Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Veronica Rossman
Nominee to the Court of Appeals for the Tenth Circuit
June 16, 2021

1. **At your hearing, members on both sides of the aisle asked you questions about your time as a federal public defender. While there is no doubt that you have a great deal of experience working on criminal matters, you also have experience in private practice working on civil cases.**

Can you discuss your experience working on civil matters?

Response: I have worked exclusively on civil matters for nearly half of my 20-year legal career.

First, I spent a year as a law clerk to Chief Justice William A. Maupin of the Nevada Supreme Court. In that role, I conducted research, wrote legal memoranda, and prepared draft opinions in many civil appellate cases. These civil appeals involved a wide range of civil subject areas, including family law, contracts, products liability, insurance defense, civil rights, and personal injury.

Second, I spent four years as a civil litigation associate at Morrison & Foerster LLP, where I worked only on civil matters. I practiced complex civil litigation, primarily in federal trial and appellate courts, including in the United States Supreme Court. I also practiced before the United States International Trade Commission and worked on matters before the Federal Trade Commission. While at the firm, I specialized in antitrust and intellectual property law, but I also worked on civil cases involving bankruptcy, securities, telecommunications, transportation, energy, employment, finance, and banking law. I prepared legal memoranda, took and defended depositions, participated in large-scale document review work, drafted motions, wrote appellate briefs, worked with expert witnesses, assisted at trial, and conducted oral arguments. I also took on civil pro bono matters involving civil rights and constitutional law.

Third, I spent a year as a lawyer at Mastbaum & Moffat, where I worked only on civil matters. I focused on employment law, contract disputes, and intellectual property law. I served as second-chair in a week-long employment law jury trial in federal district court.

Fourth, I spent a year as a Staff Attorney at the United States Court of Appeals for the Ninth Circuit, where I was assigned to the civil research unit and only worked on civil appeals. In that role, I reviewed appellate briefing involving various civil subject areas, including employment, civil rights, and immigration law. I also worked on a number of civil pro se appeals, which exposed me to the Prison Litigation Reform Act. In addition, I gained familiarity with federal abstention doctrines and procedures. I drafted legal memoranda and proposed orders and presented findings and recommendations to three-judge oral screening panels.

Fifth, I spent two years as a full-time faculty member at the University of Denver, Sturm College of Law, where I only taught civil doctrinal courses—namely, Civil Procedure and Conflict of Laws.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Veronica Sophia Rossman
Judicial Nominee to the United States Circuit Court of Appeals for the Tenth Circuit

1. How many appeals have you argued?

Response: I have personally handled and supervised over 100 criminal appellate matters arising out of every judicial district in the Tenth Circuit and involving a wide range of substantive and procedural federal criminal law. Most of these appellate case are submitted for decision on the briefs without oral argument. I have personally argued 8 appeals, and I have served as co-counsel/supervisory counsel at oral argument in more than a dozen additional appeals. I would additionally note that I have personally presented oral argument on motions in the district court and, since 2017, I have had supervisory responsibility for the Motions Unit, a team of appellate specialists who assist the Trial Division with complex legal research and writing, issue preservation, and strategic planning during earlier stages of federal criminal litigation.

2. Of the appeals you have argued, how many have you won?

Response: I have won 6 of the 8 appeals that I've personally argued.

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

Response: I am not familiar with Judge Jackson's remark. I would respectfully reiterate what I said at my hearing, which was that "I believe the Constitution is an enduring document."

4. During your hearing you wouldn't explain your approach to constitutional interpretation beyond whatever is commanded by precedent. How would you interpret a constitutional issue in a case of first impression?

Response: I do not ascribe to any single school of interpretative methodology. If confirmed as a circuit judge, I would be bound by the precedents of the Supreme Court, without regard to any personal view about constitutional interpretation. I expect it will be the rare case where, as a circuit judge, I would be called upon to interpret a constitutional provision that has never been considered in a precedent of the Supreme Court. Should such a case of first impression come before the Tenth Circuit, I would start with the constitutional text and adhere to the modes of constitutional interpretation used by the Supreme Court. In recent years, the Supreme Court has interpreted various constitutional provisions according to the "original public meaning" of the Constitution's text at the time of the Founding. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008). The Supreme Court also has referred to the original intent of the Framers when interpreting the Constitution. *See,*

e.g., Crawford v. Washington, 541 U.S. 36, 53–54 (2004). If confirmed, I will faithfully follow Supreme Court precedent in every case, including in a case raising a constitutional issue of first impression, regardless of whether the particular precedent was grounded in any specific judicial philosophy or approach to constitutional interpretation.

While I do not ascribe to a specific judicial philosophy or approach to constitutional interpretation, I have carefully considered the judicial process I will bring with me to the appellate bench, if confirmed. In every case, I will treat all litigants respectfully and impartially; I will carefully consider the issue(s) presented and give due regard to the parties' legal arguments; I will carefully review the record on appeal; I will put aside any personal views; I will faithfully adhere to the rule of law; I will reach a decision, working collaboratively with my judicial colleagues, that adjudicates only the issue presented in the case; and I will strive to issue well-written opinions that make the reasoning underlying the outcome clear to the litigants and to the public.

5. In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?

Response: Please see my response to Question 4.

6. What role should empathy play in interpreting the law?

Response: Empathy should play no role in interpreting the law. A judge must be impartial and abide by the rule of law, without regard to any external influences or personal opinions.

7. Should judicial decisions take into consideration principles of social "equity"?

Response: Judicial decisions must be based on the law as applied to the facts presented in that particular case.

8. Are legal doctrine and practice best understood as an objective and defensible scheme of human association? Or are they better understood as being of instrumental use for political ends?

Response: Your question seems to refer to different schools of legal theory. Judges must abide by the rule of law, without regard to personal views or political ends.

9. How do you define formalism?

Response: There does not appear to be a single definition of formalism. My general understanding is that "formalism" means "An approach to law, and esp. to constitutional and statutory interpretation, holding that (1) where an authoritative text governs, meaning is to be derived from its words, (2) the meaning so derived can be applied to particular facts, (3) some situations are governed by that meaning, and some are not, and (4) the

standards for deciding what constitutes following the rules is objectively ascertainable." FORMALISM, Black's Law Dictionary (11th ed. 2019).

10. Do you consider yourself a formalist?

Response: I do not ascribe to any particular school of legal reasoning and analysis. If confirmed as a judge on the Tenth Circuit, I would be bound by Supreme Court and Tenth Circuit precedent, whether or not the precedent is considered "formalist."

11. Is the complexity of precedent and its multiplicity a feature or a bug of the law?

Response: Stare decisis is a foundational principle of judicial decision-making.

12. How do you define legal realism?

Response: There does not appear to be a single definition of legal realism. My general understanding is that "legal realism" means "[t]he theory that law is based not on formal rules or principles but instead on judicial decisions deriving from social interests and public policy as conceived by individual judges." LEGAL REALISM, Black's Law Dictionary (11th ed. 2019).

13. Do you consider yourself a legal realist?

Response: I do not ascribe to any particular school of legal reasoning and analysis. If confirmed as a judge on the Tenth Circuit, I would be bound by Supreme Court and Tenth Circuit precedent, whether or not the precedent is considered "legal realist."

14. Do you agree that all lawyers are, at some level, legal realists?

Response: Advocates may seek to advance their litigation position by making arguments based not only on categorical legal principles but also by asking the judge to consider the law's probable consequence in a particular case.

15. What is the purpose of criminal sentencing under the law?

Response: Congress has identified four general purposes of criminal sentencing: just punishment, deterrence, protection of the public, and rehabilitation. *See* 18 U.S.C. § 3553(a)(2).

16. What is the purpose of criminal sentencing from a moral perspective?

Response: The purpose of criminal sentencing from a moral perspective, in the abstract, is not a subject I would be concerned with when adjudicating individual cases and controversies as an appellate judge, if confirmed. Questions of sentencing policy are to be determined by Congress and state legislatures.

17. What, if anything, do you think is the relationship between morality and the law when it comes to punishing criminals?

Response: The well-settled principle of individualized sentencing, *see, e.g., Pepper v. United States*, 562 U.S. 476, 487-88 (2011), and the requirement of proportionality, embodied in the parsimony principle of 18 U.S.C. § 3553(a), are emblematic of the relationship between morality and the law when it comes to punishment.

18. What is the relationship between morality and the law generally?

Response: The theoretical relationship between morality and the law, as a general matter, is not a subject that would inform my adjudication of an appellate case, if I am confirmed. As an appellate judge, if confirmed, my role would be to consider the specific legal claims and facts presented in individual cases and controversies.

19. Is the practice of judicial review defensible absent the existence of neutral legal principles?

Response: Judicial review is established beyond question. *See Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803).

20. Alexander Solzhenitsyn said in a letter to students, "There is nothing relative about justice, as there is nothing relative about conscience. Indeed, justice is conscience, not a personal conscience but the conscience of the whole of humanity." He went on to say, "And please do not tell me that 'everybody understands justice in his own way.' No!"[1]

a. How do you define justice?

Response: In the context of the judiciary, justice means that *all* litigants who come before the court receive equal treatment and a fair hearing, before an impartial judicial officer, who decides the case according to the faithful application of the rule of law, without regard to personal views, and renders a well-reasoned, written ruling that can be understood, and accepted, by the litigants, the public, and other judges.

b. Is justice relative?

Response: Justice might have different definitions depending on the context.

c. How do people figure out what justice is?

Response: Please see my response to Question 20a.

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[1] Alexander Solzhenitsyn, *Two From Solzhenitsyn*, Dissent (Nov.-Dec. 1970), *available at* https://www.dissentmagazine.org/article/two-from-solzhenitsyn-2.

21. What is your understanding of the original meaning of the Cruel and Unusual Punishment Clause?

Response: The Supreme Court has interpreted the Eighth Amendment according to "'evolving standards of decency.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal citation omitted). More recently, in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Supreme Court discussed the meaning of the phrase "cruel and unusual" at the time of the Eighth Amendment's adoption. If confirmed, I would faithfully follow binding Supreme Court and Tenth Circuit precedent in appeals raising Eighth Amendment issues.

22. Do you think law firms should allow paying clients to influence which pro bono clients they take?

Response: Law firms make individual decisions about these matters. I am not familiar with any applicable ethics rules that would govern in this context.

23. Do you think law-firm clients should use their financial position to influence which pro bono clients their attorneys take?

Response: Please see my answer to Question 22.

24. Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?

Response: Please see my answer to Question 22.

25. As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?

Response: The Supreme Court has not recognized a right to representation in civil cases in the same way that *Gideon v. Wainwright* established a fundamental right to counsel in criminal cases. A number of state legislatures have considered or enacted civil right-to-counsel legislation. The American Bar Association (ABA) maintains a research report detailing existing state authority to appoint counsel in various types of civil proceedings. S*ee* ABA, Civil Right to Counsel, *available at* https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1/

26. You handled many defendants charged with unlawfully possessing firearms. Approximately how many cases did you handle that dealt with defendants charged with unlawful possession of a firearm, illegal firearm trafficking, or violence committed with a firearm?

Response: To the best of my knowledge, I have handled approximately 50 cases involving defendants charged with unlawfully possessing firearms.

27. During your years as a federal defender did you ever raise a Second Amendment defense on behalf of your clients?

Response: No.

28. In your SJQ, you noted that "appropriately limiting restitution is important because a large restitution order can follow a client for 20 years and make it difficult for them to get back on their feet and stay there." You concluded the blog post by stating that "[r]estitution can be very burdensome for our clients."

a. What is the burden borne by crime victims?

Response: The impact of crime on victims is different in every case. Victim impact statements allow crime victims to express in their own words what they have experienced. The victim impact statement can become part of the Presentence Investigation Report prepared by the U.S. Probation Office.

b. Do you believe that victims should receive restitution?

Response: Victims should receive restitution if they are entitled to it under applicable law. The Mandatory Restitution Act of 1996 (MVRA) established procedures for determining the amount of restitution to which a victim may be entitled. If confirmed, I would follow the MVRA, any other applicable restitution statutes, and Supreme Court and Tenth Circuit precedents governing restitution in any case where the issue arises.

c. If confirmed, are you able to divorce your prior advocacy and affirm large restitution amounts, even if the "large" order "follow[s] a client for 20 years" if the amount appropriately correlates with the crime?

Response: Yes.

29. In a blog post you once discussed the concept of the "trial penalty."

a. Do you believe that the "trial penalty" has "so thoroughly tipped the scales of justice against the accused that the danger of government overreach is ever-present."

Response: The quoted statement appears in a report prepared by the National Association of Criminal Defense Lawyers (NACDL). I am not a member of NACDL, nor did I have any role in writing their report. If confirmed, I would consider any issue concerning a defendant's trial rights under applicable law, including the Sixth Amendment, the Federal Rules of Criminal Procedure, federal statutes, and Supreme Court and Tenth Circuit precedent.

b. Do you believe that prosecutors retain "virtually unfettered prosecutorial charging discretion"?

Response: Please see my response to Question 29a.

30. How many of your clients have been fully exonerated and declared innocent of their crime(s)?

Response: I have personally only raised legal sufficiency claims on direct appeal. *See, e.g., Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (distinguishing "actual innocence" claims from "legal sufficiency" claims).

a. As a total percentage how many of your clients do you believe were innocent?

Response: At the Office of the Federal Public Defender, I have been appointed to represent clients who qualify for the assistance of counsel under the Sixth Amendment and the Criminal Justice Act, 18 U.S.C. § 3006A. It is well-settled that the right to counsel is not conditioned upon actual innocence. "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike." *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). Disclosing information about my personal beliefs, if any, about a client would compromise my duties of loyalty and zealous advocacy required by the Sixth Amendment and would violate the Colorado Rules of Professional Responsibility.

b. Given the number cited above, how does it comport with your statement that "on a human level, for the defense attorney there is no more heartwrenching task than explaining to a client who very likely may be innocent that they must seriously consider pleading guilty or risk the utter devastation of the remainder of their life with incalculable impacts on family."

Response: Please see my response to Question 29a.

31. You led the charge advocating for the broad release of prisoners from jails, citing the dangers of the pandemic for prisoners. During one presentation where you delivered advice for defense counsel in seeking the release of their clients from jail due to the pandemic, you stated that "the coronavirus pandemic itself is an extraordinary and compelling reason justifying relief—especially if your client belongs to a high-risk group according to CDC guidelines." You applied this logic to several cases, including *United States v. Moon*, 2020 WL 2520371, No. 20-150, 1:20 CR 00061 (10th Cir. May 14, 2020). How should a court treat the defendant's medical condition in relation to his stash of multiple firearms and repeated threats to kill his children?

Response: Mr. Moon was not seeking compassionate release under 18 U.S.C. § 3582, which applies only to defendants seeking release from a custodial sentence. Mr. Moon's appeal arose in the context of pretrial release and involved the Bail Reform Act, 18 U.S.C

§ 3142, which governs release or detention of a defendant pending trial. Under that statute, "[t]he judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," consider the following factors: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including his "physical and mental condition[,]; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g)(1)-(4).

I did not argue that generalized concerns over COVID-19, without more, entitle every detainee to pretrial release under the Bail Reform Act. I argued that the pandemic changed the detention analysis under the Bail Reform Act, requiring courts to consider the significant health risks of incarcerating defendants with serious medical problems under conditions that did not permit compliance with widespread health directives. Consistent with my obligations of zealous and effective advocacy under the Sixth Amendment, I advanced appellate arguments for Mr. Moon under applicable law and based on the specific facts of his case. For example, I argued that the pandemic altered the danger to the safety of the community risk assessment which must now incorporate the public health risks of detention. I argued that, in assessing danger to the community under the Bail Reform Act, courts must weigh not just the risks that a defendant's release would impose on the community but also the converse—the health risks to prison staff, inmates, and the local community, when defendants with serious medical problems remain in custody under conditions that do not permit compliance with widespread health directives. I also argued that Mr. Moon should have been released to home detention under strict conditions that would assure the safety of the community, so he could immediately resume cancer treatment and practice the CDC-recommended social distancing measures.

The Tenth Circuit affirmed the detention order, and Mr. Moon remained in pretrial custody.

32. What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?

Response: The safety of the community and the criminal history of the defendant are among the factors that would be relevant to a trial court's decision in cases involving pretrial release (18 U.S.C. § 3142), sentencing (18 U.S.C. § 3553(a)), and compassionate release (18 U.S.C. § 3582).

33. In your SJQ attachments, you advised defense counsel not to wait for the BOP to identify eligible clients for home confinement, recommending instead that defense counsel "figure out a release plan and bring eligibility to the attention of the case manager."

a. What guidance permits the release of violent, repeat gun reoffenders?

Response: In September 1995, the BOP issued Program Statement 7320.01, titled "Home Confinement," which states that "Public Safety Factors as defined in the Security Designation and Custody Classification Manual" should be considered before placing an inmate on home confinement. In April 2019, the BOP issued additional guidance about placing inmates on home confinement in response to The First Step Act of 2018. At the start of the COVID-19 pandemic in March 2020, the Attorney General, under the CARES Act, found that emergency conditions were materially affecting the functioning of BOP and expanded the cohort of inmates eligible to be considered for release to home confinement. An inmate's qualification for early release on home confinement under the CARES Act is an individualized determination by the BOP. The eligibility requirements for Home Confinement are set forth in the Attorney General's March 26 and April 3, 2020 Memoranda, available at https://www/justice.gov/coronavirus/DOJresponse

b. What guidance permits the release of sex offenders?

Response: Please see my response to Question 33a.

c. What guidance permits the release of rapists?

Response: Please see my response to Question 33a.

34. Do you believe that sex offenders who were convicted prior to July 27, 2006 (the enactment of the Sex Offender Registration and Notification Act) should not be included in the sex offender registry?

Response: In a joint petition for certiorari, I argued the Supreme Court should revisit its non-delegation doctrine precedent and hold that 34 U.S.C. § 20193(d) is an unconstitutional delegation of legislative authority to the Executive Branch. *See* Rossman SJQ at 17. The petition was denied. *See Dodson, et. al. v. United States*, 140 S.Ct. 664 (2019). If confirmed, I will follow all binding precedents of the Supreme Court and the Tenth Circuit, including *Gundy v. United States*, 139 S.Ct. 2116 (2019) and any other precedents addressing the Sex Offender Registration and Notification Act.

a. Do you believe that convicted sex offenders who are not on the sex offender registry pose a threat to the community?

Response: Please see my response to Question 34.

b. Does requiring a sex offender to register as a sex offender violate the defendant's constitutional rights? If yes, which ones and why?

Response: Please see my response to Question 34.

35. Does voluntary intoxication always negate the specific intent required for a crime? Why or why not?

Response: The Tenth Circuit recognizes voluntary intoxication as a defense to crimes requiring proof of specific intent. *See, e.g., United States v. Williams*, 403 F.3d 1188, 1194 (10th Cir. 2005); *see also United States v. Flynn,* 220 Fed. Appx. 836, 837 (10th Cir. 2007) (unpublished) (affirming district court's refusal to instruct the jury on involuntary intoxication where there was no evidence that intoxication impaired the defendant's mental capacity).

36. What specific percentage of incarceration should a defendant have served to be eligible for compassionate release?

Response: Eligibility for compassionate release does not turn on the specific percentage of incarceration served. Under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, a defendant is eligible for compassionate release if he exhausted administrative remedies and shows that "extraordinary and compelling reasons" warrant a reduction. Assuming eligibility, a court has the discretion to order compassionate release under § 3582(c)(1), if the reduction is consistent with applicable policy statements of the United States Sentencing Commission and the sentencing factors in 18 U.S.C. § 3553(a). The length of the prison term already served is one factor in the multi-factor analysis.

37. Please explain how the charge of felon in possession of a firearm constitutes a "non-violent crime"?

Response: Section 922(g)(1) of Title 18 makes it unlawful for a person previously convicted of a felony to possess a firearm or ammunition. The Tenth Circuit has noted that the felon-in-possession offense "applies to persons with greatly diverse propensities and previously convicted of a wide range of conduct." *United States v. Ingle*, 454 F.3d 1082, 1086 (10th Cir. 2006). "Not all felons are potentially more violent than non-felons. Numerous felonies involve economic crimes or regulatory offenses which, while serious, do not entail a substantial risk of physical force. And ex-felons have the same motives as lawful possessors of firearms to possess a firearm—self-defense, hunting, gun collecting, and target practice." *Id.* (internal citations and alterations omitted) (holding "that a felon-in-possession offense under § 922(g)(1) is not inherently a crime of violence"). As an appellate judge, if confirmed, I will follow all binding Supreme Court and Tenth Circuit precedent, including in cases involving firearms offenses.

a. Does the presence of a firearm constitute a violent crime?

Response: See response to question 37.

38. Do you believe that there is a drug epidemic in this country?

Response: As an appellate judge, if confirmed, my role is to consider legal claims and facts in individual cases and controversies. My personal beliefs, if any, about this issue or any other policy matter would not bear on judicial decision-making. I am aware that, for example, the Centers for Disease Control and Prevention (CDC) and the U.S. Department of Health and Human Services (HHS) have described the number of opioid-involved overdose deaths in the United States since 1999 as an "epidemic." *See* CDC, Opioid Overdose, Understanding the Epidemic, *available at* https://www.cdc.gov/drugoverdose/epidemic/index.html and HHS, What is the U.S. Opioid Epidemic?, *available at* https://www.hhs.gov/opioids/about-the-epidemic/index.html

39. In *United States v. Grillo*, 2011 WL 2631787 (10th Cir. July 6, 2011), you requested a downward variance for your client, citing her advanced age, poor health and minimal criminal history for support. How much weight did you place on your client's charges, specifically that she pled guilty to distributing oxycodone, a highly addictive substance within 1,000 feet of a school and to children under the age of 18?

Response: The *Grillo* appeal challenged the length of the defendant's 78-month sentence on substantive reasonableness grounds. *See Gall v. United States*, 552 U.S. 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."). Whether a sentence is substantively unreasonable depends upon "all of the circumstances of the case in light of the factors set forth in" 18 U.S.C. § 3553(a). *United States v. Sayad*, 589 F.3d 1110, 1116 (10th Cir. 2006).

40. In your SJQ, you noted that you are now involved "mostly behind the scenes with many more cases at the pretrial and trial stage of federal criminal litigation." In response to a question concerning recusal, you stated that you would "recuse [yourself] from any defendant [you] personally represented or who was represented by the Office of the Federal Public Defender for the Districts of Colorado and Wyoming while [you] worked at that office." Given that you appeared to be involved in the majority of cases arising from the Office of the Federal Public Defender, I would like your reassurance, that, if confirmed, you will recuse from all cases involving the Office of the Federal Public Defender, not just those clients who you personally represented.

Response: I will make all decisions about recusal in accordance with the Code of Conduct for United States Judges, the Colorado Rules of Professional Responsibility, and all other applicable canons governing recusal. As I stated in my SJQ, I will recuse from any case involving any individual who was represented by the Office of the Federal Public Defender for the Districts of Colorado and Wyoming while I worked at that office, even if I did not personally represent that person.

41. What legal standard would you apply in the Tenth Circuit when evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: The Tenth Circuit has applied "intermediate scrutiny" in this context, reasoning: "The Supreme Court did not specify in *Heller* precisely what level of scrutiny a reviewing court must apply to a challenged law. Instead, the Court indicated only that the rational basis test is not appropriate for assessing Second Amendment challenges to federal laws. Thus, we must apply some level of heightened scrutiny and, in doing so, must look to analogous cases for guidance on precisely what level to apply." *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) (internal citations and quotation marks omitted); *see also Peterson v. Martinez*, 707 F.3d 1197, 1220 (10th Cir. 2013); *Bonidy v. U.S. Postal Serv*., 790 F.3d 1121, 1126 (10th Cir. 2015) ("Intermediate scrutiny makes sense in the Second Amendment context.").

42. Do you agree that DOJ litigation positions, such as the failure to defend in court agency actions like the "Remain in Mexico" policy, have contributed to the perceived incentives that underlie this border crisis? If not, why not?

Response: As a judicial nominee, it would not be appropriate for me to opine on the litigation positions of the Department of Justice.

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

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

Response: The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores*, *Inc*., 573 U.S. 682, 682 (2014) (quoting 42 U.S.C. §§ 2000bb–1(a), (b)); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006). When evaluating a person's RFRA claim, courts defer to parties' assertions about their sincerely held religious beliefs. *See Burwell*, 573 U.S. at 724.

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

Response: RFRA does not define the term "substantial[] burden." The Supreme Court in *Burwell* reasoned that because "the contraceptive mandate forces [the plaintiffs] to pay an enormous sum of money…if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Burwell*, 573 U.S. at 726; *see id.* at 710 (holding that "a law that "operates so as to make the practice of ... religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion"). My personal views of the legal standard, if any, are not relevant to my role as an appellate judge, if confirmed. I will faithfully follow all binding Supreme Court and Tenth Circuit precedent, including in any case involving RFRA.

44. Do you agree with the Supreme Court that the Free Exercise Clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?

Response: The free exercise of religion is a fundamental right under the First Amendment. In *Bostock v. Clayton County*, *Georgia,* the Supreme Court held that an employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person. 140 S. Ct. 1731 (2020). In addressing "the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions," the Supreme Court stated: "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage." *Bostock*, 140 S. Ct. at 1754. My personal views of the *Bostock* decision, if any, are not relevant to my role as an appellate judge, if confirmed, and I will faithfully follow all binding Supreme Court and Tenth Circuit precedent, including in any case involving the First Amendment.

45. Does illegal immigration impose costs on border communities?

Response: I have no personal knowledge of whether illegal immigration imposes costs on border communities, and I believe that an evaluation of any costs it might impose is best left to policy makers. As an appellate judge, if confirmed, my role would be to consider specific legal claims involving immigration law.

46. When was the last time you visited the U.S.-Mexico border?

Response: I have never visited the U.S.-Mexico border.

47. When was the last time you visited the U.S.-Mexico border outside of a port of entry?

Response: See my response to Question 46.

48. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?

Response: I will seek to hire law clerks from a wide range of backgrounds, without regard to membership or non-membership in any particular organization.

49. The Blackstone Legal Fellowship "prepares Christian law students for careers marked by integrity, excellence, and leadership." Blackstone "is a program of Alliance Defending Freedom. ADF is the world's largest legal organization committed to protecting religious freedom, free speech, and the sanctity of life." Would you hire a Blackstone Fellow to serve in your chambers as a law clerk?

Response: Please see my answer to Question 48.

50. Do Blaine Amendments violate the Constitution?

Response: The original Blaine Amendment "would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Some states have passed so-called Blaine Amendments, which I understand to be state-law provisions or practices that bar government entities from appropriating funds to religious institutions, because doing so is necessary to prevent Establishment Clause violations. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2262 (2020), the Supreme Court considered the Montana Supreme Court's application of a no-aid provision in Montana's Constitution to invalidate a state scholarship program. The Supreme Court struck down the state restriction as violating the First Amendment's neutrality requirement. *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). If confirmed, I will faithfully follow all binding Supreme Court and Tenth Circuit precedent, including in any case involving the First Amendment.

51. Please explain, with detail, the process by which you became a circuit-court nominee.

Response: In February 2021, shortly after the Honorable United States Circuit Judge Carlos F. Lucero announced that he would be taking senior status, Federal Public Defender Virginia L. Grady submitted my name for consideration to Senator Michael Bennet's State Director. On February 17, 2021, I met with the state directors for Senator Bennet and Senator John Hickenlooper. On March 8, 2021, I interviewed with Senators Bennet and Hickenlooper. On March 12, 2021, I interviewed with attorneys from the White House Counsel's Office. Since then, I have been in contact with officials from the

Office of Legal Policy at the Department of Justice. On May 10, 2021, I interviewed with President Biden and White House Counsel Dana Remus. On May 12, 2021, my nomination was submitted to the Senate.

52. You mentioned in your SJQ that you met with President Biden before being nominated. What was the nature of that meeting?

Response: President Biden interviewed me for approximately 20 minutes over Zoom on May 10, 2021. We discussed why I wanted to become a federal appellate court judge and my experience as an appellate specialist in the Tenth Circuit. The President did not ask me to make any commitments on any matter nor did I offer to make any commitments.

53. Have you had any conversations with individuals associated with the group Demand Justice—including, but not limited to, Brian Fallon or Chris Kang—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: I had a conversation with Chris Kang, shortly after my name was submitted to Senator Michael Bennet's State Director. Because I knew nothing about federal judicial nominations, I asked Mr. Kang for basic information about the process, knowing that he had experience serving as chief judicial nominations counsel to President Obama. Mr. Kang also congratulated me on this nomination.

a. To your knowledge, has anyone had such conversations on your behalf?

Response: Not to my knowledge.

54. Have you had any conversations with individuals associated with the American Constitution Society—including, but not limited, to Russ Feingold—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: I had a conversation with Zachary Gima of the American Constitution Society, shortly after my name was submitted to Senator Michael Bennet's State Director. Although I have never been a member of ACS, I reached out to Mr. Gima for basic information about the federal judicial nominations process.

a. To your knowledge, has anyone had such conversations on your behalf?

Response: Not to my knowledge.

55. Please explain with particularity the process by which you answered these questions.

Response: On June 16, 2021, I received these questions from the Office of Legal Policy at the Department of Justice (OLP). I reviewed the questions, conducted legal research, reviewed filings in cases I litigated that were referenced in the questions, and drafted my

answers. OLP provided feedback, which I considered, before submitting my final answers to the Committee.

56. Do these answers reflect your true and personal views?

Response: Yes.

Senator Blackburn
Questions for the Record to Veronica S. Rossman
Nominee to be United States Circuit Judge for the Tenth Circuit

1. **Your record demonstrates that you were an advocate for the release of prisoners to prevent the spread of Covid-19 in the prison system during the pandemic. However, you advocated for the 'compassionate release' for violent criminals as well. For instance, you argued that your client in *United States v. Kevin Maurice Wilson* (10th Cir. 2021) being a felon in possession of a gun is a 'non-violent gun possession offense' and that he should be released because of that. Could you please explain how the courts should balance releasing prisoners early with their potential danger to society?**

   Response: The *Wilson* appeal is an active case now pending before the Tenth Circuit Court of Appeals. Oral argument has not yet been set in the matter. Accordingly, it would be inappropriate to comment specifically on the *Wilson* appeal, beyond the arguments I made in the Tenth Circuit briefs I filed on Mr. Wilson's behalf as his advocate, or to take a general position on the multi-factor balancing a district court must engage in at sentencing. I would note that the felon-in-possession offense "applies to persons with greatly diverse propensities and previously convicted of a wide range of conduct." *United States v. Ingle*, 454 F.3d 1082, 1086 (10th Cir. 2006). As the Tenth Circuit has explained: "Not all felons are potentially more violent than non-felons. Numerous felonies involve economic crimes or regulatory offenses which, while serious, do not entail a substantial risk of physical force. And ex-felons have the same motives as lawful possessors of firearms to possess a firearm—self-defense, hunting, gun collecting, and target practice." *Id.* (internal citations, quotation marks, and alterations omitted).

2. **In response to a question I asked you during the hearing, you said that you do not have a specific judicial philosophy. Please elaborate on your answer. How do you believe the Constitution should be interpreted?**

   Response: I do not have a specific judicial philosophy, meaning I do not ascribe to any single school of interpretive methodology. As I said at my hearing, "I believe the Constitution is an enduring document." If confirmed as a circuit judge, I would be bound by the precedents of the Supreme Court, without regard to any personal view about constitutional interpretation. I expect it will be the rare case where, as a circuit judge, I would be called upon to interpret a constitutional provision that has never been considered in a precedent of the Supreme Court. Should such a case of first impression come before the Tenth Circuit, I would start with the constitutional text and adhere to the modes of constitutional interpretation used by the Supreme Court. In recent years, the Supreme Court has interpreted various constitutional provisions according to the "original public meaning" of the Constitution's text at the time of the Founding. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008). The Supreme Court also has referred to the original intent of the Framers when interpreting the Constitution. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). If confirmed, I will faithfully follow Supreme Court precedents

regarding constitutional issues, regardless of whether the particular precedent was grounded in any specific judicial philosophy or approach to constitutional interpretation.

While I do not ascribe to a specific judicial philosophy, I have carefully considered the judicial process I will bring with me to the appellate bench, if confirmed. In every case, I will treat all litigants respectfully and impartially; I will carefully consider the issue(s) presented and give due regard to the parties' legal arguments; I will carefully review the record on appeal; I will put aside any personal views; I will faithfully adhere to the rule of law; I will reach a decision, working collaboratively with my judicial colleagues, that adjudicates only the issue presented in the case; and I will strive to issue well-written opinions that make the reasoning underlying the outcome clear to the litigants and to the public.

Nomination of Veronica S. Rossman to be United States Circuit Judge for the Tenth Circuit Questions for the Record Submitted June 16, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

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

   Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held the Second Amendment protects an individual's fundamental right to keep and bear arms. As the Supreme Court later explained in *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010), "our central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." My personal opinion, if any, about any Supreme Court precedent would not bear on my role as a circuit judge. If confirmed, I will faithfully follow *Heller* and *McDonald*, and all other applicable Supreme Court and Tenth Circuit precedents in cases involving the Second Amendment.

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

   Response: The Second Amendment right to keep and bear arms is an individual right. *See District of Columbia v. Heller*, 554 U.S. 570, 578-79 (2008) (textual analysis of the operative clause of the Second Amendment confirms it codifies a "right of the people" which "unambiguously refer[s] to individual rights, not 'collective' rights"); *id.* at 592 (Second Amendment "guarantee[s] the individual right"); *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (the "Second Amendment protects a personal right").

5. **Please describe what you believe to be the Supreme Court's holding in *Greer v. United States*, 593 U.S. _____ (2021).**

   Response: In *Greer v. United States,* two defendants challenged their felon-in-possession convictions for the first time on appeal, contending that the district court failed to instruct the jury (Greer) or advise the defendant during a plea colloquy (Gary) of the required *mens rea* element of the offense. *Greer v. United States*, 19-8709, 2021 WL 2405146 (U.S. June 14, 2021). Recall, in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court held that, in felon-in-possession offenses, the Government must

prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed it.

The Supreme Court rejected both challenges, holding:

First, *Rehaif* error is not "structural error" because such error "does not affect the entire framework within which the proceeding occurs" or "deprive defendants of basic protections[.]" *Greer*, at *7. Accordingly, *Rehaif* error does not require automatic reversal of a conviction and instead, is subject to plain-error appellate review under Federal Rule of Criminal Procedure 52(b). Under Rule 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b); *see Greer*, at *4 ("The defendant has 'the burden of establishing entitlement to relief for plain error'.") (*quoting United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

Second, to satisfy the third-prong of the plain-error standard (that the error affected "substantial rights"), a defendant must make a sufficient argument or representation on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon. *Greer*, at *7. Absent such an argument or presentation, the Supreme Court determined, the defendant cannot show a "reasonable probability" that the result would have been different absent the *Rehaif* error. *Id.* at *4.

6. Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 593 U.S. _____ (2021).

Response: The Supreme Court held in *Terry v. United States* that the Fair Sentencing Act of 2010 (FSA), made retroactive by the First Step Act of 2018, "did not modify the statutory penalties for" crack cocaine offenses under 21 § 841(b)(1)(C). *Terry v. United States,* 20-5904, 2021 WL 2405145, at *4 (U.S. June 14, 2021). Accordingly, persons convicted under § 841(b)(1)(C) are not eligible for resentencing under the First Step Act because they were not convicted of a "covered offense" under the FSA. *Terry*, at *5.

7. Please describe what you believe to be the Supreme Court's holding in *Jones v. Mississippi*, 593 U.S. _____ (2021).

Response: The Supreme Court held in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) that the Eighth Amendment does not require a finding that a minor be permanently incorrigible as a prerequisite to a life-without-parole sentence, so long as the sentence resulted from a discretionary sentencing procedure.

8. Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 593 U.S. _____ (2021).

Response: In reversing the denial of an emergency injunction pending appeal, the Supreme Court held in *Tandon v. Newsom* that government regulations are not "neutral and generally applicable"—and thus would trigger strict-scrutiny review under the Free Exercise Clause—"whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021) (emphasis in original).

9. Please describe what you believe to be the Supreme Court's holding in *Sanchez v. Mayorkas*, 593 U.S. _____ (2021).

Response: The Supreme Court held in *Sanchez v. Mayorkas,* 20-315, 2021 WL 2301964, (U.S. June 7, 2021) that an individual who entered the United States unlawfully is not eligible to become a lawful permanent resident under 8 U.S.C. § 1255, even if the United States had granted the individual Temporary Protected Status under 8 U.S.C. § 1254a.

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

Response: My personal opinion, if any, about the merits of arbitration as a litigation alternative in civil cases would not bear on my role as a circuit judge, if confirmed. I am aware the Supreme Court has recently decided a number of cases involving the Federal Arbitration Act (FAA). *See, e.g., New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019); *Henry Schein, Inc. v. Archer and White Sales, Inc.,* 139 S. Ct. 524 (2019); *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). I will faithfully follow all applicable Supreme Court and Tenth Circuit precedents, including in civil cases involving arbitration and the FAA.

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

Response: On June 16, 2021, I received these questions from the Office of Legal Policy at the Department of Justice (OLP). I reviewed the questions, conducted legal research, reviewed filings in cases I litigated that were referenced in the questions, and drafted my answers. OLP provided feedback, which I considered, before submitting my final answers to the Committee.

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

Response: No.

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

Questions for the Record for Veronica Sophia Rossman, Nominee for the United States Court of Appeals for the Tenth Circuit

I. Directions

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

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

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

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

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

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

II. Questions

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

Response: The reference to "the executive" in your question may mean the President or the Executive Branch. Under our Constitution, the "executive Power" is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1;

id., §3. Justice Robert Jackson, in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), articulated a tripartite analysis for judicial assessments of executive action. Regarding the Executive Branch, the Supreme Court has affirmed that the decision "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.").

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

Response: I am generally aware, through publicly available news sources, of President Biden's commission. I have no opinion on it. If I am confirmed, my role as a judicial officer of the Tenth Circuit will be to abide faithfully by all the rulings of the Supreme Court, irrespective of the number of justices who serve on it.

3. Do you personally own any firearms? If so, please list them.

Response: No.

4. Have you ever personally owned any firearms?

Response: No.

5. Have you ever used a firearm? If so, when and under what circumstances?

Response: No.

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

Response: The Supreme Court has held the Second Amendment protects an individual's fundamental right to keep and bear arms. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("[O]ur central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."). In *McDonald*, the Supreme Court held that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 791.

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

Response: Your question may be referring to the level of constitutional scrutiny used in judicial review of laws that infringe on the fundamental right guaranteed by the Second Amendment. The Supreme Court has not answered this question. As the Tenth Circuit has observed, *Heller* left unresolved much of the "who, what, where, when, and why" of

Second Amendment protections. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012) (internal quotations omitted). The Supreme Court in *Heller* did acknowledge that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court left for another day an analysis of the full scope of the right. If I am confirmed, I will follow all binding Supreme Court and Tenth Circuit precedents, including in cases concerning the Second Amendment and other individual rights.

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

Response: Both the right to own a firearm and the right to vote are considered fundamental rights. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . a fundamental political right, because preservative of all rights."). If I am confirmed, I will follow all binding Supreme Court and Tenth Circuit precedents, including in cases concerning the Second Amendment and the right to vote.

9. Is the Religious Freedom Restoration Act a civil rights law?

Response: Yes. Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) "in order to provide very broad protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (quoting *Burwell v. Hobby Lobby Stores*, *Inc.*, 573 U.S. 682, 693 (2014)); *see generally City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress considers litigation involving RFRA claims to be a "proceeding in vindication of civil rights." *See* 42 U.S.C. § 1988.

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

Response: Yes. The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise" of religion. The Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *See Fulton v. City of Philadelphia*, *Pennsylvania*, 19-123, 2021 WL 2459253, at *4 (U.S. June 17, 2021) (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). The Supreme Court has further held that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, at *5 (citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ___, ___–___ (2018) (slip op., at 16–17)). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, at *5. I am aware of other recent Supreme Court precedents involving the free exercise of religion that may inform the analysis. *See, e.g., Tandon v. Newsom*, 141 S. Ct.

1294 (2021); *see also Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). If confirmed, I will faithfully follow all binding Supreme Court and the Tenth Circuit precedents, including in cases involving religious liberty claims.

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

Response: Yes.

12. President Biden has promised to nominate judges "who look like America." What do you understand this to mean?

Response: I cannot speculate about what President Biden may have meant. I understand the phrase "who look like America" to acknowledge the many different people we find in our nation, which is home to individuals of all races, ethnicities, religions, genders, ages, abilities, sexual orientations, and professional backgrounds

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

Response: Under the Appointments Clause of the Constitution, the President and the Senate share the power to make appointments to high-level politically appointed positions in the federal government. U.S. Constitution, Art. II, §2, cl. 2. Every branch of government must follow the Constitution.

14. Is there systemic racism in public policy across America?

Response: The discourse of the law speaks in terms of racial discrimination and racial disparity. The judicial role is concerned with resolving specific legal claims in individual cases and controversies under applicable law. If confirmed, I will adjudicate all appeals raising issues of racial discrimination or racial disparity on a case-by-case basis, according to the Constitution and other controlling authority.

15. Is the criminal justice system systemically racist?

Response: The discourse of the law speaks in terms of racial discrimination and racial disparity. The judicial role is concerned with resolving specific legal claims in individual cases and controversies under applicable law. If confirmed, I will adjudicate all appeals raising issues of racial discrimination or racial disparity on a case-by-case basis, according to the Constitution and other controlling authority.

16. If you are to join the Circuit court, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the Court to provide its employees trainings which include the following:

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

Response: I am not aware of the Tenth Circuit's training for its employees. I do not know how the human resources program at the Tenth Circuit works or whether judicial officers have any role in supervising it. As a general matter, all judiciary branch training programs must comply with the Constitution and other applicable law.

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

Response: I am not aware of the Tenth Circuit's training for its employees. I do not know how the human resources program at the Tenth Circuit works or whether judicial officers have any role in supervising it. As a general matter, all judiciary branch training programs must comply with the Constitution and other applicable law.

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

Response: I am not aware of the Tenth Circuit's training for its employees. I do not know how the human resources program at the Tenth Circuit works or whether judicial officers have any role in supervising it. As a general matter, all judiciary branch training programs must comply with the Constitution and other applicable law.

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

Response: I am not aware of the Tenth Circuit's training for its employees. I do not know how the human resources program at the Tenth Circuit works or whether judicial officers have any role in supervising it. As a general matter, all judiciary branch training programs must comply with the Constitution and other applicable law.

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

Response: I am not aware of the Tenth Circuit's training for its employees. I do not know how the human resources program at the Tenth Circuit works or whether judicial officers have any role in supervising it. As a general matter, all judiciary branch training programs must comply with the Constitution and other applicable law.

18. Is racial profiling categorically banned by the Constitution?

Response: The Fourth Amendment requires individual justification for searches and seizures, and the Equal Protection Clause of the Fourteenth Amendment requires that policing, like other government functions, afford all persons the equal protection of the laws.

19. Is it appropriate for a witness to a crime to consider the race of the perpetrator when deciding whether to provide information to the police or federal authorities?

Response: Whether an individual will report a crime to the police or federal authorities is a personal and fact-intensive decision. The race of the perpetrator may be relevant if the witness to a crime is reporting a suspect's description and part of that description is the suspect's race.

20. Is it racist for a person to call police out of concern over the threatening or unlawful conduct of a person of color?

Response: Whether an individual will report a crime to the police or federal authorities is a personal and fact-intensive decision. The race of the perpetrator may be relevant if the witness to a crime is reporting a suspect's description and part of that description is the suspect's race.

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

a. Does the implementation of a criminal punishment prescribed by law depend entirely on the President's discretion?

Response: Congress has authorized the death penalty as a punishment for certain federal crimes. The Supreme Court has held that capital punishment is constitutional under certain circumstances. The President cannot unilaterally change criminal penalties enacted by Congress. The President maintains the constitutional authority to grant pardons, commutations, and reprieves. The Department of Justice's death penalty procedure is based on the Federal Death Penalty Act, 18 U.S.C. §§ 3591 to 3599. The decision to seek or not seek the death penalty must be approved by the Attorney General.

b. Could a President lawfully declare, as a policy, that he disfavors physical imprisonment and order all federal prosecutors to refuse to seek it?

Response: Congress has authorized the death penalty as a punishment for certain federal crimes. The Supreme Court has held that capital punishment is constitutional under certain circumstances. The President cannot unilaterally change criminal penalties enacted by Congress. The President maintains the constitutional authority to grant pardons, commutations, and reprieves. The Department of Justice's death penalty procedure is based on the Federal Death Penalty Act, 18 U.S.C. §§ 3591 to 3599. The decision to seek or not seek the death penalty must be approved by the Attorney General.

22. Do you believe that unlawfully setting a building on fire, amidst general rioting, is a violent act?

Response: The facts presented in your question may implicate state criminal laws governing rioting and related activity. In addition, issues attendant to rioting and property destruction may implicate certain federal criminal laws governing willful damage to government property (*see, e.g.,* 18 U.S.C. § 1361). The Anti-Riot Act, 18 U.S.C. § 2101, also may be relevant.

23. At his hearing, Attorney General Garland said that an attack on a courthouse while in operation, and trying to prevent judges from actually trying cases, "plainly is domestic extremism." And when pressed, he mentioned also that an attack "simply on government property at night or any other kind of circumstances" is a clear and serious crime. But he seemed to make a distinction between the two, describing the latter (and only the latter) as an "attack on our democratic institutions." If you are confirmed, you will be sitting on a very important court. Do you agree with these statements?

Response: I am not familiar with Attorney General Garland's statements, and therefore, I cannot take a position on them. Any attack on government institutions, property, or employees would be an incredibly serious matter.

24. Do you agree that free speech is an essential and irreplaceable American value?

Response: Yes.

a. What are the present threats to free speech in America?

Response: Cases involving the First Amendment's protection of free speech arise frequently in the federal courts, including in the Tenth Circuit. Accordingly, it would be inappropriate for me as a judicial nominee to opine generally on this question. If confirmed, I would faithfully follow the Constitution and all binding Supreme Court and Tenth Circuit precedents in every case, including in cases involving free speech.

b. What role do the courts have in addressing threats to free speech?

Response: The role of an appellate court is to adjudicate every case and controversy that comes before the court according to the rule of law and without regard to the personal views of any judicial officer.

c. Does the First Amendment protect speech that some may consider offensive?

Response: Yes. This is a foundational principle animating the Supreme Court's First Amendment jurisprudence. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234,

245 (2002) (observing it is "well established that speech may not be prohibited because it concerns subjects offending our sensibilities.") (citing cases).

i. If so, what are the limits to that protection?

Response: In a number of cases, the Supreme Court has held that the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790–91 (2011) (internal citations and quotation marks omitted). The Supreme Court has identified the following few categories of unprotected speech: obscenity, incitement, fighting words, defamation, fraud, and speech integral to criminal conduct. *See, e.g., United States v. Alvarez*, 567 U.S. 709 (2012).

d. What is "hate speech"?

Response: I am not aware of a Supreme Court case specifically defining "hate speech." The Supreme Court has stated that: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (Alito, J.) (internal citation omitted).

i. Is "hate speech," as you have just defined it, protected by the First Amendment?

Response: In a number of cases, the Supreme Court has held that the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790–91 (2011) (internal citations omitted). The Supreme Court has identified the following few categories of unprotected speech: obscenity, incitement, fighting words, defamation, fraud, and speech integral to criminal conduct. *See, e.g., United States v. Alvarez*, 567 U.S. 709 (2012). What some may define as "hate speech" could raise First Amendment questions.

ii. If so, what are the limits to that protection?

Response: I am not aware of any Supreme Court precedent that recognizes "hate speech" as an unprotected category of speech. However, there are Supreme Court precedents that address speech that is truly threatening. *See Virginia v. Black*, 538 U.S. 343 (2003); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568 (1962).

25. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?

Response: The Supreme Court has held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Tinker v. Des Moines Independent Community School Dist*., 393 U.S. 503, 506 (1969). Other Supreme Court cases have addressed when public educational institutions may restrict student speech. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986*); Morse v. Frederick*, 551 U.S. 393, 395 (2007).

26. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?

Response: The First Amendment applies only to state actors. In general, private educational institutions are not state actors, so they would not be required to provide the same First Amendment speech protections as public institutions. Federal statutes and state laws governing speech may be implicated in the analysis, however.

27. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?

Response: I am not aware of any federal law that prohibits educational institutions receiving federal funds from discriminating based on speech.

28. What do you understand to be the scope of Section 230 protection?

Response: I have no professional experience with Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230. My general understanding is that Section 230 "provides limited federal immunity to providers and users of interactive computer services. The law generally precludes providers and users from being held liable…for information provided by a third party, but does not prevent them from being held legally responsible for information that they have developed or for activities unrelated to third-party content." Congressional Research Service, Section 230: An Overview, April 7, 2021, available at https://crsreports.congress.gov/product/pdf/R/R46751.

a. Does Section 230 immunize content publishers only?

Response: Section 230(c)(1) states that a provider or user of an interactive computer service will not be considered a publisher or speaker of content "provided by another information content provider." 47 U.S.C. § 230(c)(1). Whether a defendant claiming protection under Section 230(c)(1) should be treated as a "publisher or speaker" of another's content is actively being litigated in the federal courts. Accordingly, it would be inappropriate for me to opine on this question as a judicial nominee.

b. If an internet platform curates content, and specifically selects what a user sees and does not see, is the platform engaged in publishing?

Response: This is an open question that could come before the Tenth Circuit, so it would be inappropriate for me to opine on it.

c. Do you believe that corporations like Facebook, Twitter, and Google should have a special immunity from liability when publishing material that is unavailable to traditional publishers like the *New York Times*? Please explain why.

Response: This is an open question that could come before the Tenth Circuit, so it would be inappropriate for me to opine on it.

29. Does it promote violence against, or directly attack, a person on the basis of gender identity to say there are only two genders?

Response: I do not have an opinion on this matter. Legal issues related to gender and gender identity are frequently litigated in federal courts. If confirmed, and a case came before me that presented a legal claim relating to gender or gender identity, I would carefully analyze those issues, just as I would any other legal claim.

30. Does it promote violence against, or directly attack, a person on the basis of religious affiliation to say there are more than two genders?

Response: I do not have an opinion on this matter. Legal issues related to religious affiliation, gender, and gender identity are frequently litigated in federal courts. If confirmed, and a case came before me that presented a legal claim relating to religious affiliation, gender, or gender identify, I would carefully analyze those issues, just as I would any other legal claim.

31. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letter to colleges and universities that broadened the definition of sexual harassment and required schools to adopt a lenient "more likely than not" burden of proof when adjudicating claims, among other procedural defects. How does this compare with the standard of proof that governs in criminal prosecutions?

Response: I am not familiar with the 2011 Dear Colleague Letter issued by the U.S. Department of Education. As a general matter, the "more likely than not" standard of proof is another way of describing the preponderance-of-the-evidence standard. The standard of proof that governs in criminal prosecutions is the beyond-a-reasonable-doubt standard. *See In re Winship*, 397 U.S. 358, 362 (1970) ("Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."); *id.* at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

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

Response: The Supreme Court has recognized that a student's entitlement to a public education is a property interest protected by the Fourteenth Amendment's Due Process Clause "which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

33. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?

Response: As a judicial nominee, it would be inappropriate for me to comment on any extra-judicial matter concerning any member of the Supreme Court.

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

Response: I do not have a specific judicial philosophy, meaning I do not ascribe to any single school of interpretive methodology. If confirmed as a circuit judge, I would be bound by the precedents of the Supreme Court, without regard to any personal view about constitutional interpretation. I expect it will be the rare case where, as a circuit judge, I would be called upon to interpret a constitutional provision that has never been considered in a precedent of the Supreme Court. Should such a case of first impression come before the Tenth Circuit, I would start with the constitutional text and adhere to the modes of constitutional interpretation used by the Supreme Court. In recent years, the Supreme Court has interpreted various constitutional provisions according to the "original public meaning" of the Constitution's text at the time of the Founding. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008). The Supreme Court also has referred to the original intent of the Framers when interpreting the Constitution. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). If confirmed, I will faithfully follow Supreme Court precedents regarding constitutional issues, regardless of whether the particular precedent was grounded in any specific judicial philosophy or approach to constitutional interpretation.

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

Response: I would respectfully reiterate what I said at hearing, which was that "I believe the Constitution is an enduring document."

36. Over the last year, you routinely and publicly doubted the veracity of the Bureau of Prison statistics, stating in a blog post in December, 2020 that: "There is good reason to believe the numbers reported by the BOP understate the actual number of tested-positive cases. When using BOP data, make sure to keep in mind that just because a facility isn't listed on the BOP website does not mean there are no presumptive positive or clinically confirmed cases in that facility." Were you

accusing BOP of manipulating data or intentionally underrepresenting COVID cases? Please clarify.

Response: No. I was not accusing BOP of manipulating data or intentionally under-representing COVID cases. As I said at my hearing, the pandemic was a "true crisis" and "[a]ll actors, in my view, were doing their very best under extraordinarily difficult circumstances." The blog post referenced in this question was describing the challenge of verifying one particular data point, given the rapidly-evolving nature of COVID-19 diagnosis and testing during the pandemic. As the BOP states on its website, "Data [concerning the number of COVID-19 cases] is subject to change based on additional reporting." *See* https://www.bop.gov/coronavirus/index.jsp

37. **In March and April of 2020, you advised criminal defense attorneys on the latest developments in home confinement, and advised to not "wait for the BOP to identify" eligible clients, rather, to "figure out a release plan and bring eligibility to the attention of the case manager." You then provided an "explanation of why prisons and jails are particularly vulnerable to outbreaks, as well as guidance on Covid-19 release advocacy." Now that prisoners have the opportunity to be vaccinated, do you believe that defense attorneys should be asking for—and judges should be granting—early release based on COVID-19? Please explain.**

Response: The compassionate release provision of 18 U.S.C. § 3582 permits district courts to reduce a prisoner's sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). The First Step Act of 2018 amended the compassionate release statute to allow eligible prisoners to directly ask a court to reduce a sentence for extraordinary and compelling reasons. At all times, an advocate's decision to pursue a compassionate release motion for an eligible defendant, and a judge's exercise of discretion to adjudicate that motion, are governed by statutory factors and case law, as applied to the highly-individualized circumstances of each petitioner's case.

Senator Josh Hawley
Questions for the Record

Veronica S. Rossman
Nominee, U.S. Court of Appeals for the Tenth Circuit

1. **In statements prepared for the Illinois Institute of Continuing Legal Education, you discussed the Adam Walsh Child Protection and Safety Act of 2006. That law, as you correctly stated at the time, "include[s] a new mandatory condition of electronic monitoring for all persons charged with a long list of sexual abuse or pornography crimes, including failure to register as a sexual offender under 18 U.S.C. § 2250, if those crimes involve a 'minor victim.'"**

    a. **Were these statements targeted to members of the criminal defense bar?**

    Response: These are not my statements. I have never prepared any statement for the Illinois Institute of Continuing Legal Education.

    b. **In those statements, you noted that "[a] number of district courts have found [the Adam Walsh Child Protection and Safety Act of 2006] unconstitutional as a violation of the Excessive Bail Clause of the Eight Amendment, procedural due process under the Fifth Amendment, and the separation-of-powers doctrine." Do you believe the Adam Walsh Child Protection and Safety Act is unconstitutional on Eighth Amendment grounds?**

    Response: These are not my statements. I have never prepared any statement for the Illinois Institute of Continuing Legal Education.

    c. **Do you believe the Adam Walsh Child Protection and Safety Act is unconstitutional on Fifth Amendment grounds?**

    Response: My personal views, if any, on federal statutes would have no bearing on my role as an appellate judge on the Tenth Circuit, if confirmed.
    The Supreme Court recently found unconstitutional under the Fifth and Sixth Amendments a supervised-release provision, 18 U.S.C. § 3583(k), that applied to a defendant who must register under the Sex Offender Registration and Notification Act (SORNA), which is Title I of the Adam Walsh Child Protection and Safety Act of 2006. *See United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). Whether the Adam Walsh Act amendments to the Bail Reform Act, 18 U.S.C.A. § 3142(c)(1)(B), violate the Due Process Clause of the Fifth Amendment appears to be a question that is currently being litigated in the lower federal courts, so it would be inappropriate for me, as a judicial nominee, to opine generally on this matter. I will faithfully follow all binding Supreme Court and Tenth Circuit precedent in every case, including precedents addressing the Adam Walsh Protection and Safety Act.

d. Do you believe the Adam Walsh Child Protection and Safety Act is unconstitutional on separation-of-powers grounds?

Response: My personal views, if any, on federal statutes would have no bearing on my role as an appellate judge on the Tenth Circuit, if confirmed. In *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019), the Supreme Court rejected a constitutional challenge (on separation-of-powers and non-delegation doctrine grounds) to SORNA. I will faithfully follow all binding Supreme Court and Tenth Circuit precedent in every case, including precedents addressing the Adam Walsh Protection and Safety Act.

2. 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?

Response: The Supreme Court has held that "all Eighth Amendment method-of-execution claims" require that "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." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (*citing Glossip v. Gross*, 135 S. Ct. 2726 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008)). The Tenth Circuit has recognized these Supreme Court precedents as providing the "legal standard that governs Eighth Amendment method-of-execution challenges." *See United States v. Guillen*, 995 F.3d 1095, 1120 (10th Cir. 2021).

3. 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?

Response: Yes, please see my response to Question 2.

4. 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?

Response: No. *See D.A.'s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 73 (2009) (refusing to recognize a substantive due process right to obtain postconviction access to the State's evidence for DNA testing); *see also Huey v. Kunzweiler for Tulsa County State*, 847 Fed. Appx. 530, 534 (10th Cir. 2021) (unpublished) (acknowledging *Osborne* as controlling precedent).

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

   Response: No.

6.

   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.**

      Response: The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise" of religion. The Supreme Court has held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *See Fulton v. City of Philadelphia, Pennsylvania*, 19-123, 2021 WL 2459253, at *4 (U.S. June 17, 2021) (*citing Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990)). The Supreme Court has further held that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, at *5 (*citing Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ___, ___–___ (2018) (slip op., at 16–17)). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, at *5. I am aware of other Supreme Court precedent involving the free exercise of religion that may inform the analysis. *See, e.g., Tandon v. Newsom*, 141 S.Ct. 1294 (2021); *see also Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020).

      In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), for example, the Tenth Circuit addressed what constitutes a "substantial burden," finding religious exercise to be substantially burdened "when a government (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief[.]" *Id.* at 1316; *see also Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

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?

Response: As a general rule, laws that discriminate against religion are "odious to our Constitution." *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2263 (2020). In *Espinoza v. Montana Dept. of Revenue*, the Supreme Court held that "[w]hen otherwise eligible recipients are disqualified from a public benefit solely because of their religious character, we must apply strict scrutiny." *Id.* at 2260 (internal citations and quotation marks omitted). The *Espinoza* Court described this as a "rule against express religious discrimination." *Id.* Under these circumstances, where strict scrutiny applies, the "government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal citations and quotation marks omitted); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ——, 137 S.Ct. 2012 (2017).

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?

Response: The Tenth Circuit has held that, on the issue of whether a person's religious belief are sincerely held, a federal judge's task is a "modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold—a comparatively familiar task for secular courts that are regularly called on to make credibility assessments—and an important task, too, for ensuring the integrity of any judicial proceeding." *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014). The Tenth Circuit confirmed, that "in suggesting we may ask whether a claimant truly holds a religious belief isn't to suggest we may decide whether the claimant's religious belief is true." *Id.*

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held the Second Amendment protects an individual's fundamental right to keep and bear arms. As the Supreme Court later explained in *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010), "our central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."

8. 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."

Response: I am not familiar with the source of the above-quoted language. I agree that it is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067 (2018)). If confirmed, I will faithfully follow all binding Supreme Court and Tenth Circuit precedent, including precedents regarding the canons of statutory construction.

9. **During your testimony, you defended your decision to seek pretrial release for the defendant in *United States v. Moon*. Please clarify why you thought it was appropriate for the defendant to be released, despite the fact that the defendant was found with an arsenal of automatic machine guns and was accused of making threats against his children.**

Response: I was appointed to represent Mr. Moon in his Tenth Circuit appeal of the district court's order denying pretrial release under the Bail Reform Act, 18 U.S.C § 3142(g). Mr. Moon was a 52-year old, immunocompromised cancer patient, facing a single felon-in-possession charge under 18 U.S.C. §922(g)(1). Mr. Moon was in the middle of cancer treatment when he was arrested, but his chemotherapy and radiation had stopped abruptly because he was taken into custody. The trial court's detention order entered right at the start of the COVID-19 crisis, at a time before the Bureau of Prisons had any meaningful opportunity to implement many of its pandemic-related health and safety protocols. Mr. Moon asked to reopen the bail hearing in the trial court, given COVID-19 and the direct risk it posed to him. The concern at the time was that Mr. Moon's cancer would spread if he did not resume treatment immediately and, if he contracted COVID-19 in his immunocompromised state, he might die. The court again refused to release Mr. Moon, and I filed an appeal to the Tenth Circuit.

I never argued that generalized concerns over COVID-19, without more, should justify release for every pretrial detainee. But, given the specific facts and circumstances of Mr. Moon's case, and fulfilling my obligation under the Sixth Amendment to advocate zealously on his behalf, I argued that Mr. Moon should have been released to home detention, under strict conditions that would assure the safety of the community, so he could immediately resume cancer treatment and practice the CDC-recommended social distancing measures.

I also made a legal argument, which had been recognized by federal courts across the country, that the pandemic changed the Bail Reform Act analysis. Under that statute, "[t]he judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," consider the following factors: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including his "physical and mental condition[,];

and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g)(1)-(4). I argued that the pandemic altered the danger-to-the-safety of the community risk assessment, which must now incorporate the public-health risks of detention. I argued that, in assessing danger to the community under the Bail Reform Act, courts must weigh not just the risks that a defendant's release would impose on the community, but also the converse—the health risks to prison staff, inmates, and the local community, when defendants with serious medical problems remain in custody under conditions that do not permit compliance with widespread health directives. I also argued that the district court's failure to consider how the heightened risk of COVID-19 transmission in jails affects the detention calculus violated the Bail Reform Act's requirement that courts account for a detainee's physical condition and the community's safety when setting bail.

The Tenth Circuit affirmed the district court's detention order, and Mr. Moon was never released from pretrial custody.

10. Please clarify your understanding of the role that public safety has in considering defendants for pretrial release.

Response: Please see my response to Question 8.

Questions for the Record for Veronica S. Rossman
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

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

   Response: No.

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

   Response: No.

Senate Judiciary Committee - Questions for the Record from Senator John Kennedy
June 9, 2021

Hearing entitled: "Nominations"

Questions for Veronica Rossman, Nominee for the U.S. Court of Appeals for the Tenth Circuit

1. **Do you personally believe, generally and at the most fundamental level, that the provisions of the United States Constitution should be interpreted according to their respective meanings at the time of adoption?**

   Response: I do not have a specific judicial philosophy, meaning I do not ascribe to any single school of interpretive methodology. As I said at my hearing, "I believe the Constitution is an enduring document." If confirmed as a circuit judge, I would be bound by the precedents of the Supreme Court, without regard to any personal view about constitutional interpretation. I expect it will be the rare case where, as a circuit judge, I would be called upon to interpret a constitutional provision that has never been considered in a precedent of the Supreme Court. Should such a case of first impression come before the Tenth Circuit, I would start with the constitutional text and adhere to the modes of constitutional interpretation used by the Supreme Court. In recent years, the Supreme Court has interpreted various constitutional provisions according to the "original public meaning" of the Constitution's text at the time of the Founding. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008). The Supreme Court also has referred to the original intent of the Framers when interpreting the Constitution. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). If confirmed, I will faithfully follow Supreme Court precedents regarding constitutional issues, regardless of whether the particular precedent was grounded in any specific judicial philosophy or approach to constitutional interpretation.

2. **If you do not subscribe to Original Meaning as your core judicial philosophy, then what is your approach to constitutional interpretation?**

   Response: Please see response to Question 1. In addition, while I do not ascribe to a specific judicial philosophy, I have carefully considered the judicial process I will bring with me to the appellate bench, if confirmed. In every case, I will treat all litigants respectfully and impartially; I will carefully consider the issue(s) presented and give due regard to the parties' legal arguments; I will carefully review the record on appeal; I will put aside any personal views; I will faithfully adhere to the rule of law; I will reach a decision, working collaboratively with my judicial colleagues, that adjudicates only the issue presented in the case; and I will strive to issue well-written opinions that make the reasoning underlying the outcome clear to the litigants and to the public.

Senator Mike Lee
Questions for the Record
Veronica S. Rossman, Tenth Circuit Court of Appeals

1. How would you describe your judicial philosophy?

Response: I do not have a specific judicial philosophy, meaning I do not ascribe to any single school of interpretive methodology. As I said at my hearing, "I believe the Constitution is an enduring document." If confirmed as a circuit judge, I would be bound by the precedents of the Supreme Court, without regard to any personal view about constitutional interpretation. I expect it will be the rare case where, as a circuit judge, I would be called upon to interpret a constitutional provision that has never been considered in a precedent of the Supreme Court. Should such a case of first impression come before the Tenth Circuit, I would start with the constitutional text and adhere to the modes of constitutional interpretation used by the Supreme Court. In recent years, the Supreme Court has interpreted various constitutional provisions according to the "original public meaning" of the Constitution's text at the time of the Founding. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008). The Supreme Court also has referred to the original intent of the Framers when interpreting the Constitution. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). If confirmed, I will faithfully follow Supreme Court precedents regarding constitutional issues, regardless of whether the particular precedent was grounded in any specific judicial philosophy or approach to constitutional interpretation.

While I do not ascribe to a specific judicial philosophy, I have carefully considered the judicial process I will bring with me to the appellate bench, if confirmed. In every case, I will treat all litigants respectfully and impartially; I will carefully consider the issue(s) presented and give due regard to the parties' legal arguments; I will carefully review the record on appeal; I will put aside any personal views; I will faithfully adhere to the rule of law; I will reach a decision, working collaboratively with my judicial colleagues, that adjudicates only the issue presented in the case; and I will strive to issue well-written opinions that make the reasoning underlying the outcome clear to the litigants and to the public.

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

Response: I would research to learn whether the statute had been interpreted in any Supreme Court or Tenth Circuit cases, as those precedents would be binding. In a case of first impression, I would look first at the statutory text. Unless Congress has supplied a definition in the statute, I would interpret statutory terms in accordance with their ordinary meaning. In this scenario, there would be no need to consult any

sources; the statute would be applied as written. If the statutory text is ambiguous, I would begin by looking at statutory context, examining the rest of the specific provision or the legislation as a whole. Then, I would turn to semantic and substantive canons of construction. I also would look at Tenth Circuit cases interpreting analogous provisions in other statutes and cases outside the Tenth Circuit that have interpreted that statute as a source of persuasive, not binding, authority. In the final analysis, legislative history might be useful, particularly committee reports.

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

Response: As a circuit court judge, if confirmed, I would expect that constitutional cases of first impression would be rare. In any constitutional case, I would always begin by researching applicable Supreme Court and Tenth Circuit precedent, and I would be bound by those precedents regardless of the interpretive methodology those precedents used. In a case of first impression, I would do what it appears the Supreme Court does: look first at the text of the constitutional provision. I would familiarize myself with the variety of interpretive methodologies used by the Supreme Court and if there was a particular method that the Supreme Court had used to interpret the provision at issue—for example, the Supreme Court looked to original public meaning to understand the scope of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008)—then I would follow that methodology. I would interpret the constitutional text in a manner consistent with the methods used by the Supreme Court.

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

Response: The original meaning approach to constitutional interpretation, as I understand it, considers the plain meaning of the Constitution's text as it would have been understood by the general public who lived at the time the Constitution was ratified. For example, Justice Scalia's majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008) used the "original public meaning" methodology to interpret the Second Amendment.

5. What are the constitutional requirements for standing?

Response: The Supreme Court recently reiterated the requirements of constitutional standing in *Texas v. California,* 19-1019, 2021 WL 2459255 (U.S. June 17, 2021):

> The Constitution gives federal courts the power to adjudicate only genuine "Cases" and "Controversies." Art. III, § 2. That power includes the requirement that litigants have standing. A plaintiff has standing only if he

can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."

Texas, at *4 (*quoting DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) and *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561) (1992)).

6. Do you believe there is a difference between "prudential" jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

Response: Constitutional standing enforces the case or controversy requirement in Article III. Prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interest protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984). More recently, the Supreme Court has observed that prudential standing is "in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Intern., Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1386 (2014) (internal quotation marks omitted). One of these prudential standing considerations was whether "a plaintiff's complaint fall[s] within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751. The Supreme Court stated that the notion of "prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute." *Lexmark Intern., Inc.*, 134 S. Ct. at 1387 (internal quotation marks omitted). The Tenth Circuit holds that "third party standing should continue to be analyzed under the framework of prudential standing." *Hill v. Warsewa*, 947 F.3d 1305, 1309 (10th Cir. 2020).

7. How would you define the doctrine of administrative exhaustion?

Response: The doctrine of exhaustion of administrative remedies is part of the jurisprudence of administrative and habeas law. It is a kind of order-of-operations requirement for seeking relief in federal court. "The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006) (internal citation and quotation omitted). The Supreme Court has observed that the exhaustion of administrative remedies doctrine "protects administrative agency authority" and "promotes efficiency." *Id.*

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

Response: Congress "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816). The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18; *see McCullough v. Maryland*, 17 U.S. 316 (1819); *see also Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 247 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of [Article I, section 8] 'and all other Powers vested by this Constitution."). The Supreme Court has held that the Necessary and Proper Clause provides Congress "implied power to criminalize any conduct that might interfere with the exercise of an enumerated power." *United States v. Comstock*, 560 U.S. 126, 147 (2010).

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

Response: If Congress enacts a law without reference to a specific constitutional enumerated power, and this was an issue of first impression with no controlling Supreme Court or Tenth Circuit precedent, I would evaluate the constitutionality of that law as follows: I would apply the de novo standard of review, which the Tenth Circuit uses to review challenges to the constitutionality of a statute. *See, e.g, United States v. Dorris,* 236 F.3d 582, 584 (10th Cir. 2000). I would begin with the presumption of constitutionality ordinarily given to acts of Congress. *See, e.g., United States v. Harris*, 106 U.S. 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power."). But I would also keep in mind that, as the Supreme Court reiterated in *United States v. Morrison*, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." 529 U.S. 598, 607 (2000); *see generally United States v. Lopez*, 514 U.S. 549 (1995). I would then assess the nature of the statute at issue (for example, whether the law regulates an aspect of interstate commerce), and review Supreme Court jurisprudence analyzing the scope of Congressional power to ascertain guiding principles for analysis.

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

Response: Yes. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy); *United States v. Guest*, 383 U.S. 745 (1966) (right of interstate travel); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (right to the presumption of innocence).

11. What rights are protected under substantive due process?

Response: The Supreme Court's substantive due process jurisprudence recognizes a number of rights, as summarized in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997):

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'") (*quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *Casey*, 505 U.S., at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception*, ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278–279.

521 U.S. 702, 719–20 (1997); *see also Obergefell v. Hodges,* 576 U.S. 644 (2015) (right of same-sex couples to marry).

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

Response: As an appellate judge, if confirmed, my personal beliefs about substantive due process, or any other doctrinal matter, would not bear on my ability to apply binding Supreme Court and Tenth Circuit precedent. The issue is not whether these rights are inherently distinguishable, but the fact that the Supreme Court has treated them distinctly over the years. The Supreme Court has consistently reaffirmed the right to choose an abortion in the pre-viability stage of pregnancy. *See Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *see also June Med. Services LLC v. Russo,* 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J.) (concurring) ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*,"' 'a woman's right to terminate her pregnancy before viability.'") (internal citation omitted). The Supreme Court's view of *Lochner* and its progeny is less certain. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (upholding a state minimum wage law for women, and calling into question the viability of the Supreme Court's liberty-of-contract jurisprudence). If confirmed, I will respect and apply the substantive due process precedents of the Supreme Court and the Tenth Circuit.

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

Response: The Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) sets out Congress's power under the Commerce Clause. The Court held in *Lopez* that there are "three broad categories of activity that Congress may regulate under its commerce power," namely, the power to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that substantially affects interstate commerce. *Id.* at 558-59.

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

Response: In determining what qualifies a particular group as a "suspect class," the Supreme Court has referred to the "traditional indicia of suspectedness" which it has understood as an "immutable characteristic determined solely by the accident of birth," or classes of persons "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process[.]" *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (internal citations and quotation marks omitted). The Supreme Court has found race, alienage, national origin, and religion to be suspect classifications, which subject laws affecting those groups to strict scrutiny review. *See, e.g., Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The separation of powers and the system of checks and balances are foundational, structural protections inherent in our Constitution, which "scrupulously avoids concentrating power in the hands of any single individual." *Seila Law LLC v. Consumer Fin. Protec. Bureau*, 140 S. Ct. 2183, 2202 (2020). As the Supreme Court has explained, the Framers "'split the atom of sovereignty' itself into one Federal Government and the States. They then divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Id*. (internal citation and quotation marks omitted).

The purpose of separating and dividing the power of government was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring). "[C]hecks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with "[t]he judicial Power ... extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (internal citations omitted). The structure of our constitutional system also promotes "a workable government." *Youngstown Sheet & Tube Co*., 343 U.S. at 635 (Jackson, J., concurring); *see also id.* ("While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government[,]" and thereby "enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

To be sure, "this system of division and separation of powers produces conflicts, confusion, and discordance at times," but "it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher*, 478 U.S. at 722.

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

Response: I would begin by researching applicable Supreme Court and Tenth Circuit precedent. If this was an issue of first impression, I would begin the analysis by examining the text of the Constitution that relates to the issue presented and the particular branch of government involved. I would then examine Supreme Court and Tenth Circuit cases addressing, depending on the facts, the scope of congressional, executive, or judicial power to ascertain guiding principles for deciding whether the action taken overstepped Constitutional limits. *See, e.g., United States v. Lopez*, 514

U.S. 549 (1995); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999).

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

Response: Empathy should play no role in interpreting the law. A judge must be impartial and abide by the rule of law, without regard to any external influences or personal opinions.

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

Response: As a general matter, neither option would likely withstand constitutional scrutiny.

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

Response: It is well settled that "[i]t is emphatically the province and duty of the judicial department to say what the law is[.]" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is also well settled that a presumption of constitutionality ordinarily applies to acts of Congress. *See, e.g., United States v. Harris*, 106 U.S. 629, 635 (1883). These basic principles seem to be implicated by the question posed. But I have no personal knowledge about the changes in the Supreme Court's rate of constitutional invalidation nor have I formed any opinion on the relative upsides and downsides of "aggressive" judicial review.

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

Response: The landmark decision in *Marbury v. Madison* provides the foundation for judicial review—which is the power of the Court to assess the legality of laws or decisions made by a coordinate branch of government. Judicial supremacy creates "the obligation of coordinate officials not only to obey that ruling but to follow its reasoning in future deliberations." Scott E. Gant*, Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 Hastings Const. L.Q. 359, 368 (1997) (explaining the difference between judicial review and judicial supremacy). As the Supreme Court has explained, "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference[,]…the courts retain

the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

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

Response: Elected officials have an independent obligation to uphold the Constitution and take an oath affirming their duty to do so. U.S. Const., Art. VI, Sec. 3. As a judicial nominee, it would be inappropriate for me to speculate, in the abstract, on what balance should be struck between an elected official's own interpretation of the Constitution and the need to respect duly rendered judicial decisions.

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

Response: When adjudicating cases, it is important for judges to keep in mind the limited authority of the federal courts. Judges must be ever-mindful that cases are to be decided impartially, in a principled manner according to the rule of law, and not the personal views or "will" of any individual judge. Keeping in mind the limits of the judicial role will ensure that a judge adjudicates only cases and controversies, within the bounds of Article III, and will further respect for the distinct powers and duties of the legislative and executive branches.

23. How would you describe your approach to reading statutes—how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: I would research to learn whether the statute had been interpreted in any Supreme Court or Tenth Circuit cases, as those precedents would be binding. In a case of first impression, I would look first at the statutory text. Unless Congress has supplied a definition in the statute, I would interpret statutory terms in accordance with their ordinary meaning. In this scenario, there would be no need to consult any sources; the statute would be applied as written. If the statutory text is ambiguous, I

would begin by looking at statutory context, examining the rest of the specific provision or the legislation as a whole. Then, I would turn to semantic and substantive canons of construction. I also would look at Tenth Circuit cases interpreting analogous provisions in other statutes and cases outside the Tenth Circuit that have interpreted that statute as a source of persuasive, not binding, authority. In the final analysis, legislative history might be useful, particularly committee reports.

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

Response: A circuit judge must apply applicable, controlling precedents, irrespective of any personal opinion about the relative merits or correctness of the holding or reasoning in the case. "Adherence to precedent is a foundation stone of the rule of law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (internal citation and quotation marks omitted). "Respect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. It is the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *June Med. Services LLC. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (internal citations and quotation marks omitted) (Roberts, C.J.) (concurring). If the precedent is not controlling or applicable, however, it would be appropriate for a circuit judge to distinguish it from the case at hand and explain why it does not control the outcome.

25. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

Response: No.

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

Response: Several legal principles may inform the answer to this question.

First, the sentencing statute – 18 U.S.C. § 3553(a) – specifies "various factors that courts must consider in exercising their discretion" at sentencing. *Pepper v. United*

States, 562 U.S. 476, 489 (2011). Among these factors is the "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

Second, the Supreme Court has emphasized that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Pepper*, 562 U.S. at 488. Congress codified this long-standing sentencing principle in 18 U.S.C. § 3661, which provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Sentencing Commission has expressly incorporated § 3661 into the Sentencing Guidelines. *See* USSG § 1B1.4.

Third, the Supreme Court has noted that the sentencing court's discretion to consider a wide range of information under § 3661 "is subject to constitutional constraints." *Pepper*, 562 U.S. 489 n.8.

Finally, the Supreme Court has held that sentencing must be individualized. *See, e.g., Pepper*, 562 U.S. at 487-88 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual").

Accordingly, a defendant's group identities may factor into the sentencing analysis, to the extent they are relevant to the factors listed in § 3553(a) and subject to constitutional constraints, so long as the sentencing judge adheres to the principle of individualized sentencing.

27. Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemic sentencing disparities?

Response: No.

28. The President of Alliance for Justice—a left-wing "dark money" group—recently praised your nomination, saying that "Biden and the Senate are ensuring our courts look like and understand the people who will be coming before them." The implication here seems to be that in order to judge someone fairly, you have to look like them—or, stated differently, they have to look like you. Do you believe a judge's rulings should change based on whether they share gender, racial, religious, or other characteristics with either of the parties in a particular case?

Response: No.

29. Have you spoken with anyone affiliated with Demand Justice or the Leadership Conference on Civil Rights regarding your nomination either before or after it was announced?

Response: I had a conversation with Chris Kang of Demand Justice, shortly after my name was submitted to Senator Michael Bennet's State Director. Because I knew nothing about federal judicial nominations, I asked Mr. Kang for basic information about the process, knowing that he had experience serving as chief judicial nominations counsel to President Obama. Mr. Kang also congratulated me on this nomination when it was announced. I have not spoken with anyone affiliated with the Leadership Conference on Civil and Human Rights.

30. What role, if any, do you believe "empathy" should play in the judicial process?

Response: Empathy should play no role in interpreting the law. A judge must be impartial and abide by the rule of law, without regard to any external influences or personal opinions.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
June 9, 2021

For Ms. Veronica Rossman:

1. **Why did you choose to work for the Office of the Federal Public Defender for the Districts of Colorado and Wyoming?**

   Response: After my appellate clerkship, I started my legal career as a civil litigator in private practice, but I hoped that, at some point, I would work in public service. The mission of the Office of the Federal Public Defender for the Districts of Colorado and Wyoming (FPD) is to uphold our fundamental constitutional values, such as ensuring due process through the effective assistance of counsel. In our adversarial criminal justice system, I understood the defense role to be just as important as the role of the prosecutor. I knew that working for the FPD would allow me to serve the public and defend our fundamental rights while practicing trial and appellate litigation at the highest level in complex federal cases.

2. **Were you ever concerned that your work for the Office of the Federal Public Defender for the Districts of Colorado and Wyoming would result in more violent criminals—including gun criminals and sex criminals—being put back on the streets?**

   Response: No. I am proud of the work I have performed upholding our fundamental constitutional rights and ensuring that the right to counsel guaranteed by the Sixth Amendment and the Criminal Justice Act, 18 U.S.C. § 3006A is enforced on behalf of those who cannot afford to retain a lawyer.

For all nominees:

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

   Response: No.

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

   Response: No.

3. How would you describe your judicial philosophy?

Response: I do not have a specific judicial philosophy, meaning I do not ascribe to any single school of interpretive methodology. As I said at my hearing, "I believe the Constitution is an enduring document." If confirmed as a circuit judge, I would be bound by the precedents of the Supreme Court, without regard to any personal view about constitutional interpretation. I expect it will be the rare case where, as a circuit judge, I would be called upon to interpret a constitutional provision that has never been considered in a precedent of the Supreme Court. Should such a case of first impression come before the Tenth Circuit, I would start with the constitutional text and adhere to the modes of constitutional interpretation used by the Supreme Court. In recent years, the Supreme Court has interpreted various constitutional provisions according to the "original public meaning" of the Constitution's text at the time of the Founding. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008). The Supreme Court also has referred to the original intent of the Framers when interpreting the Constitution. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). If confirmed, I will faithfully follow Supreme Court precedents regarding constitutional issues, regardless of whether the particular precedent was grounded in any specific judicial philosophy or approach to constitutional interpretation.

While I do not ascribe to a specific judicial philosophy, I have carefully considered the judicial process I will bring with me to the appellate bench, if confirmed. In every case, I will treat all litigants respectfully and impartially; I will carefully consider the issue(s) presented and give due regard to the parties' legal arguments; I will carefully review the record on appeal; I will put aside any personal views; I will faithfully adhere to the rule of law; I will reach a decision, working collaboratively with my judicial colleagues, that adjudicates only the issue presented in the case; and I will strive to issue well-written opinions that make the reasoning underlying the outcome clear to the litigants and to the public.

4. Would you describe yourself as an originalist?

Response: Please see my response to Question 3.

5. Would you describe yourself as a textualist?

Response: Please see my response to Question 3.

6. Do you believe the Constitution is a "living" document? Why or why not?

Response: I would respectfully reiterate what I stated at my hearing, which was, "I believe the Constitution is an enduring document."

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

   Response: I particularly admire both Justices Gorsuch and Kagan because they share a quality that I believe is essential for appellate judges: an ability to write clear, reasoned judicial decisions, in plain language, which then make the Supreme Court's opinions accessible to the litigants, the public, and lower courts.

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

    Response to Questions 8-30: All of the cases identified here are Supreme Court precedents, which would be binding on circuit courts. If confirmed, I will faithfully follow each precedent whenever it applies to a case that comes before the Tenth Circuit. Consistent with the position taken by other judicial nominees, and the important principle of judicial impartiality, I believe it would be inappropriate for me to comment on the merits of any decision of the Supreme Court. Of the listed cases, I can identify four exceptions to this general rule: *Marbury v. Madison*, *Brown v. Board of Education*, *Gideon v. Wainwright*, and *Loving v. Virginia*. The holdings in these four cases are beyond dispute.

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

Response: Stare decisis applies in the Tenth Circuit. As the Court of Appeals has explained: "[u]nder the doctrine of stare decisis, [one] panel cannot overturn the decision of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (internal quotation marks and citations omitted). Federal Rule of Appellate Procedure 35(a) governs en banc review, which "is not favored." The rule states that en banc review "ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2). Likewise, the Tenth Circuit considers en banc review to be "an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." 10th Cir. R. 35.1(A).

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

Response: Please see my response to Question 31.

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

Response: The Supreme Court has held that sentencing must be individualized. *See, e.g., Pepper v. United States*, 562 U.S. 476, 487-88 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual"). The federal sentencing statute—18 U.S.C. § 3553(a)– enumerates several factors that the sentencing court "shall consider[,]" including § 3553(a)(6), under which a sentencing court considers "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." As a general matter, § 3553(a)(6) "looks to uniformity on a national scale." *United States v. Ivory*, 532 F.3d 1095, 1107 (10th Cir. 2008); *see also United States v. Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010) (holding that, under *Gall v. United States*, 552 U.S. 38, 46 (2007), "although § 3553(a) does not require a consideration of co-defendant disparity, it is not improper for a district court to undertake such a comparison"). "Unwarranted disparities result when the court relies on things like alienage, race, and sex to differentiate sentence terms." *United States v. Bridgewater*, 950 F.3d 928, 936 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 638 (2020); *see also McCoy v. United States*, 145 F.3d 1332 (6th Cir. 1998) ("Mere disparity is not legally impermissible unless the district court considered an improper factor, such as race or a defendant's exercise of his constitutional right to a trial."). The Supreme Court has

observed that even the perception of unwarranted sentencing disparity based on race fosters disrespect for and lack of confidence in the criminal justice system. *See Kimbrough v. United States*, 128 S. Ct. 558, 568 (2007).

Questions for the Record for
Senator Thom Tillis for
Questions for Ms. Veronica Sophia Rossman

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

   Response: Yes.

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

   Response: Judicial activism may have more than one definition. To me, judicial activism occurs when judges decide cases by reference to their personal views, by reaching outside the scope of the issue presented in a case, or by ignoring basic jurisdictional and justiciability requirements under Article III to decide a case or controversy not properly before the court.

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

   Response: Impartiality is an expectation of the judicial role. *See* Code of Conduct for United States Judges, Canon 3 ("a judge should perform the duties of the office fairly, impartially, and diligently").

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

   Response: No.

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

   Response: A judge should not be focused on whether any particular outcome is or is not desirable. The duty of a judicial officer is to put aside her personal views and to decide the case, impartially, based on the rule of law, as applied to the specific facts presented.

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

   Response: No.

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

   Response: I will faithfully and diligently uphold the Constitution and, in an impartial and fair manner, follow all binding Supreme Court and Tenth Circuit precedent in the Second Amendment context, including *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) and

McDonald v. City of Chicago, 561 U.S. 742, 780 (2010), which held the Second Amendment protects an individual's right to keep and bear arms.

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

Response: Questions concerning the COVID-19 pandemic are actively being litigated in the Supreme Court and the lower federal courts. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021). As a judicial nominee, I cannot comment on pending cases or impending matters that may come before the Tenth Circuit. If I am confirmed, should a case come before me that raises constitutional claims, I will faithfully follow all binding Supreme Court and Tenth Circuit precedent on the issue.

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

Response: I have not had occasion to consider a qualified immunity case, because I have never served as a judge. If I am confirmed, I will diligently research and apply binding Supreme Court and Tenth Circuit precedent concerning the doctrine of qualified immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

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

Response: I would respectfully reiterate what I said at my hearing, when I was asked about qualified immunity, which was: "I'd say that law enforcement has a tremendously important and challenging job. If I'm confirmed as a circuit judge, I would follow the law of qualified immunity as developed by the Supreme Court in cases like *Harlow* and others and the case law that's developed in the Tenth Circuit. And with respect to any policy positions that may implicate the doctrine of qualified immunity as a doctrinal judicial matter, that would be outside the scope of what I would be concerned with as a judge, if I'm confirmed."

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

Response: Please see my answer to Question 10.