Nomination of Toby Jon Crouse to the United States District Court for the District of Kansas
Questions for the Record
August 5, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

   The First Amendment precludes Congress from making any laws that prohibit "the free exercise" of religion and the Fourteenth Amendment applies that prohibition to the states. As there is a significant amount of precedent on this topic, *see*, *e.g.*, *Employment Division v. Smith*, 494 U.S. 872 (1990), and the Supreme Court has agreed to explore that issue in the coming Term, *see Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020), it would be inappropriate under Canons 2A and 3A(6) of the Code of Conduct for United States Judges for me, as a district court nominee, to comment on any portion or grade any opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent applicable to this issue.

2. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

   In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the U.S. Supreme Court held that laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including *Loving*.

3. In 2019, while you were serving as Kansas Solicitor General, the state joined an amicus brief urging the Supreme Court to consider the case of a florist who refused to provide flower arrangements for a same-sex couple's wedding.

   The state's brief claimed that "no individuals ha[d] been discriminated against because of their sexual orientation" and argued that the First Amendment prohibited the florist from being "compelled to violate her core religious convictions." (Brief in Support of Petitioners, *Arlene's Flowers v. Washington* (U.S. 2019))

   a. What was your involvement in Kansas's decision to join this brief?

      Under Kansas law, the Attorney General of Kansas has the sole authority to and makes the determination to appear as an amicus in the United States Supreme Court. *See generally* Kan. Stat. Ann. 75-702. My recollection is that I reviewed that brief prior to the Attorney General's determination.

b. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's "core religious convictions?"

Please see my Response to Question 2.

4. As Solicitor General of Kansas, you defended a state law that required individuals to show documentary proof of citizenship when registering to vote. In one brief, you argued that Kansas had a "compelling interest in preventing voter fraud" because such fraud would "undermine our democracy." However, you also appeared to acknowledge that the state had evidence of 129 instances of noncitizens "seeking to register to vote" since 1999—under seven instances per year. The district court dismissed this number as "statistically insignificant." (Opening Brief, *Fish v. Schwab* (10th Cir. 2020))

a. Do you believe that the evidence you presented in *Fish v. Schwab*—that there were fewer than seven instances per year of noncitizens even seeking to register to vote in Kansas—constitutes a level of voter fraud that "undermines democracy?"

The Supreme Court has recognized that evidence of voter fraud is not a precondition to a State's ability to enact laws designed to eliminate voter fraud. *See generally Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 194-95 (2008). In *Crawford*, the Court upheld Indiana's voter identification law that was focused on in-person voter impersonation at polling places even though the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* It would be inappropriate for me to express my personal belief on this issue because it may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

b. Do you have any evidence that voter fraud is a widespread problem?

In *Crawford*, the Supreme Court recognized that even without evidence of widespread voter fraud, there have been documented examples of it throughout our Nation's history, that "not only is the risk of voter fraud real but that it could affect the outcome of a close election," and that States have legitimate and important interests in preventing such fraud. 553 U.S. 191-97. Whether voter fraud is a widespread problem is a policy choice that is made by members of the legislative branch. As a district court nominee, it is inappropriate for me to express my personal belief on this issue because it may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

c. What evidence did you rely on in concluding that requiring documentary proof of citizenship in order to register to vote is effective at preventing voter fraud?

I did not make any determination as to the wisdom of enacting that law. The law at issue was enacted with the near-unanimous support of both chambers of the Kansas Legislature, signed by the Govern, and—nearly a decade later—has not been repealed. The Attorney General is statutorily required to defend such laws. Kan. Stat. Ann. 75-702. As an attorney for the State of Kansas, my role was to defend the duly enacted law consistent with the direction of the Attorney General. As the Kansas Rules of Professional Conduct expressly provide, a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Kan. R. Professional Conduct 1.2(b).

In that same brief, you also argued that preventing Kansas from implementing its documentary proof of citizenship requirement would "undermine the integrity of the electoral process—whether widespread voter fraud exists or not."

d. What is the constitutional basis for allowing a state to disenfranchise voters when there is no evidence that widespread voter fraud exists?

Please see my Response to Question 4.a. and 4.b. In addition, the Qualifications Clause confers on the States to authority to establish the qualifications to vote. *See generally Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013).

5. You have served as Kansas Solicitor General for over two years. Recently, Eleventh Circuit Judge Andrew Brasher recused himself from a case due to his previous role as Alabama Solicitor General.

Judge Brasher wrote that he consulted the Committee on Codes of Conduct for the Judicial Conference of the U.S., which recommended that he "adopt a general policy of recusing from cases in which lawyers from the Alabama Attorney General's Office represent a party"—including situations in which the Alabama Attorney General's Office submits an amicus brief—for a period of two years. (Recusal Order from Judge Brasher, *Jones v. DeSantis* (11th Cir. 2020))

a. If confirmed, will you commit to adopting Judge Brasher's recusal standard for former state Solicitors General? Please respond "Yes" or "No."

Please see my response to Question 5.b.

b. If not, please explain why you disagree with Judge Brasher and the Committee on Codes of Conduct for the Judicial Conference of the U.S. Please also explain what recusal standard you would use instead.

I appreciate the importance of impartiality and the appearance of impartiality for federal judges, as it ensures public confidence in our courts. Nonetheless, I cannot

commit to adhering to Judge Brasher's recusal standard because I am unfamiliar with either the factual or procedural background of the recusal order, the case in which it was issued, or Judge Brasher's involvement in that case or other matters he may have handled while serving as Alabama Solicitor General that led to his decision to recuse.

If confirmed, I will commit to scrupulously adhering to and applying the relevant statute, 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other applicable precedent, rules, or guidance. As necessary and appropriate, I also will consult with colleagues and ethics officials within the court to discuss potential recusal issues. While recusal is a case-by-case determination, I will recuse myself from any case that I had participated in as counsel or advisor or otherwise supervised while in the Office of Kansas Attorney General.

6. In 2019, you were Counsel of Record on an amicus brief filed in the Supreme Court arguing that firearm accessories—including silencers—receive Second Amendment protection because they are not "dangerous" and are in "common use for traditionally lawful purposes." (Amici Brief, *Kettler v. U.S.* (U.S. 2019))

   a. Do you believe that federal laws requiring individuals to register silencers and other firearm accessories violate the Second Amendment?

   In *United States v. Miller*, the Supreme Court recognized that the Second Amendment was not limited only to firearms, but also included ammunition, bayonets, and other proper accoutrements. 307 U.S. 174, 180-82 (1939). And, the Court has further held that this is an individual right to possess a firearm unconnected with service in a militia and to use a firearm, even if that firearm was not in existence at the time of founding, for traditionally lawful purposes. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008); *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-28 (2016) (granting the petition, vacating the judgment below, and remanding in a case that upheld a law prohibiting possession of stun guns). The only decision that appears to address silencers is the Tenth Circuit decision in *Kettler* giving rise to the brief mentioned in this question. If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including *Miller*, *Heller*, *Caetano*, and *Kettler*. As a district court nominee, it is inappropriate for me to express my personal belief on this issue because it may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

In December 2018, the Department of Justice and the Bureau of Alcohol, Tobacco, Firearms, and Explosives issued a final rule banning bump-fire stocks, which can essentially transform semiautomatic weapons into automatic rifles.

   b. In your view, should bump stocks receive the same protection that you believe silencers should receive?

I would fully and faithfully apply Supreme Court and Tenth Circuit precedent on any matter involving this issue should it come before me. It would be inappropriate for me to express my personal belief on this issue because it may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

c. Does the ATF rule violate the Second Amendment?

Please see my Response to Question 6.b.

7. From 2016-2018, you represented individuals associated with the Franklin County, Kansas, Sheriff's Department in an excessive use of force case after officers fatally shot an unarmed, suicidal man.

The district court's opinion indicates that attorneys for the Franklin County Sheriff's Department attempted to introduce criminal charges that had been filed against the victim when he was a minor into the record. The district court declined to consider the charges. (*McHenry v. City of Ottawa* (D. Kan. 2017))

a. Did you, in your representation of the Franklin County Sheriff's Department, attempt to introduce the victim's past criminal charges into the record?

The district court observed that both the City of Ottawa and Franklin County attached videos and documents that the complaint referenced, a permissible practice in the Tenth Circuit. *McHenry v. City of Ottawa*, Case No. 16-2736, 2017 W 42688903, at *3-4 (D. Kan. Sept. 26, 2017); *see also Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008) (recognizing that the court can "take judicial notice of all the materials in the state court's file").

***b.* If so, what relevance did you believe the charges had to the victim's estate's claims?**

The Reply brief referenced by the district court asserted that the two documents (an after-action report made by the prosecutor and the criminal file) were germane and responsive to the plaintiff's brief because they gave context to the prosecutor's conclusion (which the complaint challenged) that the deceased was suicidal because he was about to be sentenced and imprisoned for those prior crimes. *See* Reply in Support of Franklin County's Motion to Dismiss, p. 8.

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

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

It is never appropriate for lower courts to depart from Supreme Court precedent.

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

A federal district judge must rigorously follow all applicable Supreme Court precedents, regardless of that judge's personal views or opinions. A district judge would be in a position to author a concurrence or dissent if the judge is sitting by designation on a court of appeals or on a specially constituted three-judge panel of the district. In limited situations, it may be appropriate for a judge to note potential conflicts or inconsistencies in a particular legal doctrine so as to invite clarification or explanation from the Supreme Court.

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

A decision from a district court judge lacks "binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). Federal Rules of Civil Procedure 59(e) and 60 provide the standards under which a district court may reconsider a prior ruling.

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

The question of when it is appropriate for the Supreme Court to overturn its own precedent is one for the consideration and purview of the Supreme Court only, as all inferior courts are required to fully and faithfully apply all Supreme Court precedents. I am aware that the Supreme Court has discussed factors it may consider in exercising its authority to overturn its own prior precedent. *See*, *e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). If confirmed, I will fully and faithfully apply all Supreme Court precedents.

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

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

Roe v. Wade, 410 U.S. 113 (1973), is precedent and binding on all lower

courts. If confirmed, I will fully and faithfully apply the holding in *Roe*.

b. Is it settled law?

Yes. District court judges are bound to apply all Supreme Court precedent.

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

Yes. District court judges are bound to apply all Supreme Court precedent.

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

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

As a nominee to be a federal district judge, I believe it would be inappropriate for me to opine on the correctness of Supreme Court precedent or the legal reasoning of an opinion authored by a Justice of the Supreme Court. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply *District of Columbia v. Heller*, 554 U.S. 570 (2008), as well as all other applicable precedents from the Supreme Court and the Second Circuit

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

In *Heller*, the Supreme Court stated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arm." 554 U.S. at 626-627.

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

I do not believe it is appropriate for a nominee for a district judgeship to opine on whether a Supreme Court's decision has followed or departed from one or more of the Court's earlier decisions. I note, however, that the Supreme Court in *Heller* stated that "[w]e conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." *Heller*, 554

U.S. at 625. If confirmed, I will fully and faithfully apply all Supreme Court precedents, including *Heller*.

12. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

    a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

    As a district court nominee, it would be inappropriate under Canon 2A and 3A(6) of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent.

    b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

    As a district court nominee, it would be inappropriate under Canon 2A and 3A(6) of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent.

    c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

    As a district court nominee, it would be inappropriate under Canon 2A and 3A(6) of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent.

13. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

    Please see my Response to Question 2.

14. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2019. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals,

the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I was not aware of the website page quoted in Question 14. I cannot speak to its meaning because I was not the author and have never heard a discussion of the quoted contents of that page.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

Please see my Response to Question 14.a.

c. What "traditional values" does the Federalist society seek to place a premium on?

Please see my Response to Question 14.a.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

I believe that many of my friends, co-workers, and colleagues across the country are members of the Federalist Society. I have spoken with them about my nomination to the seat for which I am currently being considered.

e. Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No.

f. When you joined the Federalist Society in 2019—19 years after you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary or within the Trump Administration? Please answer either "yes" or "no."

No.

i If your answer is "no," then why did you decide to join the Federalist Society in 2019, 19 years after you began practicing law?

I joined the Federalist Society for the same reasons I joined other bar associations (such as the Kansas Bar Association and the local Inns of Court): for professional networking and continuing legal education opportunities.

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that "membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct]." (*Draft Ethics Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

g. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

I do not believe that I was aware of the draft until a recent nominations hearing and press accounts of it. In those news reports, I also learned that several hundred judges drafted a letter in response to the Committee's request for comments and that they opposed that draft opinion. It is my understanding that, based on the comments received and further consideration, the draft opinion has been rescinded.

h. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

Canon 4 of the Code of Conduct for United States Judges states that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and government activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." Code of Conduct for United States Judges, Canon 4. The Commentary to Canon 4 states that "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law." Canon 4 further states that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below." Code of Conduct for United States Judges, Commentary to Canon 4. In addition, Committee on Codes of Conduct Advisory Opinion 116 sets forth a non-exhaustive list of factors that a judge should consider "[i]n assessing the propriety of participation in a conference or seminar (either as a lecturer, panel member, or attendee)," such as "whether it engages in education,

lobbying, or outreach to members of Congress, key congressional staffers, or policymakers in the executive branch"; "whether it is actively involved in litigation in the state or federal courts, including the filing of amicus briefs, participating in moot courts or boards to prepare candidates or advocates"; and "whether it advocates for specific outcomes on legal or political issues." Committee on Codes of Conduct Advisory Opinion No. 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates. If confirmed, I will consider and apply these standards, as well as consult and consider any other applicable Canons of the Code of Conduct for United States Judges, any rules for the federal judiciary, and other guidance, to determine whether to be a member of the Federalist Society or other entities.

15. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

    a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

    Not that I recall.

    b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

    Not that I recall.

    c. What are your "views on administrative law"?

    As a judicial nominee, it is inappropriate to offer my personal views on any area of the law, other than to affirm my commitment to apply the law as set by the Constitution, statute, or judicial precedent. If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and the Tenth Circuit concerning administrative law and any other area of the law.

16. Do you believe that human activity is contributing to or causing climate change?

I have not studied this issue. Additionally, I believe it would be inappropriate for me, as a nominee for a federal judgeship, to comment on a political issue, particularly one that is the subject of political discussion or debate or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

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

    If confirmed, I will follow and apply Supreme Court and Tenth Circuit precedents governing the consideration of legislative history to construe a statute. The Supreme Court has made clear that if the text of a statute is clear, the inquiry ends there; it may not be used to muddy the meaning of clear language. *See*, *e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Supreme Court further has cautioned that "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms," noting that "[n]ot all extrinsic materials are reliable sources of insight into legislative understandings." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). That is because "legislative history is itself often murky, ambiguous, and contradictory," and that "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.*

18. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

    No.

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

    I received these questions from the Department of Justice's Office of Legal Policy on Wednesday, August 5, 2020. I reviewed some of the materials cited in the questions, conducted necessary and limited research, and drafted and edited my responses. The Office of Legal Policy offered some suggested edits to my responses, which I considered. I then made final changes to my responses and authorized the filing of these responses.

Nomination of Toby Crouse, to be United States District Court Judge for the District of Kansas
Questions for the Record
Submitted August 5, 2020

QUESTIONS FROM SENATOR COONS

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

   If confirmed, I will fully and faithfully apply the framework set by the Supreme Court addressing whether a right is fundamental and protected under the Fourteenth Amendment, including *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In *Glucksberg*, the Court noted that its substantive due process analysis has two primary factors: (1) the fundamental rights and liberties must be objectively deeply rooted in this Nation's history and tradition; and (2) there must be a careful description of the asserted fundamental liberty interest. 521 U.S. at 720-21.

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

      Yes, consistent with Supreme Court and Tenth Circuit precedent.

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

      Yes. The Supreme Court recognized that this Nation's history, legal traditions, and practices provide "crucial 'guideposts for responsible decisionmaking, . . . that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721. If confirmed, I will follow guidance from the Supreme Court and Tenth Circuit and sources utilized by them, including historical practice under the common law, the practice in the American colonies, historical state statutes, judicial decisions, and long-established traditions. *Id.* at 710-20; *accord Kahler v. Kansas*, 140 S. Ct. 1021, 1027-37 (2020) (exploring whether a rule was deeply rooted by examining historical practice under English common law dating back into the Thirteenth Century).

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

      Yes. If confirmed, I will fully and faithfully apply all precedents from the Supreme Court and Tenth Circuit. In the absence of binding precedent, I would consider persuasive authority from other circuit courts of appeals and district courts. Please also see my Response to Question 1(b).

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes. If confirmed, I will fully and faithfully apply all precedents from the Supreme Court and Tenth Circuit. In the absence of binding precedent, I would consider persuasive authority from other circuit courts of appeals and district courts. Please also see my response to Question 1(b).

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

Yes. Both *Casey* and *Lawrence* are binding precedents of the Supreme Court that, if confirmed, I would fully and faithfully apply.

f. What other factors would you consider?

If confirmed, I will consider any other factors that have been found applicable by the Supreme Court or Tenth Circuit.

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender and that the government must demonstrate an exceedingly persuasive justification for gender-based classifications. *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

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

The Supreme Court has held that the Fourteenth Amendment applies to both race-based classifications and gender-based classifications. Therefore, if confirmed, I will fully and faithfully apply all precedent of the Supreme Court and Tenth Circuit on the Fourteenth Amendment.

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

I do not know why the issue raised in *Virginia* did not reach the Supreme Court until 1996.

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

In *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry on the same terms as accorded to couples of the opposite sex. 135 S. Ct. 2584, 2607 (2015). To the extent this question seeks my view on an issue that has not been resolved by the Supreme Court or Tenth Circuit, it would be inappropriate for me to comment on a subject that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedents, including *Obergefell*.

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

It is my understanding that the Supreme Court has not reached this issue. *See generally Bostock v. Clayton* County, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting). As a judicial nominee, it would be inappropriate for me to comment on a subject that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedents on the Fourteenth Amendment and concerning the treatment of transgender people.

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

The Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to use contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Tenth Circuit, including *Griswold* and *Eisenstadt*.

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

The Supreme Court has held in multiple cases that there is a constitutional right to privacy that protects a woman's right to an abortion. *See*, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I would fully and faithfully apply all precedents of the Supreme Court and Second Circuit, including *Roe*, *Casey*, and *Whole Woman's Health*.

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

The Supreme Court has held that the constitutional right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders. *See*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Second Circuit, including *Obergefell* and *Lawrence*.

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

Please see my Responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

In the event that Supreme Court or Tenth Circuit precedent instruct lower courts to consider evidence that sheds light on our changing understanding of society, lower court judges must follow that precedent. If confirmed, I will fully and faithfully apply and follow Supreme Court and Tenth Circuit precedents on this issue, including *Virginia* and *Obergefell*.

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

Whether sociology, scientific evidence, or data would play a role in a judicial proceeding would depend on the nature of the particular issue arising in the case. A district court judge presiding over a trial often encounters issues involving the admission of scientific evidence. *See generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (directing district court judges to perform a gatekeeping function). If confirmed, I will fully and faithfully apply *Daubert*, as well as other precedents from the Supreme Court and Tenth Circuit on the admission of expert testimony and scientific evidence, consistent with Federal Rules of Evidence 702 and 703.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own

continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Obergefell is binding Supreme Court precedent that I would fully and faithfully apply. In addition to holding in *Obergefell* that same-sex couples have a right to marry, the Supreme Court has held in *Lawrence v. Texas*, 539 U.S. 558 (2003), that same-sex couples have a right of privacy. The Supreme Court further has more recently stated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and the Tenth Circuit, including *Obergefell*, *Lawrence*, and *Masterpiece Cakeshop*.

b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

Please see my responses to Questions 1 and 5(a).

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

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

I am aware that there is a debate among legal scholars as to whether the holding in *Brown* is consistent with the original meaning of the Fourteenth Amendment. *See generally* Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 Harv. J. of Law & Pub. Policy 457 (1995) (rejecting the argument that *Brown* is inconsistent with the original meaning of the Fourteenth Amendment); *see also Bostock v. Clayton County*, 150 S. Ct. 1731, 1835 n.10 (2020) (Kavanaugh, J., dissenting) ("*Brown* is a correct decision as a matter of original public meaning."). That ongoing debate notwithstanding, it remains that the Supreme Court has held that racial discrimination is unconstitutional. If confirmed, I will fully and faithfully apply all precedents of the

Supreme Court and Tenth Circuit on racial discrimination, including *Brown* and its progeny.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' or 'equal protection,' or 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Aug. 4, 2020).

I have not read this article and am not familiar with the argument. If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Tenth Circuit concerning free speech, equal protection, and due process without regard to academic debates surrounding the issue(s).

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

If confirmed, the prevailing view of the Supreme Court and Tenth Circuit on the meaning of a constitutional provision would be dispositive to my interpretation. The Supreme Court has examined the Constitution's text from the perspective of the original understanding in interpreting a constitutional provision. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). If the Supreme Court determined the meaning of a constitutional provision by applying another mode of interpretation, that decision would be binding on me a district court judge. If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent, regardless of the method of constitutional interpretation employed.

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my Response to Question 6(c).

e. What sources would you employ to discern the contours of a constitutional provision?

If confirmed, I would fully and faithfully apply all relevant precedents from the Supreme Court and Tenth Circuit instructing on the appropriate sources to consider in discerning the contours of a constitutional provision. Please see also my Response to Question 6(c).

7. You were listed as the counsel of record on an amici brief filed in *Kettler v. United States*, 139 S. Ct. 2691 (2019) (cert. denied), which called on the Supreme Court to interpret the Second Amendment to include a right to possess unregistered firearm silencers. Are you aware of any precedent for the position that requiring gun silencers and other firearm accessories to be registered violates the Second Amendment?

The only precedent on this specific issue that I am aware of is the Tenth Circuit decision from which the petition originated. If confirmed, that Tenth Circuit precedent would be

binding on me as a district court judge and I would fully and faithfully follow it.

8. In 2018, you filed a petition for a writ of certiorari requesting that the Supreme Court reinstate Kansas's decision to terminate Planned Parenthood's eligibility to receive Medicaid funds. In the petition, you wrote that YouTube videos "reveal[ed]" that Planned Parenthood "was selling body parts from fetuses obtained during abortion procedures."

   The State of Kansas (prior to my tenure as Solicitor General) hired outside counsel to represent it in that litigation. Thus, I took no part in creating any evidentiary record in the district court. I was not involved until after the Tenth Circuit rendered its decision and the State, by and through the Attorney General, decided to file a petition for writ of certiorari. *See generally* Kan. Stat. Ann. 75-702. While my name is on this brief, I did not author it and am not the Counsel of Record.

   a. On what evidence did you base this claim?

      The full statement that was partially quoted in this question reads as follows: "In 2014, the Center for Medical Progress published videos revealing that Planned Parenthood Federation of America ('PPFA' or the 'National Office'), in conjunction with several of its regional affiliates was selling body parts from fetuses obtained during abortion procedures." Pet. at 6-7.

      The petition cites as support for that statement the Tenth Circuit's decision which was attached to the petition and submitted to the Supreme Court. The Tenth Circuit stated as follows:

      > In July 2015, the anti-abortion group Center for Medical Progress ("CMP") released on YouTube a series of edited videos purportedly depicting PPFA executives negotiating with undercover journalists for the sale of fetal tissue and body parts. Kansas alleges that the videos demonstrate that "Planned Parenthood manipulates abortions to harvest organs with the highest market demand" and that PPFA executives are willing to negotiate fetal-tissue prices to obtain profits. Appellant's Opening Br. at 7. According to Kansas, this evidence matters because "PPFA controls its 'affiliate' organizations, including [PPGP] and PPSLR." *Id.* Neither PPGP nor PPSLR is the subject of the videos and it is undisputed that neither participates in fetal-tissue donation or sale.

      Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205, 1212 (10th Cir. 2018). Indeed, as the Tenth Circuit further observed, the Board of Healing Arts investigated CMP's claims and took no further action with regard to the Kansas participants at issue in that litigation. Instead, the Governor later terminated the contracts at issue for unrelated concerns. That termination decision was the basis of the petition.

   b. Do you still believe that Planned Parenthood "was selling body parts from fetuses obtained during abortion procedures"?

As noted in my Response to Question 8.a, the petition did not assert that the substance of the claims in videos were verified. Rather, as the Tenth Circuit noted, the claims made in the videos were the basis for the Kansas Board of Healing Arts to initiate an investigation into those claims and, upon investigation, the Board of Healing Arts determined to take no action. *Andersen*, 882 F.3d at 1212-13.

c. Do you believe that attorneys have a responsibility to ensure the accuracy of their written representations to the court?

Yes.

9. While serving as Kansas Solicitor General, the state joined an amici brief in support of an Indiana law that required women to receive an ultrasound at least 18 hours prior to an abortion procedure. That brief argued that the Seventh Circuit erred because "[i]nstead of determining whether the women burdened by the ultrasound law comprise a 'substantial fraction' of the women for whom the law is 'relevant,' … it focused *exclusively* on the women it considered to be burdened." What fraction of women must face an undue burden in order for a restriction on abortion to be unconstitutional?

The State of Kansas, on the authority of the Attorney General, and several other States joined the amicus brief written by the State of Louisiana in *Box v. Planned Parenthood of Ind. & Kent.*, No. 18-1019. I do not believe that brief took a position on the question that you asked. But, if this question seeks my personal view on an issue that has not been resolved by the Supreme Court, it is inappropriate for me as a judicial nominee to comment on a subject that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

10. While serving as Kansas Solicitor General, the state joined an amici brief urging the Supreme Court to grant certiorari in *Arlene's Flowers, Inc. v. Washington*, which considered the case of a florist who refused to provide arrangements for an LGBT couple's wedding. Based on the same rationale articulated in the state's brief, could a florist refuse to provide services to a couple based on their race, religion, or nationality?

The State of Kansas, on the authority of the Attorney General, and several other States joined the amicus brief written by the States of Arkansas and Texas in *Arlene's Flowers, Inc. v. Washington*, No. 19-333. I do not believe that brief took a position on the question that you asked. But, if this question seeks my personal view on an issue that has not been resolved by the Supreme Court, it is inappropriate for me as a judicial nominee to comment on a subject that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

11. While serving as Kansas Solicitor General, the state joined an amici brief in support of President Trump's Executive Order 13780, which limits travel to the U.S. by nationals of several countries.

a. Do you believe that facially neutral immigration restrictions can be based on a discriminatory pretext?

The State of Kansas, on the authority of the Attorney General, and several other States joined the amicus brief that was written by the State of Texas in support of the United States government's petition in *Trump v. Hawaii*, No. 17,965. I do not believe that brief took a position on the question that you asked. The Supreme Court did, however, grant the government's petition and reversed the judgment. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). To the extent the Supreme Court's decision resolved the issue that is raised, I would if confirmed fully and faithfully follow that decision as binding precedent. But to the extent that decision has not yet been resolved and this question seeks my personal view on the subject, it is inappropriate for me as a judicial nominee to comment on a matter that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

b. The brief argued that the Executive Order was facially neutral and could only be invalidated by a "clear showing" that the Executive Order was a pretext for religiously motivated government action. In your view, why were President Trump's comments about Muslims during his presidential campaign insufficient to demonstrate a "clear showing" of pretext?

I would, if confirmed, fully and faithfully follow all Supreme Court precedent, including *Trump v. Hawaii.* To the extent this question seeks my personal view on the subject, it is inappropriate for me as a judicial nominee to comment on a matter that implicates a partisan political speech or that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5.

12. While serving as Kansas Solicitor General, you defended a Kansas law that required individuals to show documentary proof of citizenship when registering to vote. A Tenth Circuit panel found that this requirement was unconstitutional.

a. Do you believe that facially neutral voting restrictions can be unlawful?

The Supreme Court has held that that state laws concerning the right to vote are permissible if the law at issue advances legitimate state interests and does not result in a severe burden on the right to vote. *See generally Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181 (2008). If confirmed, I would fully and faithfully follow all Supreme Court precedent, including *Crawford*.

b. Do you believe that facially neutral voting restrictions can have a disproportionate impact on minorities?

Although Justice Scalia suggested that class-based analysis was an appropriate consideration, the Supreme Court has not applied that form of analysis to voting laws. *Compare Crawford*, 553 U.S. at 189-203 (Stevens, J.); *with id.* at 207-08 (Scalia, J., concurring) (suggesting that more traditional equal protection analysis should be

required). Even so, I have not studied whether facially neutral voting restrictions can have a disproportionate impact on minorities. I therefore do not believe it is appropriate to comment on a subject matter that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

c. Do you believe that laws passed with the stated purpose of protecting "voter integrity" can suppress the votes of minorities?

Please see my response to Questions 12.a.and 12.b.

Nominations
Hearing before the Senate Committee on the Judiciary
Questions for the Record
July 29, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Mr. Toby Crouse

1. **In your response to Question 16(b)(i) of your Senate Judiciary Questionnaire, you stated that as the Solicitor General of Kansas, you are the "chief appellate lawyer for the State of Kansas" and that you "supervise appellate and significant trial litigation for Kansas Attorney General Derek Schmidt."[1]**

   a. **Please explain—**

      i. **Your role and responsibilities as the "chief appellate lawyer for the State of Kansas."**

      I am the division head of the Solicitors division, one of several divisions within the Office of Kansas Attorney General Derek Schmidt. My responsibilities are set by Attorney General Schmidt and have included appearing in the United States Supreme Court, Tenth Circuit, Kansas Supreme Court, and other state and federal courts. Additionally, I am responsible for various administrative tasks for the division and provide input or advice to those within that division.

      ii. **The extent and level of your supervision of "appellate and significant trial litigation for Kansas Attorney General Derek Schmidt."**

      As described in my Senate Judiciary Questionnaire, I have conducted and supervised all appellate litigation undertaken on behalf of the Attorney General for the State of Kansas. This includes submitting briefs and arguing cases in which the State of Kansas, as determined by the Attorney General, has an interest. It also includes reviewing briefs, participating in moot courts, and other related appellate litigation efforts.

   Question 16(e) asked you to "[d]escribe your practice, if any, before the Supreme Court of the United States." Question 16(e) also asked you, to the extent that you had practiced before the Supreme Court, to "[s]upply four (4) copies of any briefs, amicus or otherwise, and if applicable, any oral argument transcripts before the Supreme Court in connection with your practice."

   b. **Please describe your role, as Kansas Solicitor General, in—**

[1] Senate Judiciary Questionnaire.

i. Drafting, editing, or contributing to the briefs, amicus or otherwise, you listed in response to Question 16(e).

If the Attorney General of Kansas makes the determination to pursue litigation or defend the interest of the State of Kansas, where the State of Kansas is drafting an amicus brief, my colleagues and I will determine how best to divide responsibilities to complete the brief. As Solicitor General, my name appears as Counsel of Record in Supreme Court briefs that Kansas has written. If the State of Kansas is not responsible for drafting the amicus brief, it (like most other States) indicates as such under the name of the Attorney General.

ii. Advising or recommending to the Kansas Attorney General to—

- **Author the briefs, amicus or otherwise, you listed in response to Question 16(e).**

  Please see my Response to Question 1.b.i. In addition, I will frequently review litigation files and draft amicus briefs in my role as Solicitor General. The existence and details of any discussions or advice is protected by the attorney-client privilege. Kan. R. Professional Conduct 1.6.

- **Join the briefs, amicus or otherwise, you listed in response to Question 16(e).**

  Please see my Response to Question 1.b.i. and 1.b.ii., *supra*.

At your hearing, you testified that "[s]tates frequently have sovereign interests that are either aligned with the litigants or they are not."[2]

c. Please describe how, as the "chief appellate lawyer for the State of Kansas," you make a determination—

i. That Kansas has a specific "sovereign interest[]."

The Kansas Attorney General is an independent constitutional officer popularly elected every four years. Under Kansas law, the Attorney General of Kansas has the sole authority to and makes the determination as to whether to pursue litigation on behalf and defend the interest of the State of Kansas. *See generally* Kan. Stat. Ann. 75-702. As a result, the choice to draft or join an amicus is a decision that is within the Attorney General's exclusive judgment.

ii. Whether a "sovereign interest[]" is "aligned with the litigants . . . or not."

Please see my Response to Question 1.c.i.

[2] *Nominations Before the S. Comm. On the Judiciary*, 116th Cong. (2020), available at https://www.judiciary.senate.gov/meetings/07/29/2020/nominations.

iii. That a particular brief, amicus or otherwise, advances a given "sovereign interest[]."

Please see my Response to Question 1.c.i.

In response to Question 16(e), you distinguished your practice before the Supreme Court, while you have been Kansas Solicitor General, in four different ways:

- **Merits cases that you litigated as Kansas Solicitor General to judgment as Counsel of Record.**
- **Cases in which you, as Kansas Solicitor General, were Counsel of Record seeking or opposing a writ of certiorari.**
- **Petitions filed by the State of Kansas while you have been Kansas Solicitor General in which you were not Counsel of Record.**
- **Cases in which the State of Kansas "authored or joined amicus briefs" while you have been Kansas Solicitor General.**

With respect to the fourth category – cases in which the State of Kansas "authored or joined amicus briefs" while you have been Kansas Solicitor General – you listed a number of cases, including the following:

- ***Arlene's Flowers Inc. v. Washington*, No. 19-333**
- ***Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, No. 19-816**
- ***Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, No. 18-1019**
- ***Department of Commerce v. United States District Court for the Southern District of New York*, Nos. 18-557 and 18-996**
- ***Little Sisters of the Poor St. Peters & Paul Home v. Pennsylvania*, Nos. 19-431 and 19-454**
- ***New York State Rifle & Pistol Association Inc. v. City of New York*, No. 18-280**
- ***Texas v. California*, No. 220153**
- ***Trump v. Hawaii*, No. 17-965**

d. For the each of the aforementioned cases, please—

i. Explain whether you, as Kansas Solicitor General, were involved in the decision to "author[] or join[]" the relevant amicus brief and, if so, the extent of your involvement in that decision. If you were not involved in the decision to "author[] or join[]" the relevant amicus brief, why did you list the case in response to Question 16(e), which asked you to "[d]escribe your practice"?

I listed all briefs—merits and amicus—that were submitted to the United States Supreme Court that Kansas authored or joined during the period of time in which I have been Solicitor General because I understand that information to be responsive. As discussed in Response to Question 1.b.i., the Attorney General makes the determination as to which matter the State of Kansas will author or join. To the best

of my knowledge, I was involved in reviewing most (if not all) of the briefs that were listed.

ii. Identify the specific "sovereign interest[]" the relevant amicus brief advanced and describe how the relevant amicus brief advanced that "sovereign interest[]."

Generally speaking, each of the States has a sovereign interest separate and apart from each other and the federal government. *See generally Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1363, 1871 (2016). That manifests itself in a variety of ways that lead to experimentation as to public policy choices, priorities, and the means to effectuate them within and among each other. *See generally* Jeffrey Sutton, *51 Imperfect Solutions* (2018). One frequent result of these efforts is a natural tension between the States and/or the federal government. *See*, *e.g.*, *United States v. Bond*, 564 U.S. 211, 220-24 (2011) (exploring the liberty-preserving attributes of that derive from diffusive sovereign powers). If litigation arises as a result of these disputes and tensions, the Attorney General makes the determination as to whether to participate as amicus (and, if so, in what capacity and in support of which party) based on his judgment of how the underlying litigation impacts Kansas's laws and priorities. As shown in each of the amicus briefs that are mentioned (copies of which were provided), the amicus parties provide a capsule of their particular interests in each case and the substance of the briefs flesh out those concerns that implicate those sovereign interests.

2. In your response to Question 16(e) of your Senate Judiciary Questionnaire, you specifically listed *Department of Homeland Security v. Regents of the University of California,* Case Nos. 18-587, 18-588, and 18-589, as a case in which the "State of Kansas authored or joined amicus briefs." You also provided a copy of an August 2019 amicus brief signed by Kansas Attorney General Derek Schmidt, which argued "DACA [i]s [u]nlawful" and supported a Trump Administration policy that would have rescinded the Deferred Action for Childhood Arrivals program and put more 700,000 individuals at risk of deportation.[3]

a. Please describe your involvement in the decision for the State of Kansas to join the amicus brief signed by Attorney General Derek Schmidt for *Department of Homeland Security v. Regents of the University of California*.

As set forth in my Response to Question 1.c.i., the decision to participate in litigation as amicus is made by the Attorney General. To the best of my recollection, I reviewed that brief before the Attorney General joined it. The existence and details of any discussions or advice is protected by the attorney-client privilege. Kan. R. Professional Conduct 1.6.

b. At the time the decision was made for the State of Kansas to join the amicus brief, did you agree with the decision? If no—

[3] Brief for the State of Texas et al. as Amici Curiae Supporting Petitioners, Department of Homeland Sec. v. Regents of the Univ. of Calif., 140 S.Ct. 1891 (2020) [see Senate Judiciary Questionnaire Attachments 16(e) at p. 4449].

As set forth in my Response to Question 1.c.i., under Kansas law, the Attorney General of Kansas has the authority to and makes the determination to appear as an amicus in the United States Supreme Court. *See generally* Kan. Stat. Ann. 75-702. As an attorney within the Office of Attorney General, it is not my job to agree, disagree, or second-guess the wisdom of a choice made by the popularly elected constitutional officer of the State of Kansas who is authorized to make such a judgment. The Kansas Rules of Professional Conduct expressly provide that a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Kan. R. Professional Conduct 1.2(b).

i. Why not?

Please see my Response to Question 2.b.

ii. Did you express any concern(s) or disapproval over the State of Kansas authoring or joining the amicus brief to the individual(s) who were responsible for the decision?

Please see my Response to Question 2.b. The existence and details of any discussions or advice is protected by the attorney-client privilege. Kan. R. Professional Conduct 1.6.

On October 4, 2019, Kansas Governor Laura Kelly joined Montana Governor Steve Bullock and the states of Nevada, Michigan, and Wisconsin in an amicus brief in support of DACA. That brief explained that "rescinding DACA will cost the Kansas economy $1.76 billion over the next decade" and argued that "[f]or Kansas, terminating DACA will prevent it from realizing the benefits of its investments in DACA recipients, significantly weakening Kansas's economy."[4]

c. In light of the brief authored joined by Governor Kelly and the findings within that highlighted the potential negative effects a rescission of DACA would have on the State of Kansas, did you take or recommend any action to change the state's position as stated in the August 2019 amicus brief?

I did not take any action. The existence and details of any discussions or advice is protected by the attorney-client privilege. Kan. R. Professional Conduct 1.6.

[4] Brief for the State of Nevada et al. as Amici Curiae Supporting Respondents at 6-7, Department of Homeland Sec. v. Regents of the Univ. of Calif., 140 S.Ct. 1891 (2020), available at https://www.supremecourt.gov/DocketPDF/18/18-587/118110/20191004123429306_18-587%2018-588%2018-589%20bsac%20Nevada%20et%20al.pdf.

Questions for the Record for Toby Crouse
From Senator Mazie K. Hirono

1. As Kansas' Solicitor General, you joined several amicus briefs that reflect extreme, anti-choice positions. For example, you defended another state's law that would require parents to be notified if a minor is seeking an abortion, even when the minor obtained a judicial bypass that determined it would not be in the minor's best interest to get her parents' consent. You also defended another state's law that would have required women to receive an ultrasound at least 18 hours prior to an abortion procedure.

   a. **As the Kansas Solicitor General, did you ever object to participating in an amicus brief involving a different state's laws as inconsistent with *Roe v. Wade* or other Supreme Court precedent?**

      Under Kansas law, the Attorney General of Kansas has the authority to and makes the determination to appear as an amicus in the United States Supreme Court. *See generally* Kan. Stat. Ann. 75-702. As an attorney within the Office of Attorney General, it is not my job to second-guess the decision of a popularly elected constitutional officer of the State of Kansas. The Rules of Professional Conduct expressly provide that a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Kan. R. Professional Conduct 1.2(b).

   b. What was your role in selecting which amicus briefs the state of Kansas would join?

      Please see my Response to Question 1.a.

2. In a 2010 Continuing Legal Education course, you discussed the Supreme Court's 5-4 decision in *Citizens United v. Federal Election Commission*. You argued that the case is "significant because it gave a hoops-minded, sitting President an occasion to trash talk the Justices of the Supreme Court."

   a. Why did you call President Obama, our country's first Black President, a "hoops-minded" President? And, why is that what is significant about this case?

      The written materials in which this partial quote appears was a collaboration between a colleague and me. Each of us was responsible for half of the cases that we would be responsible for summarizing and being ready to discuss. I do not believe that I was responsible for discussing Citizens United and, as a result, I do not believe that I drafted that language.

   b. You claimed that the Supreme Court did not decide two fundamental issues: whether Congress might limit spending of foreign corporations in U.S. elections and whether the century-old limit on corporate contributions to candidates' campaigns should be reconsidered. In your view, are those open questions for lower court judges to decide without binding Supreme Court precedent?

Please see my Response to Question 2.a. In addition, the Supreme Court's decision in *Citizens United* is binding precedent that, if confirmed, I would fully and faithfully apply. To the extent this question seeks my view on an issue that has not been resolved by the Supreme Court or Tenth Circuit precedent, it would be inappropriate for me to comment on a subject that may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

3. According to your Senate Judiciary Questionnaire, you joined the Federalist Society in 2019, not long before you started the process that led to your nomination.

   a. Did anyone tell you that you would increase your chances of being nominated to the federal bench if you joined the Federalist Society?

   No.

   b. Why did you join the Federalist Society when you did?

   To the best of my recollection, I joined the Federalist Society for the same reasons I joined other bar associations (such as the Kansas Bar Association and the local Inns of Court): for professional networking and continuing legal education opportunities.

Nomination of Toby Crouse
United States District Court for the District of Kansas
Questions for the Record
Submitted August 5, 2020

QUESTIONS FROM SENATOR BOOKER

1. While you were Solicitor General of Kansas, the state signed on to several amicus briefs in *New York State Rifle & Pistol Assn., Inc. v. City of New York*.[1] The case involved a challenge to New York's City's licensing scheme for handguns, which offered two types of handgun licenses: a carry license and a premises license. The district court granted New York City's motion for summary judgment and the Second Circuit affirmed the lower court's decision applying intermediate scrutiny.

   One of the amicus briefs Kansas signed on to urging the Supreme Court to reverse the Second Circuit stated, "[t]he Founders would be shocked by government restrictions on law-abiding citizens that exist today."[2]

   a. Did you review that amicus brief?

      To the best of my recollection, I believe that I reviewed one or both of the amicus briefs that are referenced.

   b. Do you agree that the "Founders would be shocked by government restrictions on law-abiding citizens that exist today"? If so, why?

      The State of Kansas, on the authority of its Attorney General, and several other States joined the amicus briefs written by the State of Louisiana to advocate a position held by many of the citizens in their respective States. It is inappropriate for me, as a judicial nominee, to express my personal view on an issue that has not been resolved by the Supreme Court because it may be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

2. In 2019, you were Counsel of Record on an amicus brief that argued that firearms accessories—including silencers—are protected by the Second Amendment.[3] In the brief, you argued that the Second Amendment protects silencers because they are not "dangerous or unusual" and are "in common use for traditionally lawful purposes."[4] The

[1] SJQ at p. 19.
[2] Brief of Lousiana, et al. as Amici Curiae in Support of Petitioners, *New York State Rifle & Pistol Assn., Inc. v. City of New York*, 140 S. Ct. 1525 (2020), 2019 WL 2173983 (May 14, 2019), at *2. While Crouse was serving as Solicitor General of Kansas, the state joined an amicus brief challenging Maryland's licensing scheme for carrying handguns outside the home. The brief similarly argued that the Second Amendment guarantees the right to carry a gun outside the home for self defense. *See* Brief of Alabama and 20 Other States as Amici Curiae in Support of Petitioners, *Malpasso v. Pallozzi*, 2020 WL 3146688 *8 (U.S. 2020) (cert. denied), 2019 WL 6170547 (Nov. 18, 2019).
[3] Brief of Amici Curiae States of Kansas, et al. in Support of Petitioner, *Kettler v. U.S.*, 139 S. Ct. 2691 (2019) (cert. denied), 2019 WL 932011 (Feb. 19, 2019).
[4] *Id.*

Supreme Court denied cert in that case.[5]

a. Did you make the determination to submit an amicus brief in that case?

Under Kansas law, the Attorney General of Kansas has the authority to and makes the determination to appear as an amicus in litigation before the United States Supreme Court. *See generally* Kan. Stat. Ann. 75-702.

b. If so, why did you decide to submit an amicus brief in that case arguing that firearm accessories, such as silencers, are protected by the Second Amendment?

Please see my response to Question 2.a.

c. Do you stand by the arguments in that brief that silencers are protected by the Second Amendment?

Under Kansas law, the Attorney General of Kansas has the authority to and makes the determination to appear as an amicus in litigation before the United States Supreme Court. *See generally* Kan. Stat. Ann. 75-702. As an attorney within the Office of Attorney General, it is my job to make arguments in support of those decisions. The Rules of Professional Conduct expressly provide that a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Kan. R. Professional Conduct 1.2(b).

3. Twice, while you were Kansas Solicitor General, Kansas signed on to amicus briefs before the Supreme Court in *DHS v. Regents of University of California*.[6] Those briefs argued that DACA was unlawful because it "contravene[d] Congress's extensive immigration-enforcement scheme" and violated the Administrative Procedures Act (APA). The briefs also argued that Department of Homeland Security's decision to terminate DACA was not arbitrary and capricious and did not violate the APA.

Just recently, in June 2020, Chief Justice Roberts wrote a majority opinion holding that the Department of Homeland Security's decision to rescind DACA was arbitrary and capricious in violation of the APA.[7] Given that Kansas signed on to an amicus brief while you were Solicitor General arguing that the Department of Homeland Security's decision to terminate DACA did not violate the APA, do you disagree with the Supreme Court's holding that the decision to rescind DACA was arbitrary and capricious? If not, why?

The Supreme Court's decision in *Department of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020), is binding precedent. If confirmed, I would fully and faithfully apply all Supreme Court precedent.

4. As Kansas Solicitor General, you defended a Kansas law that required individuals to

[5] *Kettler v. U.S.*, 139 S. Ct. 2691 (2019) (cert. denied).
[6] SJQ at p. 20.
[7] *DHS v. Regents of the University of California*, 140 S. Ct. 1891 (2020).

provide documentary proof of citizenship when registering to vote.[8] This law was challenged by numerous organizations, including the League of Women Voters and the American Civil Liberties Union. In defending the law, you argued preventing Kansas from requiring documentary proof of citizenship would "undermine the integrity of the electoral process—whether widespread voter fraud exists or not."[9] You were unable to provide evidence that Kansas experienced widespread voter fraud. Rather, you were only able to provide evidence of 129 instances of noncitizens seeking to register to vote since 1999.[10] The district court struck down the law and the Tenth Circuit affirmed that decision.

a. Do you believe that the inability to provide evidence of widespread voter fraud in Kansas undermined your defense of the law?

   The Supreme Court upheld Indiana's voter identification law that was focused on in-person voter impersonation at polling places even though the "record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 194 (2008).

b. In hindsight, do you believe the law was necessary given that widespread voter fraud was not occurring in Kansas?

   The law was approved by near-unanimous support of both chambers of the Kansas Legislature, signed by the Governor, and—nearly a decade later—has not been repealed. The Attorney General is statutorily required to defend such laws. Kan. Stat. Ann. 75-702. As an attorney within the Office of the Attorney General, it is not my role to opine on the wisdom or necessity of the law.

c. To your knowledge, did then-Secretary of State Kris Kobach help draft the law requiring that individuals show documentary proof of citizenship when registering to vote?

   I have no first-hand knowledge, as the law at issue was enacted nearly seven years before I joined the Attorney General's office. My understanding is that former Secretary of State Kobach supported this legislation, but I have no information as to his role in drafting the law.

d. Did the Office of the Solicitor General of Kansas consult with then-Secretary of State Kris Kobach in defending the law?

   I became Solicitor General in early 2018 and have no first-hand knowledge of the events preceding my tenure. My understanding is that the Attorney General's office was not involved in the underlying litigation in district court, but prosecuted the appeal after the district court rendered a final judgment in June 2018.

[8] *Fish v. Kobach*, 840 F.3d 710, 717 (10th Cir. 2016).
[9] *Id.* at *36.
[10] *Id.* at 60.

5. In 2010, you appeared to take issue with President Barack Obama's criticism of the Supreme Court's decision in *Citizens United v. Federal Election Commission* during his 2010 State of the Union address. You said, "This case is significant because it gave a hoops-minded, sitting President an occasion to trash talk the Justices of the Supreme Court when the President enjoyed a home-court advantage and no Justice could respond without committing a technical foul."[11]

   a. Why did you characterize President Obama as "hoops-minded"?

      The written materials from which this language was partially quoted was a collaboration between a colleague and me. Each of us was responsible for half of the cases that we would be responsible for summarizing and being ready to discuss. I do not believe that I was responsible for discussing *Citizens United* and, as a result, probably did not draft that language.

   b. Was the "hoops-minded" characterization meant to be a reference to President Obama's race?

      While I probably did not draft that language, as described above, I have not interpreted it in the materials as a reference to President Obama's race. It was common knowledge that President Obama loved the game of basketball, was competitive, and enjoyed needling his friends and competitors. *See generally* https://www.complex.com/sports/2017/01/obama-best-sports-trash-talking-moments/obama-steph-curry-golf (last visited August 7, 2020).

   c. Do you understand how calling President Obama "hoops-minded" could be seen as an inappropriate jab at his race?

      Without the context I just described, such a comment might be interpreted as a reference to an individual's race.

      i. Do you regret using this inappropriate reference?

         As described above, I probably did not draft that language. Please see my Responses to Questions 5.a., 5.b., and 5.c.

   d. President Trump's attacked Associate Justice Sotomayor for her dissent in *Wolf v. Cook County*, which criticized the Court's decision to overturn a lower court ruling that prevented the Trump Administration from denying the issuance of green cards to immigrants who used benefits like Medicaid, SNAP, and housing assistance. President Trump wrote on Twitter: "'Sotomayor accuses GOP appointed Justices of being biased in favor of Trump.' @IngrahamAngle @FoxNews This is a terrible thing to say. Trying to 'shame some into voting her way? She never criticized Justice Ginsberg when she called me a 'faker'. Both

[11] Toby Crouse, Speaker, "U.S. Supreme Court Opinions: Summary & Analysis – OT2009," CLE Presentation, Kansas Bar Association Annual Meeting, Wichita, Kansas (June 2010); SJQ Attachment 12(d) at p. 1464.

should recuse themselves.."[12] He went on the criticize Associate Justice Ginsburg writing, "...on all Trump, or Trump related, matters! While 'elections have consequences', I only ask for fairness, especially when it comes to decisions made by the United States Supreme Court![13]

Do you take issue with these statements? If not, please explain why.

As a district court nominee, it is inappropriate for me to opine on any statement made by the President or any other political figure. *See* Code of Conduct for United States Judges, Canon 5.

e. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[14]

i. Do you think it was appropriate for President Trump to attack Judge Gonzalo in this case?

As a district court nominee, it is inappropriate for me to opine on any statement made by the President or any other political figure. *See* Code of Conduct for United States Judges, Canon 5.

ii. Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

If confirmed, I will assess a basis for recusal or disqualification in accordance with 28 U.S.C. §§ 144 and 455. As a district court nominee, it is inappropriate for me to opine on any statement made by the President or any other political figure.

6. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I do not subscribe to any particular label. Labels mean different things to different people. If confirmed, I will apply the law fairly and impartially as written. Further, I will follow Supreme Court and Tenth Circuit precedent that address acceptable methods of constitutional and statutory construction.

7. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

I do not subscribe to any particular label. Labels mean different things to different people. If confirmed, I will apply the law fairly and impartially as written. Further, I will follow Supreme Court and Tenth Circuit precedent that address acceptable methods of

[12] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2018, 11:09 P.M.), https://twitter.com/realDonaldTrump/status/1232155591537254400.
[13] *Id.*
[14] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,*'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.

constitutional and statutory construction.

8. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

   a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

      If confirmed, I will follow and apply Supreme Court and Tenth Circuit precedents governing the consideration of legislative history to construe a statute. The Supreme Court has made clear that if the text of a statute is clear, the inquiry ends there; legislative history may not be used to muddy the meaning of clear language. *See*, *e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Supreme Court further has cautioned that "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms," noting that "[n]ot all extrinsic materials are reliable sources of insight into legislative understandings." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). That is because "legislative history is itself often murky, ambiguous, and contradictory," and that "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.*

   b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

      Please see my Response to Question 8.a.

9. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

   Trial and appellate judges should apply the law fairly and impartially to the facts of a case before them, following appropriate Circuit and Supreme Court precedent. If confirmed, I will follow Canon 3A(1) of the Code of Conduct for United States Judges and Tenth Circuit and Supreme Court precedent in deciding a case. I understand judicial restraint to be a theory of interpretation that encourages restraint in deciding cases that might involve a law being struck down.

   a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed

the Court's longstanding interpretation of the Second Amendment.[15] Was that decision guided by the principle of judicial restraint?

As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Heller*.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[16] Was that decision guided by the principle of judicial restraint?

As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Citizens United*.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[17] Was that decision guided by the principle of judicial restraint?

As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Shelby County*.

10. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[18] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[19]

    a. Do you believe that in-person voter fraud is a widespread problem in American elections?

    I have not read any of the studies referenced in your question nor any studies that indicated voter fraud is a widespread problem in American elections. Therefore, I lack sufficient knowledge to answer your question. But the Constitution grants States the power to establish voter qualifications, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013), and the Supreme Court has recognized that States have legitimate justifications to

[15] 554 U.S. 570 (2008).
[16] 558 U.S. 310 (2010).
[17] 570 U.S. 529 (2013).
[18] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[19] *Id.*

legislate in this realm even without widespread voter fraud, *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 193-97 (2008). Additionally, as a district court nominee it would be inappropriate under Canons 2A and 3A(6) of the Code of Conduct for United States Judges to opine on an issue that might appear before me. If confirmed as a district judge, I will fully and faithfully apply both Tenth Circuit and Supreme Court precedent.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not read any of the studies referenced in your question nor any studies that indicated voter fraud is a widespread problem in American elections. Therefore, I lack sufficient knowledge to answer your question. Additionally, as a district court nominee it would be inappropriate under Canons 2A and 3A(6) of the Code of Conduct for United States Judges to opine on an issue that might appear before me. If confirmed as a district judge, I will fully and faithfully apply both Tenth Circuit and Supreme Court precedent.

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I have not read any of the studies referenced in your question nor any studies that indicated voter fraud is a widespread problem in American elections. Therefore, it would be inappropriate for me to speculate. Additionally, as a district court nominee it would be inappropriate under Canons 2A and 3A(6) of the Code of Conduct for United States Judges to opine on an issue that might appear before me. If confirmed as a district judge, I will fully and faithfully apply both Tenth Circuit and Supreme Court precedent.

11. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[20] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[21] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[22] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[23]

a. Do you believe there is implicit racial bias in our criminal justice system?

Racism exists in our society, but I have not researched the question of implicit racial bias in the criminal justice system. If confirmed, I will be conscious of the potential for implicit racial bias and work to exclude it from the courtroom.

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[20] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[21] *Id.*
[22] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[23] *Id.*

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

No.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[24] Why do you think that is the case?

I have not studied that report or similar reports and therefore cannot opine as to the reasons for that disparity, but I do recognize that a number of factors, including implicit racial bias, may contribute to that disparity.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[25] Why do you think that is the case?

I have not studied that report or similar reports and therefore cannot opine as to the reasons for that disparity, but I do recognize that a number of factors, including implicit racial bias, may contribute to that disparity.

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

I believe awareness of the issue of implicit racial bias by every participant in our criminal justice system may help address this issue. Training for all involved may also help increase awareness of this issue.

12. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[26] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[27]

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[24] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

[25] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

[26] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.

[27] *Id.*

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue and cannot give an opinion on the same.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this issue and cannot give an opinion on the same.

13. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

14. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

15. Do you believe that *Brown v. Board of Education*[28] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Generally, Canons 2A and 3A(6) of the Code of Conduct for Unites States Judges prohibit me from grading or commenting on the propriety of a Supreme Court opinion. But due to *Brown*'s unique importance in our nation's history, the fact that I do not believe this issue will ever appear before me, and because prior nominees to the nation's federal courts have done so, I am comfortable in saying that *Brown* was correctly decided.

16. Do you believe that *Plessy v. Ferguson*[29] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. The Supreme Court overruled *Plessy* in *Brown*.

17. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

No.

18. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no

[28] 347 U.S. 483 (1954).
[29] 163 U.S. 537 (1896).

Judges or Court Cases, bring them back from where they came."[30] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

As a district judge nominee, it is inappropriate for me to opine on any statement made by the President or any other political figure. The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), has indicated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." If confirmed, I will fully and faithfully apply all applicable Tenth Circuit and Supreme Court precedent.

[30] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted August 5, 2020
For the Nomination of:

Toby Crouse, to be United States District Judge for the District of Kansas

1. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortions. After the law passed, the number of those health care facilities dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman's Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

    a. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

    In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court held that state health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right and are therefore constitutionally invalid. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112 (2020). That standard requires courts to independently review the legislative findings and to weigh the law's asserted benefits against the burdens it imposes on access. *Id.* To the extent that Supreme Court or Tenth Circuit precedent has not resolved this particular question, it is inappropriate for me, as a nominee for a district court judgeship, to provide my personal view on an issue that is subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canon 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including *June Medical Services* and *Whole Woman's Health*.

    b. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law has an overall impact of reducing abortion access statewide?**

    Please see my Response to Question 1.a.

2. In 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that the right to marry is fundamental and must be guaranteed to all same-sex couples.

    a. **In your view, does the right to marry carry an implicit guarantee that everyone should be able to exercise that right equally?**

    In *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry on the same terms as accorded to couples of the opposite sex. 135 S. Ct. 2584, 2607 (2015). To the

extent that Supreme Court or Tenth Circuit precedent has not resolved this particular question, it is inappropriate for me, as a nominee for a district court judgeship, to provide my personal view on an issue that is subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canon 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including *Obergefell.*

b. **If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

Please see my Response to Question 2.a.

c. **If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent, including *Obergefell* and its progeny. At this time, *Obergefell*'s implications on a dispute involving same-sex couples seeking to adopt children remains an open question. *See* 135 S. Ct. at 2625-26 (Roberts, C.J., dissenting); *see also Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (granting certiorari to consider this question). As a result, it is inappropriate for me, as a nominee for a district court judgeship, to provide my personal view on an issue that is subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canon 2(A), 3(A)(6).

3. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

a. **What is the process you would follow before you sentenced a defendant?**

If confirmed as a district court judge, before sentencing any defendant, I will (1) review the Rule 11 Plea Agreement of the parties, if any, (2) review the presentence report prepared by the probation department, (3) review the advisory sentencing guidelines, (4) review any sentencing memorandums submitted by the parties, (5) consider the arguments of the parties, (6) consider the allocution of the defendant and any victim, if applicable, and (7) consider the sentencing factors identified in 18 U.S.C. § 3553(a).

b. **As a new judge, how would you plan to determine what constitutes a fair and proportional sentence?**

If confirmed, I will determine what constitutes a fair and proportional sentence by using the process described above and consult with other judges, when appropriate, for feedback and insight to consider. I will also consider other sentences imposed in similar cases to ensure consistency in sentences.

c. **When is it appropriate to depart from the Sentencing Guidelines?**

The Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), determined that the United States Sentencing Guidelines are advisory rather than mandatory. However, § 5K of the United States Sentencing Guidelines does provide circumstances where it might be appropriate to depart from the calculated guideline range (for example, a downward departure for providing substantial assistance in the prosecution of another, § 5K1.1; or an upward departure for when death resulted from the crime of conviction, § 5K2.1). If confirmed, I will faithfully apply federal sentencing laws along with Tenth Circuit and Supreme Court precedent in determining a sentence.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

i. **Do you agree with Judge Reeves?**

I am not familiar with Judge Reeves' comments or his basis for those comments. The issue of mandatory minimum sentences is a policy issue to be addressed by Congress. If I am confirmed as a district court judge I will faithfully apply federal sentencing laws and any applicable Tenth Circuit and Supreme Court precedent.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

The issue of mandatory minimum sentences is a policy issue to be addressed by Congress. If I am confirmed as a district court judge I will faithfully apply federal sentencing laws and any applicable Tenth Circuit and Supreme Court precedent.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

The issue of mandatory minimum sentences is a policy issue to be addressed by Congress. If I am confirmed as a district court judge I will faithfully apply federal sentencing laws and any applicable Tenth Circuit and Supreme Court precedent.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf.

remedy unjust sentences that result from mandatory minimums.[1] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

   The issue of mandatory minimum sentences is a policy issue to be addressed by Congress. If I am confirmed as a district court judge I will faithfully apply federal sentencing laws and any applicable Tenth Circuit and Supreme Court precedent.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   Charging decisions are within the sole discretion of the executive branch. Discussing charging policies with the U.S. Attorney would be inappropriate as it might encroach on the separation of powers.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   Clemency considerations are within the sole discretion of the executive branch. Discussing clemency considerations with the U.S. Attorney would be inappropriate as it might encroach on the separation of powers.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

   Yes.

4. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   f. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

   Yes.

[1] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html.

g. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

I am aware of studies that show there are racial disparities in our criminal justice system. I do not have specific examples.

5. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

The Code of Conduct for United States Judges, Canon 3(B)(3) states that a judge should "exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism." If confirmed and to the extent that as a district court judge I am in a position to appoint or recommend candidates for positions of power or supervisory positions, I commit to ensuring that all individuals, including qualified minorities and women, are given equal consideration for such positions.

Senator Josh Hawley
Questions for the Record

Toby Crouse
Nominee, U.S. District Court for the District of Kansas

1. **Under Supreme Court and U.S. Court of Appeals for the Tenth Circuit precedent, 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?**

The Eighth Amendment forbids "cruel and unusual" methods of capital punishment but does not guarantee a prisoner a painless death. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122-26 (2019). To succeed on a method of execution claim, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125.

2. **Under the Supreme Court's holding in *Glossip v. Gross*, 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?**

Yes. Please see my Response to Question 1.

3. **Have the Supreme Court or the U.S. Court of Appeals for the Tenth Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

The Supreme Court has ruled that there is no constitutional right to post-conviction DNA testing for a habeas petitioner to prove actual innocence. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). To my knowledge, the Tenth Circuit has not held to the contrary. *See McDaniel v. Suthers*, 335 F. App'x 734, 736 (10th Cir. 2009) (relying on *Osborne*).

4. **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?**

No.

5.

a. Under Supreme Court and U.S. Court of Appeals for the Tenth Circuit precedent, 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.

In *Employment Division v. Smith*, 494 U.S. 872, 877-79 (1990), the Supreme Court held that enforcement of facially neutral and generally applicable laws against religious conduct ordinarily does not trigger strict scrutiny under the Free Exercise Clause, even where those laws impose a substantial burden on religious exercise. *See also Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254-55 (2020). Under *Smith*, strict scrutiny applies to state laws that burden religious exercise if the law at issue "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). Further, if the law is not of general application, it is subject to strict scrutiny. *Id.* at 531-34, 546. The Free Exercise Clause forbids subtle departures from neutrality and covert suppression of religious beliefs. *Id.* Additionally, courts must carefully examine the context of the law's adoption and enforcement to determine whether the government has demonstrated impermissible hostility to religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018). But *Smith* does not purport to apply to all Free Exercise Claims. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). For example, *Smith* does not apply to "an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

b. Under Supreme Court and U.S. Court of Appeals for the Tenth Circuit precedent, 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.

The Supreme Court held that, at a minimum, the protections of the Free Exercise Clause pertain if the "law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S.

520, 532 (1993). Improper animus may be found in either the text or in the law's operation. *Id.* at 534-35; *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1312-15 (10th Cir 2010) (applying RLUIPA and recognizing government action may impose a substantial burden by requiring participation in conduct, forbidding participation in conduct, or placing substantial pressure on an individual to engage or not engage in religious conduct).

c. What is the standard in the U.S. Court of Appeals for the Tenth Circuit for evaluating whether a person's religious belief is held sincerely?

It is rarely appropriate for a court to inquire into the sincerity of a free-exercise plaintiff's religious beliefs. *See generally Kay v. Bemis*, 500 F.3d 1214, 1219-20 (10th Cir. 2007).

6. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?*

The Supreme Court in *District of Columbia v. Heller* held that "[t]he Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." The Supreme Court further stated that "the right secured by the Second Amendment is not unlimited" and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

7. Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."

I understand this statement to accurately reflect the guiding command for statutory and constitutional interpretation. *See*, *e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). If confirmed, I will apply this and other Supreme Court precedent fully and faithfully.