practice, I have focused my research on case law.

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

Response: While I have read some of the Federalist Papers, there is no particular Paper that has shaped my view of the law.

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

Response: While I am sure there are such opinions or articles, I simply cannot recall a specific instance.

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

Response: As a judicial nominee, my personal opinions on this matter, and all others, are irrelevant. If confirmed, I will apply Supreme Court and Tenth Circuit precedent without reservation.

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

Response: Yes. I testified under oath during the trial related to the dissolution of my prior law firm. 2009CV001959, Denver District Court. I also testified under oath as an expert witness in a confidential arbitration matter on the issue of damages related to a defamation claim.

47. 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 to Questions 47a-d: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response: No.

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

Response: No.

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

Response: Not applicable.

50. Have you ever confessed error to a court?

Response: I do not believe so.

a. If so, please describe the circumstances.

Response: Not applicable.

51. 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: All judicial nominations take an oath to tell the truth and are bound by such oath. I believe such duty includes an obligation to attempt to answer all questions thoroughly, completely, and to the best of one's ability.

Questions for the Record for Charlotte N. Sweeney
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following 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 Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
October 20, 2021

Questions for all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: My judicial philosophy is that judges owe a primary duty to the law and a secondary duty to the parties that appear before them. With respect to the former duty to the law, a judge must uphold the Constitution and the laws of the United States. In any case involving constitutional or statutory interpretation, the text and binding precedent govern. With respect to the latter duty to the parties, I believe in absolute preparedness, thorough review of the record and legal authority, and concise but thorough decision-making and drafting. In addition, all parties must be treated fairly, impartially, and with an open mind.

4. **Would you describe yourself as an originalist?**

   Response: I have never described myself with a particular label such as an originalist. My judicial philosophy is that judges owe a primary duty to the law and a secondary duty to the parties that appear before them. With respect to the former duty to the law, a judge must uphold the Constitution and the laws of the United States. In interpreting the language of the Constitution, I would first look to the text of the provision and Supreme Court precedent interpreting the provision. If the text was ambiguous, I would review related precedent from the Supreme Court or the Tenth Circuit regarding similar language. If the above has not provided adequate guidance for the provision at issue, I would look to any approach or method recognized by the Supreme Court as relevant to the particular provision. For example, the Supreme Court has recognized the value and importance of looking to the original public meaning in the context of both Second Amendment and Sixth Amendment contexts. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

5. **Would you describe yourself as a textualist?**

   Response: I have never described myself with a particular label such as a textualist. However, I believe, and the Supreme Court has repeatedly made clear, the starting place for statutory and/or constitutional analysis is the text of the provision at issue. If the text is clear, no further analysis is needed.

6. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: I have never referred to the Constitution as a "living" document. Rather, the Constitution is an enduring document and has been interpreted by the Supreme Court over time. If confirmed, I would faithfully follow Supreme Court and Tenth Circuit precedent.

7. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: There is no one Justice whose jurisprudence I admire most.

8. **Was Marbury v. Madison correctly decided?**
9. **Was Lochner v. New York correctly decided?**
10. **Was Brown v. Board of Education correctly decided?**
11. **Was Bolling v. Sharpe correctly decided?**
12. **Was Cooper v. Aaron correctly decided?**
13. **Was Mapp v. Ohio correctly decided?**
14. **Was Gideon v. Wainwright correctly decided?**
15. **Was Griswold v. Connecticut correctly decided?**
16. **Was South Carolina v. Katzenbach correctly decided?**
17. **Was Miranda v. Arizona correctly decided?**
18. **Was Katzenbach v. Morgan correctly decided?**
19. **Was Loving v. Virginia correctly decided?**
20. **Was Katz v. United States correctly decided?**
21. **Was Roe v. Wade correctly decided?**
22. **Was Romer v. Evans correctly decided?**
23. **Was United States v. Virginia correctly decided?**
24. **Was Bush v. Gore correctly decided?**
25. **Was District of Columbia v. Heller correctly decided?**
26. **Was Crawford v. Marion County Election Board correctly decided?**
27. **Was Boumediene v. Bush correctly decided?**
28. **Was Citizens United v. Federal Election Commission correctly decided?**
29. **Was Shelby County v. Holder correctly decided?**
30. **Was United States v. Windsor correctly decided?**
31. **Was Obergefell v. Hodges correctly decided?**

Responses to Questions 8-31: To the extent the cases listed above are all binding precedent (for example, *Lochner* is no longer considered good law), I will faithfully uphold them without reservation, regardless of my personal opinion about whether they were "correctly decided." In general, it is inappropriate for a judicial nominee to comment about the merits of Supreme Court decisions, but because the holdings in these cases are beyond dispute, I will state that the following cases were correctly decided: *Marbury v. Madison*, *Brown v. Board of Education*, *Bolling v. Sharpe*, *Gideon v. Wainwright, and Loving v. Virginia*.

32. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: The Tenth Circuit is bound by stare decisis unless and until a decision is overruled by en banc reconsideration or the Supreme Court. The Tenth Circuit's decision to hear a case en banc is governed by Federal Rules of Appellate Procedure 35(a) and the companion local rule (10th Cir. R. 35).

33. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: Please see my response to Question 32.

34. What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?

Response: I would first look to the actual text of the statute and if the text is clear, no further sources need be consulted. If the text is ambiguous, I would look to relevant Tenth Circuit and Supreme Court precedent to guide my determination. In the rare case where no precedent exists, I would follow the appropriate rules of statutory construction. This may include a review of cases involving similar language used in other statutes and/or sources that the Supreme Court has recognized as persuasive authority. This may also include a review of legislative history.

35. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: No.

Questions from Senator Thom Tillis for Charlotte Noelle Sweeney
Nominee to be United States District Judge for the District of Colorado

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

   Response: Yes.

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

   Response: There are many different definitions of "judicial activism." In my opinion, judicial activism is the inappropriate insertion of personal or political views into the judicial process, whether through expansion of the issues before the court or overlooking of procedural requirements. It is wholly inappropriate.

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

   Response: Impartiality is a requirement for a judge and is set forth in the Code of Conduct for United States Judges, Canon 3.

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: It may. If confirmed, my responsibility and obligation is to decide cases based on the record, the applicable law, the issues raised by the parties, and precedent. I will not consider the "desirability" of the outcome, as I am obligated to apply and follow the law, regardless of the outcome or any personal feeling I may or may not have about the outcome.

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

   Response: No.

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

   Response: As with any other legal issue, I will faithfully follow the precedent of the Supreme Court and the Tenth Circuit. As such, I will follow the Supreme Court's holdings

in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of* Chicago, 561 U.S. 742 (2010).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: I would faithfully follow precedent of the Supreme Court and the Tenth Circuit, including the cases cited in my response to Question 7 as well as any relevant precedents regarding religious liberty, including the Supreme Court's decision in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: If confirmed, I would faithfully follow the precedent of the Supreme Court and the Tenth Circuit regarding the availability of qualified immunity to law enforcement personnel and departments, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

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

Response: As a judicial nominee, it would be inappropriate for me to offer an opinion on this issue. If confirmed, I would faithfully follow the precedent of the Supreme Court and the Tenth Circuit regarding the availability of qualified immunity to law enforcement personnel and departments, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

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

Response: Please see my response to Question 10.

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

Response: If confirmed, I would faithfully follow the precedent of the Supreme Court and the Tenth Circuit regarding patent eligibility.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

f. A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the

prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

h. **Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

i. ***Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

j. ***Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

14. **Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. As patent eligibility is an issue that arises with some frequency in the United States District Court for the District of Colorado, I must refrain from providing the requested analysis. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area to resolve any issue of patent eligibility.

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

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

    Response: None.

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

    Response: None.

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

    Response: None.

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

    Response: In my 26 years of private practice, I have dealt with 5-10 cases involving First Amendment and Free Speech issues. I have also regularly dealt

with intellectual property issues in the employment context, but none have involved copyright issues.

16. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.**

    a. **In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?**

    Response: I would first look to the actual text of the statute and if the text is clear, no further sources need be consulted. If the text is ambiguous, I would look to relevant Tenth Circuit and Supreme Court precedent to guide my determination. In the rare case where no precedent exists, I would follow the appropriate rules of statutory construction. This may include a review of cases involving similar language used in other statutes and/or sources that the Supreme Court has recognized as persuasive authority. This may also include a review of legislative history.

    b. **Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?**

    Response: The advice and analysis of the federal agency with jurisdiction over an issue is entitled to minimal deference or "respect," as such advice and analysis was conducted outside a formal adjudication or "notice and comment" rulemaking. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

    c. **Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?**

    Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area.

17. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.

a. How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area.

b. How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?

Response: As a judicial nominee, it would be inappropriate for me to opine on this issue. I would faithfully apply both Supreme Court and Tenth Circuit precedent in this area.