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S. HRG. 118–29, Part 3

# CONFIRMATION HEARING ON FEDERAL APPOINTMENTS

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

MARCH 22, 2023

**Serial No. J–118–2**

**PART 3**

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# CONFIRMATION HEARING ON FEDERAL APPOINTMENTS

**WEDNESDAY, MARCH 22, 2023**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:01 a.m., in Room 226, Dirksen Senate Office Building, Hon. Alex Padilla presiding.

Present: Senators Padilla [presiding], Kennedy, and Tillis.

Also present: Senators Risch, Bennet, Hickenlooper, and Crapo.

## OPENING STATEMENT OF HON. ALEX PADILLA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator PADILLA [presiding]. Good morning, everybody. This hearing will come to order. My name is Alex Padilla. I've been asked to serve as Chair for today's hearing by Chairman Durbin.

Today we will hear from three judicial nominees: Molly Silfen, nominated to the Court of Federal Claims; Judge Amanda Brailsford, nominated to the District of Idaho; and Judge Kato Crews, nominated to the District of Colorado. Congratulations to all three nominees and their families.

The two district court nominees before us each have received blue slips from both of their home State Senators, and I would like to thank Senators Crapo, Risch, Bennet, and Hickenlooper for working with the White House in good faith to expeditiously fill these judicial vacancies. Our colleagues are all joining us today for introductions of the nominees.

But first, I would normally turn to Senator Graham, Ranking Member of the Judiciary Committee, for opening remarks. In his absence, I'll turn it over to the good Senator from the State of Louisiana, Senator Kennedy.

## STATEMENT OF HON. JOHN KENNEDY, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator KENNEDY. Thank you, Mr. Chairman. I just wanted to welcome all our nominees and our guests today. And with that, I'll turn it back over to the Chair.

Senator PADILLA. All right. We're operating pretty efficiently here this morning, Senator.

Senator KENNEDY. I think we ought to be in charge all the time. [Laughter.]

Senator RISCH. Does that need a second?

Senator PADILLA. Absolutely. Without objection. We'll now hear introductions for our nominees beginning with Senator Risch.

**STATEMENT OF HON. JAMES E. RISCH, A U.S. SENATOR FROM THE STATE OF IDAHO, INTRODUCING AMANDA K. BRAILSFORD, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF IDAHO**

Senator RISCH. Well, thank you very much, Mr. Chairman and Mr. Ranking Member. Thank you so much for having us here. It's my great honor and privilege to come here to meet with you today. And I'd like to introduce Judge Amanda Brailsford, who's here with me today to serve the United States District Court for the District of Idaho.

Judge Brailsford, congratulations to you, and welcome to you and your family. If confirmed, Judge Brailsford would not only be the first woman to serve in this role in Idaho, but also one of the most qualified nominees that I've seen move on to our Federal bench in Idaho.

Judge Brailsford was born in Hagerman, Idaho, and received her degree summa cum laude from the University of Idaho. One of the finest law schools in the United States of America, I might add. My alma mater also. She began her career in private practice working nearly 20 years at a law firm before starting her own civil litigation firm in Boise.

Judge Brailsford was then appointed to the Idaho Court of Appeals by my good friend, and successor, former Governor Butch Otter, who I might add, was one of the best governors that Idaho has had, and where she served since 2019, and had a hand in deciding a majority of the opinions that have been rendered by that court.

As you can see, Judge Brailsford has a significant qualifying experience in civil and criminal matters, and would practice respect for the Constitution and the rule of law we demand in Idaho from our Federal bench.

For these reasons, it's my honor to commend Judge Amanda Brailsford to you, and I look forward to supporting her nomination on the floor, which I'm confident you will move expeditiously. Thank you so much.

Senator PADILLA. Thank you, Senator Risch.

Senator RISCH. I'm going to ask—Mr. Chairman, I'm going to be—I'm going to ask to be excused. I think Senator Crapo is coming, but, as you know, we've got Committee meetings going on all over. So, thank you very much.

Senator PADILLA. Thank you. I now turn to Senator Bennet to introduce Judge Crews.

**STATEMENT OF HON. MICHAEL F. BENNET, A U.S. SENATOR FROM THE STATE OF COLORADO, INTRODUCING HON. S. KATO CREWS, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLORADO**

Senator BENNET. Thank you very much, Senator Padilla—Senator Kennedy, it's good to see you, as well—for the opportunity to introduce Kato Crews, President Biden's nominee for the U.S. District Court for the District of Colorado. I know that Cato's parents, Don and Napoleon, are with us today, along with his stepmother, Brooke, and his wife, April. I thank all of them for making the trip

to join us this morning as I have the chance to introduce, with Senator Hickenlooper, this exceptional nominee.

Judge Crews is a son of Colorado. He was born in Pueblo, proud steel town in the high desert in the southern part of our State. Kato's family didn't have a lot as he was growing up, but his parents worked hard to put him and his sister first.

And by the time Kato was in middle school, he knew he wanted to be a lawyer. His dad had been a solo—had a solo law practice in Pueblo. And while Kato didn't exactly know what his dad did for work, he knew he was helping people. He had the respect of his community, and he looked great in a suit.

Kato attended public high school in Rye, Colorado, a rural town in the San Isabel foothills, where he was the only African-American male in his entire school. He earned a B.A. from the University of Northern Colorado, and a J.D. from the University of Arizona, where he served on the law review, made the dean's list, and offered pro bono aid to survivors of domestic violence.

After law school, Kato served as an attorney for the National Labor Relations Board in Denver, where he investigated and prosecuted charges of unfair labor practices. He spent the next 17 years, Mr. Chairman, in private practice. First at a big firm in Denver where he made partner, and then at a smaller firm he founded with colleagues.

In private practice, Kato focused on civil litigation and employment law, representing both sides of the legal ledger of workers and employers. His inclines ranged from large companies to family businesses, nonprofits, charter schools, and vulnerable Coloradans.

In one case, Kato represented a worker who had left his employer to start his own vehicle booting company. When the employer sued him for breaching a non-compete agreement, Kato defended the worker and saved his new small business from ruin.

In private practice, Kato tried cases in Federal and State courts, administrative agency, serving as chief or sole counsel in jury trials, bench trials, and administrative hearings.

And, for the last 4½ years, he served as a magistrate judge for the District of Colorado. In this role, he's presided over five jury trials and one bench trial. He's performed most tasks expected of a district court judge, from handling evidentiary proceedings to all matters before, during, and after trial.

During his time on the bench, Judge Crews came to understand how pro se litigants often struggled to advocate for themselves. He also saw young lawyers eager for courtroom experience. So he founded a program to connect the two, giving younger lawyers valuable time in court and pro se litigant's free help to navigate certain proceedings. That's just one example of Judge Crews' commitment to making the legal system more accessible to litigants, to future lawyers, and the community.

As Colorado's first African-American magistrate, Judge Kato spends as much time as he can in the community, serving on nonprofit boards, mentoring students, and using the power of his example to help young Coloradans imagine a career in law. I have a pile of letters, Mr. Chairman, in my office from former mentors and colleagues who also describe Judge Crews as a true public servant who works hard, never loses his poise or his patience, and

never forget where he came from. He's one of the most successful judges in our State, and one of the most qualified.

Judge Crews knows what it means to try a case as a litigator and preside over one as a judge. He's practiced law for the government and for firms, large and small. He's tried cases from the perspective of employers and employees, for clients with resources and clients with none at all.

I have no doubt he would make an excellent district court judge, and I urge the Committee to send him to the floor with a strong bipartisan vote. Thank you, Mr. Chairman, for having me here today.

Senator PADILLA. Thank you, Senator Bennet. We're also joined this morning by Senator Hickenlooper, to introduce Judge Crews.

Senator BENNET. I was going to leave, but now I'm going to stay.

[Laughter.]

Senator HICKENLOOPER. I worry that might turn out not to be a wise decision.

[Laughter.]

**STATEMENT OF HON. JOHN W. HICKENLOOPER, A U.S. SENATOR FROM THE STATE OF COLORADO, INTRODUCING HON. S. KATO CREWS, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLORADO**

Senator HICKENLOOPER. Thank you, Chairman Padilla and Ranking Member Graham, for inviting me to speak. Thank you, Senior Senator Bennet, for sharing your words. And I can't add too much but I do want to provide a little bit of perspective. And I agree that his experience—Judge Kato Crews' experience, intellect, and integrity make him an ideal candidate for Federal judiciary.

He comes before this Committee with well-earned support, thanks to a career dedicated to the people, as Michael was recounting. In addition to his more than 20 years' experience in employment law, since 2018, he served as a magistrate judge on the very court to which he has been nominated.

Michael mentioned his mentors and the stacks of letters. There's also a number of letters from his proteges and younger people that he took under his wing, provided guidance and inspiration to. He's a well-documented believer in giving back. His commitment to pro bono work is almost limitless. He founded the Federal Limited Appearance Program, a volunteer program that provides litigants with legal representation and procedural and other non-dispositive situations.

Judge Crews' experience in community service, as Michael said, has earned enthusiastic support from all corners of the State, all members of the Colorado legal community. Not just former colleagues, but labor leaders, elected officials up and down the list. Obviously, when the American Bar Association does their rankings, if there was a category for "most qualified," which there's not, but, he is "well qualified"—he would be "most qualified," were there such a ranking.

In supporting his nomination, a number—a group of attorneys, who have appeared as opposing counsel in Judge Crews' courtroom, wrote that, and I quote, "Not one of us questions magistrate Judge Crews' intellect, integrity, respect for the rule of law, and the pro-

fession we share." They added that he has, quote, unquote, "embodied what all hope to see in a judicial officer: fairness and impartiality."

I could not agree more. Kato has my full, wholehearted support. I encourage this Committee to support his nomination with that same commitment. We look forward to the Senate acting swiftly to confirm him to this office, which he is so eminently qualified. Thank you to the Chair, and Ranking Member, and every Member of the Committee, for your consideration of this truly remarkable and outstanding nominee.

Senator PADILLA. Thank you, Senator Hickenlooper.

As has been mentioned, we're also expecting Senator Crapo at some point this morning. Reason for not being here, we have multiple Committees meeting this morning. So, if, and when, he's able to join us, we'll acknowledge him for some opening remarks.

It is now my pleasure to introduce Molly Silfen, who has been nominated to the Court of Federal Claims. Ms. Silfen is a graduate of Yale College and of Harvard Law School. She began her legal career in private practice where she handled patent and trademark issues for both individual patent owners, as well as major companies.

She then spent 2 years clerking for Judge Alan D. Lourie in the U.S. Court of Appeals for the Federal Circuit, the court that hears appeals from the Court of Federal Claims. In 2013, Ms. Silfen joined the U.S. Patent and Trademark Office as an associate solicitor.

Since joining the Office, she has argued 23 appeals before the Federal Courts of Appeals and has served as counsel of record in five merits cases before the Supreme Court. Ms. Silfen has also completed two details since joining the USPTO.

She first spent a year with the appellate staff in the Justice Department's Civil Division. And more recently, some of you may recall, she spent 2 years detailed as a counsel with Senator Leahy's Senate Judiciary Committee staff. It is good to have her back with us today.

At his request, I'd like to enter into the record Senator Leahy's statement of support for Ms. Silfen's nomination.

[The information appears as a submission for the record.]

Ms. Silfen does have the experience at all levels of the Federal judicial system and the technical expertise required to serve on the Court of Federal Claims. I welcome her and her family today and look forward to hearing her testimony.

And now, I invite all three nominees to please come forward. And, before you sit down, I will rise, as well, ask you to raise your right hand.

[Witnesses are sworn in.]

Senator PADILLA. Thank you. Please have a seat. Let the record reflect all three nominees have answered the question in the affirmative. I'll now turn to Ms. Silfen for your statement.

## STATEMENT OF MOLLY R. SILFEN, NOMINEE TO SERVE AS A JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

Ms. SILFEN. Thank you, Chair Padilla, for those kind remarks and for chairing this hearing. I'd also like to thank Chair Durbin,

and Ranking Member Graham, for scheduling the hearing. And, thank you to the Members of the Committee, and your staffs, for your hard work.

It's a pleasure to be back here where it was wonderful to work with all of your staffs last Congress, and it's equally exciting, but a bit scarier now, to be on this side of the dais.

I'd also like to thank President Biden for the nomination. I'm honored by his confidence in me. A heartfelt thank you to Senator Leahy for his support. He also gave me the incredible opportunity to work on this Committee, and I have the deepest respect for the bipartisan work that you do, and what you can accomplish working together.

In that vein, I'd also like to thank Senator Tillis for his support and his staff for being terrific partners when we worked together on the IP Subcommittee.

I'd like to thank all of my family and friends, those who are here today and those who cannot be here. Thank you to my parents for their unconditional love and support. Thank you to my husband, Jonathan, who has been my strongest supporter and biggest cheerleader, and even stayed home today at the last minute to take care of a sick kiddo. And, thank you to our two boys who are such kind and caring human beings, and who give me hope for the future.

Thank you to Judge Lourie, who is kind enough to come today. I was honored to be his law clerk, and he was a role model in careful reason decision-making.

And, thank you to my colleagues and friends throughout my career for modeling excellence in the practice of law.

Once again, I'm thrilled to be here today, and I welcome the Committee's questions.

Senator PADILLA. Thank you very much. Judge Brailsford.

Judge BRAILSFORD. Good morning.

Senator PADILLA. Let's make sure your microphone is on. Sorry.

**STATEMENT OF HON. AMANDA K. BRAILSFORD, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF IDAHO**

Judge BRAILSFORD. Thank you for convening this hearing and for your time and attention. I am both honored and humbled to appear before the Committee. Thank you to President Biden for nominating me and for the opportunity to serve my country, if confirmed.

Thank you to Senator Risch for your kind introduction, and to both Senators Crapo and Risch, of the great State of Idaho, for recommending me for this nomination, and for their support and encouragement. If confirmed, I would work diligently every day to earn the trust and confidence placed in me.

It would be a great honor to succeed the Honorable Lynn Winmill, who has been a hardworking, dedicated, and steadfast public servant, for his country and for the State of Idaho, for more than 35 years.

I would like to acknowledge the many people in my life who have supported me throughout my career and whose support has carried me here today.

With me today is my family and my inspiration: my husband, Matt, my daughter, Avery, and my sons, Mitchell and Maddox. As always, I appreciate that you have my back, today and every day. Additionally, I would like to acknowledge my parents. Growing up on the ranch, you taught me the value of hard work and perseverance. To my in-laws, Kerry and Carol, thank you for your love and support.

I would also like to thank my friends, my outstanding support staff at the Idaho Court of Appeals, and my supportive colleagues in the practice of law and on the bench, and my trusted mentors. I greatly appreciate the Committee's consideration of my nomination, and I look forward to answering your questions.

Senator PADILLA. Thank you. Judge Crews.

**STATEMENT OF HON. S. KATO CREWS, NOMINEE TO SERVE AS UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLORADO**

Judge CREWS. Thank you, Chair Padilla, Chair Durbin, Ranking Member Graham, and the Members of this Judiciary Committee. And many thanks to President Biden for the honor of this nomination, to Senators Bennet and Hickenlooper for their warm introduction and for their support. And, thank you to our district court nominating committee.

With me today is my high school sweetheart, who is also my wife, April. I thank her for her love, support, and sacrifices through all these years.

Our two children, unfortunately, could not be here. Turns out that when your kids become young adults, they sometimes have their own life obligations that take precedent even over matters like this. Our daughter is in her junior year as an undergraduate student, and our son is attending his last days of his dance trade school. But they're both watching from their devices, and I love them dearly, and I thank them for the privilege it has been to be their father.

Also with me today is my mother, Don, my pop, Napoleon, and my stepmother, Brooke. I thank each of them for their unwavering love and guidance.

And my additional guests include my law clerk, Stephanie, who has been with me since I took the bench in 2018, and Claudia, who is a recent addition to my chambers.

I want to thank all the family and friends who couldn't be here today and extend a heartfelt thanks to my judicial colleagues from the District of Colorado. These are some of the best colleagues I've had in my career, and it's been an honor to work with and to know them.

And a special thanks to my former partners, Julie Waggener and Rick Foster, and my dear friends, Chung Lei and Sam Brown, for their support. It's been the honor of my life to serve the public as a United States Magistrate Judge, and it would be an even higher honor to be confirmed as a United States District Judge. I thank this Committee for this opportunity to appear and to answer your questions.

Senator PADILLA. Thank you, Judge Crews. Before beginning with the questions from the Committee, we've been joined by Sen-

ator Crapo with the words of introduction of Judge Brailsford. Senator Crapo.

**STATEMENT OF HON. MIKE CRAPO, A U.S. SENATOR FROM THE STATE OF IDAHO, INTRODUCING AMANDA K. BRAILSFORD, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF IDAHO**

Senator CRAPO. Well, thank you, Chairman Padilla. And, I thank all of the Members of the Judiciary Committee. I apologize for being late. I was—I have three hearings this morning, and one of them I had to make an introductory statement at, where I was the Ranking Member, so I apologize for being late. But I appreciate you letting me squeak in here and make my introductory comments of Amanda Brailsford.

Judge Brailsford represents the best our State has to offer, and I hope you'll be able to support her nomination in this process. Judge Brailsford hails from Hagerman, Idaho, and is an Idaho native through and through. She received both her undergraduate degree and her Juris Doctorate from the University of Idaho, graduating summa cum laude from the University of Idaho for her law degree in 1993.

Judge Brailsford clerked for the Honorable Thomas Nelson of the United States Court of Appeals for the Ninth Circuit shortly after that. After her clerkship, she worked in private practice with Holland & Hart in Boise, first as an associate and then as a partner. As a partner, she handled matters relating to agriculture, product liability, and corporate law while also working as the hiring partner.

In 2013, she became a founding partner of Andersen Banducci PLLC in Boise, focusing on matters related to complex corporate, environmental, and antitrust law, while also managing all aspects of the firm. In November 2018, Governor Butch Otter appointed her to the Idaho Court of Appeals. She assumed office in 2019, and was reelected in May 2020.

Judge Brailsford has been admitted before the Idaho State Bar, the United States District Court for the District of Idaho, the court for which she's currently nominated, and the United States Court of Appeals for the Ninth Circuit.

Outside of her employment, Judge Brailsford and her husband have been married for more than 20 years and have three children. I'm sure you're going to get a chance to introduce them, Amanda. Beyond her employment, she served on the Idaho Supreme Court Evidence Rules Advisory Committee from 2016 to 2019, and has been an active volunteer with the local swim teams in Boise.

When I reviewed candidates with Senator Risch, Judge Brailsford stood out as one who would adjudicate cases according to the Constitution and the law consistent with established precedent. Throughout her career, Judge Brailsford has demonstrated adherence to the Constitution and law, as written, and has earned the respect of her legal peers.

She's proven herself to be knowledgeable in law and procedure, an active participant in both the legal community and her local community, and an extremely qualified candidate for Idaho's next district judge. I thank you for this opportunity.

And, before I close, I want to say, the folks in Idaho are excited. We've been working to get this position filled for years, and we have an outstanding candidate. And, I want to thank the Biden administration who worked very closely with us.

This was a situation in which Republican Senators and a Democrat President could come together and find an outstanding candidate for Idaho's next U.S. District Court judge.

Senator PADILLA. Thank you, Senator Crapo.

We'll now begin with our questions. Now, I will ask the first question to all three of you. And, it's a topic that I raised with all the nominees that come before this Committee. And, that is the importance of diversity, not just on the Federal bench.

Happy to talk about that all day long. But I asked a question specifically in the spirit of diversity amongst law clerks. Federal clerkships can be wonderful launch pads for a legal career and often serves as a pipeline to the top levels of our Nation's legal profession, both in the public and the private sectors. But, far too often, women and minority law students are overlooked for Federal clerkships, despite having equal qualifications as their peers.

So, I'd like to hear from each of you, starting with Judge Brailsford. If you could just discuss for a moment if you agree with that priority, the importance of diversity at all levels of the judiciary, and should you be fortunate enough to be confirmed, what you would do, individually and personally, to advance diversity in clerkships in our judicial system?

Judge BRAILSFORD. Yes. Thank you for the question, Senator. I do believe that diversity is important in the judiciary. I think it gives confidence to people that justice is for all. It's also a reminder that diligence and hard work and merit matter. And, if confirmed, I would definitely look to all backgrounds, and diverse backgrounds, for law clerks if they met the merit criteria to be a law clerk.

Senator PADILLA. Okay. Judge Crews.

Judge CREWS. Thank you, Senator. I agree. Having a diverse bench, it's important that the bench emulates the communities that we serve in order to ensure that the public has confidence in the fairness and impartiality of our courts.

I would take your comment one step further and say internships, judicial internships are an important opportunity, to offer those to diverse law students, which is something that I do in my chambers. I have hired diverse clerks, and it is important to maintain that diversity at all levels. Thank you.

Senator PADILLA. Thank you very much. Ms. Silfen.

Ms. SILFEN. Thank you, Senator. And I couldn't agree more with Judge Brailsford and Judge Crews. And, I would also look for diverse set of candidates for law clerks, I think, and, I guess I'd add, that I would look for diversity in all forms. So, I would certainly be looking for, sort of, racial, gender diversity, socioeconomic background, and also, I mean, others, sort of educational background.

When I clerked for Judge Lourie, he would always look to find clerks with different technical backgrounds, just to make sure that the various areas of technology were covered. And that's sort of an underrated set of diverse candidates to look for, as well. And so,

I would certainly go about looking diligently for a wide mix of candidates.

Senator PADILLA. Yes. I thank each of you for your answers. And yes, to be clear, in addition to gender, ethnic, racial diversity, etc., this Committee has been clear, and has worked successfully with the Biden administration, to put forward nominees for the bench that have a diverse set, of both professional as well as life experience, to have a judiciary that reflects the diverse country that it serves, but also, to your point, Judge Crews, bolsters public confidence in the system and the decisions that it puts out.

In my time remaining, I have a specific question for Ms. Silfen. You've generally focused on patent and trademark issues in your practice, and you have significant experience spanning the public sector, the private sector, as well as academia. Given your experience across these different sectors, can you please describe how your prior roles will aid you as you prepare for this specific role on the bench?

Ms. SILFEN. Thank you for the question, Senator. Starting at the beginning of my career, when I was a law clerk, I was clerking on the Federal Circuit and reviewing all of the various issues that the Court of Federal Claims were involved in, reviewing cases on all the various issues that come before the Court of Federal Claims.

In my practice, I have focused on intellectual property cases, which are one of the areas of the court's jurisdiction. But on top of that, my experience has spanned across cutting issues that the Court of Federal Claims addresses. Things like administrative law, statutory interpretation, constitutional questions. Those sorts of things come up across the board in all different areas of the court's jurisdiction.

And, one quick thing I would add is my experience practicing in front of the Federal Circuit and understanding the records of highly technical complex cases, I think, will serve me well on the court, if I were fortunate enough to be confirmed.

Senator PADILLA. Thank you very much. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. Judge, Judge, Counselor, congratulations. I want to be sure I understand your records.

We'll start with Judge Crews. Judge Crews, you handled a case called *Vyanet Operating Group v. Maurice*. Is that right?

Judge CREWS. That's correct, Senator.

Senator KENNEDY. And, you were reversed in that case. Is that right?

Judge CREWS. Yes, sir.

Senator KENNEDY. You handled a case called *Moudden v. University of Colorado*. Is that right?

Judge CREWS. I believe so, Senator. Yes.

Senator KENNEDY. And, you were reversed in that case. Right?

Judge CREWS. I believe a portion of my recommendation was reversed, yes.

Senator KENNEDY. Okay. Did you handle a case called *Vreeland v. Vigil*?

Judge CREWS. Yes, Senator.

Senator KENNEDY. And, you were reversed in that case, too?

Judge CREWS. A portion of that was reversed, as well. Yes.

Senator KENNEDY. Okay. Did you handle a case called *Vreeland v. Olson*?

Judge CREWS. Yes, Senator.

Senator KENNEDY. And, were you reversed in that case, too?

Judge CREWS. A portion of that was reversed, as well. Yes.

Senator KENNEDY. Okay. You handled a case called *KeyBank National Association v. Williams*. Is that right?

Judge CREWS. Yes, Senator.

Senator KENNEDY. Were you reversed in that case?

Judge CREWS. Senator, I've issued over 1,500 recommendations and orders over the course of my 4 years on the bench. And, that is one that was partially reversed, yes.

Senator KENNEDY. Okay. You handled a case called *Reneau v. Cardinas*. Do you remember that case?

Judge CREWS. Yes. Senator.

Senator KENNEDY. And, you were reversed in that case, too.

Judge CREWS. A portion of that was reversed, as well.

Senator KENNEDY. Do you remember a case called *Janny v. Gamez*?

Judge CREWS. Yes, Senator.

Senator KENNEDY. And, were you reversed in that case?

Judge CREWS. A portion of that was reversed, as well, Senator.

Senator KENNEDY. Okay. How about a case—do you remember this case, *Judge Schwartz v. City of Denver*?

Judge CREWS. The name is familiar, Senator. For all the cases I've handled, I'm not recalling particulars about that case.

Senator KENNEDY. Sure. Okay. Do you remember being reversed in that case?

Judge CREWS. Senator, I'm not specifically recalling that case.

Senator KENNEDY. Okay. Do you remember a case called *Lucas v. Board of Commissioners of Larimer County*?

Judge CREWS. The name is familiar, Senator. The details of the case are not coming to hand at the moment.

Senator KENNEDY. Do you remember being reversed in that case?

Judge CREWS. Senator, I don't recall offhand at the moment with that case.

Senator KENNEDY. Okay. Do you remember a case called *Brooks v. Colorado Department of Corrections*?

Judge CREWS. Yes, Senator.

Senator KENNEDY. Were you reversed in that case?

Judge CREWS. I'm not recalling offhand if that was one where I had a partial reversal.

Senator KENNEDY. Okay. Do you remember a case called *A.C. v. Jefferson County School District*?

Judge CREWS. Yes, Senator.

Senator KENNEDY. Were you reversed in that case?

Judge CREWS. I was partially reversed in that case, as well.

Senator KENNEDY. Okay. You remember a case called *Blake v. United States*?

Judge CREWS. The name sounds familiar, Senator.

Senator KENNEDY. Okay. Do you remember being reversed in that case?

Judge CREWS. I don't specifically recall that particular case.

Senator KENNEDY. Okay. Well, I've got others here, cases that you handled in which you were reversed. Tell me why you've been reversed so often, Judge.

Judge CREWS. Well, Senator, as I indicated, I've issued over 1,500 recommendations and orders over the course of my career. When I approach any of these cases, I approach them all in the same fashion, which is to analyze the law, analyze the Supreme Court and Tenth Circuit precedent that bears on those cases, and I apply those cases to the law as a—or, to the facts of that case, as a magistrate judge. Many of those are recommendations that are made, which are reviewed de novo. I respect the decisions of those district judges who viewed those circumstances differently.

Senator KENNEDY. Okay. Thank you, Judge. Tell me how you analyze a Brady motion.

Judge CREWS. How I analyze a Brady motion?

Senator KENNEDY. Yes.

Judge CREWS. Senator, in my 4½ years on the bench, I'm not—don't believe I've had the occasion to address a Brady motion in my career.

Senator KENNEDY. Do you know what a Brady motion is?

Judge CREWS. Senator, in my time on the bench, I've not had occasion to address that. And so, it's not coming to mind at the moment what a Brady motion is.

Senator KENNEDY. Do you recall the U.S. Supreme Court case, *Brady v. Maryland*?

Judge CREWS. I do recall the name of the case, Senator. Yes.

Senator KENNEDY. And what did it hold?

Judge CREWS. I believe that the *Brady* case—well, Senator, I believe the *Brady* case involves something regarding the Second Amendment. It is not—I've not had occasion to address that. If that issue were to come before me, I would certainly analyze that Supreme Court precedent and apply it as I would need to, to the facts in front of me.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator PADILLA. Thank you, Senator Kennedy.

We'll give Senator Tillis a moment to settle in, and he'll be recognized next, for his questions.

In the meantime, let me just recognize that Judge Crews—appreciate your responses to Senator Kennedy's question—we do acknowledge that the record was 18 cases, in which you were reversed or critiqued by a reviewing court. Many of these, as your responses indicated, were partial reversals, and many others, they followed a new development in the applicable area of the law. So, cases are, at times, dynamic.

Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. I'm sorry I was a little late. I was actually in the anteroom with another Member, but I wanted to come and say hello, congratulate you all for your nominations, and just ask a couple of questions.

Ms. Silfen, I think maybe by me writing a letter of recommendation to the administration on you, you kind of know where I'm leaning on your confirmation. And, thank you for the work that you did for Senator Leahy. I may ask you about workload in the Claims

Court, if I get an opportunity to. Otherwise, we'll submit something for the record.

And, I should also say that Ms. Brailsford—did I pronounce that right? Because you've been vetted and supported by two colleagues in Idaho that I have a lot of support for, that I intend to vote for your nomination, as well. I would ask you the questions that they clearly already have, in order to support your nomination.

So, Mr. Crews, I want to ask you, I may only have one question for you, and it has to do with a case that you ruled on, on qualified immunity, I think for prison guards, related to a prisoner who was denied a couple of meals after a complaint about the food, which is a legitimate complaint that someone incarcerated can make.

I understand it was then reversed by a district court, then held up by the Tenth Circuit. Am I right about those fact patterns? Correct me, if I'm wrong.

Judge CREWS. I recall a case where that was the fact pattern, Senator.

Senator TILLIS. Well, I, you know, for one, think that we have a lot of people calling for repealing qualified immunity, generally for law enforcement. And I, you know, the circumstances of the case are what they are and, you know, seem to be a rational basis for that specific example of why they were not covered under qualified immunity.

Before you started serving in a judicial role, did you ever publish, make statements, opine on qualified immunity, for, or against, it?

Judge CREWS. No, Senator. I don't believe I made any statements for, or against, that.

Senator TILLIS. Could you—if you're somebody, like me, who thinks that people in law enforcement roles need to be held accountable, we've seen some tragic incidences where they are being prosecuted. Most recently, the prison—or, the sheriff's deputies with the case in Virginia, just more recently.

But, could you at least characterize the process that—the judicial process, that you were a participant in, as an example of how you can have qualified immunity in place for people in public safety and still rely on the courts to identify the bad actors and hold them accountable?

Judge CREWS. Sorry, Senator, can you reframe that question?

Senator TILLIS. Okay. Well, we have a lot of people who are weaving the narrative that—and I have to go back to my least favorite webpage. That is a subpage of ActBlue, which is the aggregation engine for good Democrats to get fundraising.

There's a subpage there that's called "A-C-A-B." It's the 13.12-mile run. And they describe—it's a Black Lives Matter-sponsored page for fundraising. They describe "1-3-1-2," translates into "A-C-A-B," which translates into "All Cops Are Bastards."

So, there are some people who think that all law enforcement officers are bastards, and, therefore, you have to assume that they're bad actors, and none of them should have any kind of coverage for qualified immunity.

And, I'm stipulating that there is some small percentage of law enforcement, with the tens of thousands that we have across the country, who make bad judgments. They're either bad people, or they make bad judgments in a very stressful situation. But I don't

jump to the notion that even a significant minority are in that category.

But, we have people here that think the way you do, this is, threaten all people in public safety without having qualified immunity in a job that's very, very difficult and very, very dangerous. So, when I was reading your briefer, I actually saw this as an example of where qualified immunity among people in public safety can still be balanced and still be in place, and allow the judicial process to weed through ones that step beyond any sort of standard that should allow them to be excused for their actions.

And so, I don't even have a question for you. I wanted to talk about qualified immunity, and I want to talk about your case, in particular, where you ruled, then it was reversed, and then vetted by the Tenth Circuit, proves to me that you don't have to strip qualified immunity to allow law enforcement to continue to do the great work that the vast majority of them do, every day. Thank you for being here.

Judge CREWS. Thank you.

Senator PADILLA. Thank you, Senator Tillis.

Seeing no other Senators joining Judiciary Committee today, I want to make sure the nominees know this is not a reflection of you or the importance of these nominations. As I mentioned earlier, there's multiple—multiple Committees meeting concurrently today. So, other Members of the Committee, no doubt, will be able to submit questions for the record. The deadline for those being by 5 p.m. on Wednesday, March 29th.

So, I will begin to move to adjourn today's hearing. In addition to reminding everybody of that deadline for the questions for the record, I will also announce that that is also the deadline to submit letters for the record, and similar materials. And if there's no further questions, or items pending before our Committee today, this hearing is adjourned.

[Whereupon, at 10:45 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

# APPENDIX

## Additional Material Submitted for the Record

Witness List
Hearing before the
Senate Committee on the Judiciary

"Nominations"

Wednesday, March 22, 2023
Dirksen Senate Office Building, Room 226
10:00 a.m.

Amanda K. Brailsford, to be United States District Judge for the District of Idaho

S. Kato Crews, to be United States District Judge for the District of Colorado

Molly R. Silfen, to be a Judge of the United States Court of Federal Claims

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Amanda Kathleen Brailsford
   Amanda Kathleen Felton

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the District of Idaho

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Idaho Court of Appeals
   451 West State Street
   Boise, Idaho 83720

4. **Birthplace**: State year and place of birth.

   1967, Twin Falls, Idaho

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1990 – 1993, University of Idaho College of Law; J.D. (*summa cum laude*), 1993

   1985 – 1989, University of Idaho; B.A. (*cum laude*), 1989

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2019 – present
   Idaho Court of Appeals
   451 West State Street
   Boise, Idaho 83720

Court of Appeals Judge

2013 – 2017; 2018
Andersen Schwartzman Woodward Brailsford, PLLC (now defunct)
(formerly known as Andersen Banducci, PLLC)
101 South Capital Boulevard
Boise, Idaho 83702
Member (2013 – 2017)
Counsel (2018)

1995 – 2013; Summer 1992
Holland & Hart LLP
800 West Main Street, Suite 1750
Boise, Idaho 83702
Partner (2003 – 2013)
Associate (1995 – 2002)
Summer Associate (summer 1992)

1993 – 1995
U.S. Court of Appeals for the Ninth Circuit
550 West Fort Street, Suite 400
Boise, Idaho 83724
Law Clerk for the Honorable Thomas G. Nelson

1992 – 1993
University of Idaho
875 Perimeter Drive
Moscow, Idaho 83843
Judicial Advisor to Dean of Students

1991 – 1993
University of Idaho College of Law
875 Perimeter Drive
Moscow, Idaho 83844
Teaching Assistant

Summer 1991
University of Idaho College of Law
875 Perimeter Drive
Moscow, Idaho 83843
Research Assistant

Other Affiliations (uncompensated):

Flying Triangle, Inc.
18274 Highway 30

Hagerman, Idaho 83332
Minority Shareholder, Director

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I did not serve in the military. I was not required to register with the selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Martindale Hubbell, AV Preeminent rating (2012 – present)

   Litigation Counsel of America, Fellow (2017 – 2018)

   Chambers USA, America's Leading Lawyers (2009 – 2017)

   Leadership Boise (1998 – 1999)

   University of Idaho College of Law
   - University of Idaho Alumni Award for Excellence (1993)
   - J. Blaine Anderson Memorial Scholarship (1992 – 1993)

   University of Idaho
   - Outstanding Senior Award (1989)
   - Phi Beta Kappa (1989)
   - Phi Kappa Phi (1989)
   - Sigma Tau Delton (1989)
   - Grace V. Nixon Scholarship (1985 – 1988)
   - David Scholarship (1988 – 1989)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   Federal Bar Association, Idaho Chapter
   - Founding Member (2004)
   - Nominating Committee, Chairman (2006)

   Idaho State Bar Association (1993 – present)

   Idaho Supreme Court Evidence Rules Advisory Committee (2016 – 2019)

Inns of Court, Boise Chapter (2000 – 2001)

University of Idaho College of Law Conclave (2006)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Idaho, 1993

There have been no lapses in membership. I have been an inactive member on judicial status since my appointment to the Idaho Court of Appeals in 2019.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Ninth Circuit, 1993
United States District Court for the District of Idaho, 1993

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Law Advisory Council for University of Idaho College of Law
Emeritus Member (2012 – present)
Member (2007 – 2011)

Silver Sage Girl Scouts Council, Inc.
Member, Board of Directors (1996 – 2000)
Personnel Committee, Chairman (1996 – 2000)
Executive Director Selection Committee (1999)
Affirmative Action Task Force (1999)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national

origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To my knowledge, these organizations do not currently discriminate nor have they ever formally discriminated on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Idaho Employment Law Newsletters by Holland & Hart LLP, M. Lee Smith Publishers, April 1996 to approximately September 2002. I edited and occasionally wrote articles related to employment law topics for this monthly newsletter. I did not retain, and am unable to locate, copies of the newsletters or articles that I wrote or edited.

"Ask Walter" News Column, Idaho Statesman, approximately June 1998 to approximately October 2001. I occasionally wrote and edited articles for this newspaper column, which ran under the name of Walter H. Bithell, a partner at Holland & Hart. The topics related to general legal questions submitted to the newspaper. I did not retain, and am unable to locate, copies of the columns or the articles that I wrote or edited.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Idaho Supreme Court Evidence Rules Advisory Committee, report recommending changes to the Idaho Rules of Evidence. While I was a member of the committee, I attended a meeting on December 1, 2017, regarding the incorporation of certain changes to the Federal Rules of Evidence into the Idaho Rules of Evidence. Minutes of this meeting supplied. Comments on the proposed amendments were solicited in January 2018, and a court staff attorney transmitted a report on this subject in February 2018 to the Idaho Supreme Court on the recommended amendments. Report supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have searched electronic databases and paper files that I have maintained in an effort to identify all events responsive to this question and have located the following information. I have no notes, transcripts, or recordings for any of the speeches identified.

April 14, 2022: Speaker, Appellate Section of the Idaho State Bar Association, Boise, Idaho. I spoke to this group about the history and operations of the Idaho Court of Appeals. The Idaho State Bar Association's address is 525 West Jefferson Street, Boise, Idaho 83702.

August 19, 2021: Speaker, University of Idaho College of Law, Boise, Idaho. I spoke to a group of new law students about legal ethics at the College's Professionalism Day Program during student orientation at the Boise campus. The University of Idaho College of Law's Boise campus is located at 501 West Front Street, Boise, Idaho 83702.

March 10, 2020: Speaker, University of Idaho College of Law, Moscow, Idaho. I sat on a panel with other Idaho Court of Appeal judges and spoke about professional development to a group of law students at the College's Moscow campus. The College of Law's Moscow campus is located at 875 Perimeter Drive, Moscow, Idaho 83844

1999 (specific date unknown): Speaker, Holland & Hart Employment Law Update, Denver Tech Center, Colorado. I spoke to human resource managers about recent developments in employment law. The Denver address for Holland & Hart is 555 17th Street, Suite 3200, Denver, Colorado 80202.

1999 (specific date unknown): Speaker, Idaho Human Resources Organization,

Boise, Idaho. I spoke to human resources personnel about recent developments in employment law. The Idaho Human Resources Organization appears to be defunct.

1998 (specific dates unknown): Speaker, Council on Education in Management Seminars, Boise, Idaho. On two occasions, I spoke to human resources personnel and managers on employment law issues including privacy rights, drugs and alcohol in the workplace, and sexual harassment. On three other occasions, I spoke to human resources personnel and managers on employment law issues including risk-free hiring, at-will employment, and privacy rights. The Council on Education in Management appears to be defunct.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Press Release, "Idaho Gov. Otter: Moeller Appointed to Supreme Court" (Nov. 30, 2018). Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Since 2019, I have served as a judge on the Idaho State Court of Appeals. In 2018, the Governor of Idaho, Leroy "Butch" Otter appointed me to fill an unexpired term of a retired judge. In 2020, I ran for, and was elected to, a six-year term on the Court.

Idaho Code section 1-2406 establishes the jurisdiction for the Idaho Court of Appeals. The Court of Appeals has jurisdiction to hear and decide all cases that the Idaho Supreme Court assigns to it, which are primarily criminal appeals. The Supreme Court may not assign appeals invoking the Supreme Court's original jurisdiction or appeals involving capital punishment sentences, the industrial commission, or the public utilities commission.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I estimate that I have filed or joined in approximately 1,450 opinions during my time on the Idaho Court of Appeals, not counting cases dismissed before argument.

i. Of these cases, approximately what percent were:

| | |
|---|---|
| jury trials: | N/A |
| bench trials: | N/A |

ii. Of these cases, approximately what percent were:

civil proceedings: 5%
criminal proceedings: 95%

b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list of opinions.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *State v. Galindo,* No. 48123, ___ P.3d ___, 2022 WL 4372204 (Idaho Ct. App. Sept. 22, 2022).

Galindo appealed his conviction for trafficking methamphetamine, challenging the denial of his motion to suppress. After an officer lawfully stopped the vehicle Galindo was driving, Galindo complained he was ill and responded affirmatively when asked if he wanted an ambulance. As paramedics examined Galindo in the ambulance, the officer prepared the traffic citation. Paramedics were still examining Galindo when the officer completed writing the citation so he remained in his patrol vehicle and began writing the traffic stop narrative. Meanwhile, a second officer asked for and received Galindo's consent to search the vehicle. After Galindo exited the ambulance, the first officer, who had prepared the citation, began explaining the citation to Galindo. As the first officer was explaining the citation, the second officer found a digital scale with visible methamphetamine residue in the vehicle. As a result, the first officer did not return Galindo's documentation or serve the citation. About six seconds after the first officer finished explaining the citation, the second officer found methamphetamine in the vehicle. Galindo moved to suppress, arguing the first officer unlawfully extended the stop by not interrupting Galindo's medical examination to serve him the citation and rendered his consent to the search invalid. The district court denied this motion. On appeal, the Idaho Court of Appeals, in an opinion I authored, affirmed the denial, concluding Galindo—not the officer—delayed the traffic stop by requesting and receiving medical treatment. Further, we rejected Galindo's argument that the first officer should have interrupted Galindo's medical treatment to deliver the citation.

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Counsel for Respondent:
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954 West Jefferson Street, Second Floor
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(208) 334-4534

2. *State v. Colpitts*, No. 47388, 511 P.3d 873 (Idaho Ct. App. 2022).

Colpitts appealed her conviction for first-degree murder arguing the district court erred by admitting audio recordings of an inmate's jailhouse calls and refusing to instruct the jury that a witness was an accomplice as a matter of law. In an opinion I authored, the Idaho Court of Appeals ruled that the district court's evidentiary rulings and jury instructions were not in error and affirmed the conviction.

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3. *State v. Olvera*, No. 47546, 2021 WL 5175079 (Idaho Ct. App. Nov. 8, 2021).

The jury found Olvera, a juvenile, guilty of robbery and first-degree murder after another juvenile was shot multiple times and died. On appeal, Olvera challenged the district court's denial of his suppression motion, asserting he did not waive his Fifth Amendment rights knowingly, voluntarily, and intelligently. Olvera argued that he did not understand his *Miranda* rights and that his mother's absence during his confession was a factor in determining whether he understood his rights. In an opinion I authored, the Idaho Court of Appeals ruled that substantial and competent evidence supported the district court's conclusion that Olvera knowingly, voluntarily, and intelligently waived his Fifth Amendment rights.

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4. *State v. Nelson*, No. 47418, 2021 WL 4259144 (Idaho Ct. App. Sept. 20, 2021).

Nelson appealed his conviction for trafficking in methamphetamine, challenging the district court's denial of his suppression motion. Nelson argued the officers lacked reasonable suspicion to detain him outside a hotel based on a call from "hotel management and staff" reporting complaints from unidentified hotel guests about sexual and drug activity in one of the rooms. In an opinion I authored, the Idaho Court of Appeals ruled that the tip from "hotel management and staff" lacked adequate indicia of reliability to establish reasonable suspicion, reversed the district court's order denying the suppression motion, and vacated the conviction. On remand, the prosecution dismissed the charges against Nelson.

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Counsel for Respondent:
Kale D. Gans
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5. *Baker v. State*, No. 47793, 494 P.3d 1256 (Idaho Ct. App. 2021).

At trial, the State admitted the testimony of an inmate incarcerated with Baker who testified Baker had confessed to murdering his infant daughter, and the jury

convicted Baker of first-degree murder. Subsequently Baker filed a petition for post-conviction relief alleging numerous claims of ineffective assistance of counsel and a violation under *Brady v. Maryland*, 373 U.S. 83 (1963). Baker's *Brady* claim alleged the State failed to disclose: (1) the inmate's prior testimony in an unrelated murder trial in which the inmate had also testified to another individual's murder confession; and (2) the inmate's incarceration records showing he had been transferred to a minimum-security facility following his testimony despite a notation in his file that he was ineligible for such a transfer. The district court summarily dismissed Baker's claims, and Baker appealed. In an opinion I authored, the Idaho Court of Appeals ruled that Baker established genuine issues of material fact in support of his *Brady* claim and remanded for further proceedings on that claim; it affirmed the district court's dismissal of Baker's other claims. On remand, the parties entered into a settlement agreement in which the prosecution agreed to a reduction of Baker's sentence in the underlying case in exchange for a stay of Baker's post-conviction proceedings pending the results of Baker's upcoming parole hearing.

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6. *State v. Doe (2020-47)*, No. 48444, 483 P.3d 1039 (Idaho Ct. App. 2021).

A mother appealed the magistrate court's judgment terminating her parental rights to her five minor children. The mother argued the court's findings that she neglected the children and that terminating her parental rights was in the children's best interests were unsupported. Additionally, she argued the court failed to consider the coronavirus pandemic's impact on her ability to perform her case plan. In an opinion I authored, the Idaho Court of Appeals affirmed, ruling that substantial and competent evidence supported the magistrate court's findings and that the mother failed to show the pandemic adversely affected her ability to perform her case plan.

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7. *State v. Taylor*, No. 47260, 481 P.3d 767 (Idaho Ct. App. 2021).

A jury convicted Taylor of first-degree murder for killing his father and second-degree murder for killing his mother. Taylor appealed his conviction for first-degree murder, arguing the State failed to present sufficient evidence to prove premeditation. In an opinion I authored, the Idaho Court of Appeals ruled that substantial, competent circumstantial evidence was sufficient to prove Taylor's premeditation to murder his father and affirmed the conviction.

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8. *State v. Page*, No. 46352, 2020 WL 241570 (Idaho Ct. App. Jan. 14, 2020).

Page appealed her conviction for possession of methamphetamine, challenging the district court's denial of her suppression motion. Page argued the officers abandoned their community caretaking duties to conduct an investigation into criminal activity without reasonable suspicion. In an opinion I authored, the Idaho Court of Appeals ruled that the stark contrast between the officers' testimony and the video from an officer's body camera showed the district court's

factual findings were clearly erroneous. We reversed the district court's order and dismissed Page's conviction. On remand, the district court dismissed the charges against Page.

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9. *Marsalis v. State*, No. 45583, 2019 WL 2305120 (Idaho Ct. App. May 30, 2019), *aff'd*, 458 P.3d 203 (Idaho 2020).

A jury convicted Marsalis of rape after he allegedly drugged the victim. Subsequently, Marsalis filed a petition for post-conviction relief alleging numerous claims of ineffective assistance, including that his counsel failed to seek exclusion of the State's expert witness, who had an expertise in forensic toxicology and pharmacology and who testified about the victim's intoxication at the time of the rape based on retrograde extrapolation. Marsalis also alleged his counsel failed to advise him of his speedy trial rights under the Interstate Agreement on Detainers. The district court summarily dismissed Marsalis' claims, and he appealed. In an opinion I authored, the Idaho Court of Appeals ruled that Marsalis established genuine issues of material fact in support of his claims that his counsel failed to seek exclusion of the State's expert witness and to advise Marsalis of his speedy trial rights. We reversed the district court's dismissal of these claims, remanded the case for an evidentiary hearing, and affirmed the dismissal of Marsalis' other claims. The Idaho Supreme Court affirmed our decision, and on remand, Marsalis' claims of ineffective assistance of counsel proceeded to trial.

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10. *Severson v. State*, No. 45780, 2019 WL 1787315 (Idaho Ct. App. Apr. 14, 2019).

After a 17-day trial, a jury convicted Severson of first-degree murder for killing his wife and of poisoning her food or medicine. Subsequently, Severson filed successive petitions for post-conviction relief alleging numerous claims of ineffective assistance of trial and appellate counsel. Following an evidentiary hearing on Severson's third petition, the district court dismissed his claims and Severson appealed. Following a review of the entire record, the Idaho Court of Appeals ruled, in an opinion I authored, that the district court did not err in dismissing Severson's claims and affirmed its denial of his petition.

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d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *State v. Galindo*, No. 48123, ___ P.3d ___, 2022 WL 4372204 (Idaho Ct. App. Sept. 22, 2022).

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2. *State v. Colpitts*, 511 P.3d 873 (Idaho Ct. App. 2022).

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3. *State v. Olvera*, No. 47546, 2021 WL 5175079 (Idaho Ct. App. Nov. 8, 2021).

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4. *State v. Nelson*, No. 47418, 2021 WL 4259144 (Idaho Ct. App. Sept. 20, 2021).

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5. *Baker v. State*, No. 47793, 494 P.3d 1256 (Idaho Ct. App. 2021).

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6. *State v. Doe (2020-47)*, No. 48444, 483 P.3d 1039 (Idaho Ct. App. 2021).

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7. *State v. Taylor*, No. 47260, 481 P.3d 767 (Idaho Ct. App. 2021).

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8. *State v. Page*, No. 46352, 2020 WL 241570 (Idaho Ct. App. Jan. 14, 2020).

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9. *Marsalis v. State*, No. 45583, 2019 WL 2305120 (Idaho Ct. App. May 30, 2019), *aff'd*, 458 P.3d 203 (Idaho 2020).

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10. *Severson v. State*, No. 45780, 2019 WL 1787315 (Idaho Ct. App. Apr. 14, 2019).

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e. Provide a list of all cases in which certiorari was requested or granted.

The United States Supreme Court has not granted, and no party has requested, certiorari in any case that I have authored or joined in the opinion.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

The Idaho Supreme Court reversed the Idaho Court of Appeals' decision in the following cases, which I authored:

*State v. Miramontes*, No. 47628, 2021 WL 5366693 (Idaho Ct. App. Nov. 18, 2021), *rev'd*, 517 P.3d 849 (Idaho 2022). While officers were conducting a probationary check on an individual at a residence, they saw Miramontes exit the residence carrying a bag. After an officer repeatedly ordered Miramontes to stop, she complied and dropped the bag. Later, when an officer asked Miramontes for her identification, she explained it was in the bag. Another officer opened the bag to retrieve the identification and discovered drugs and drug paraphernalia. Miramontes moved to suppress the evidence arguing the officers lacked reasonable suspicion to detain her and to search the bag. The district court ruled that the officers lawfully detained Miramontes but did not address her argument that the officers lacked reasonable suspicion to search her bag. On appeal, Miramontes argued only that the officers unlawfully searched her bag. The Idaho

Court of Appeals affirmed the district court, ruled Miramontes failed to preserve for appeal whether the search of the bag was unlawful, and relied on Idaho Supreme Court authority that an appellate court will not review an assignment of error unless the record discloses an adverse ruling on the issue. The Idaho Supreme Court concluded it is no longer mandatory for an appellant to obtain an adverse ruling from the trial court to preserve an issue for appellate review, expressly overruled its prior authority to the contrary, and remanded to the district court to analyze whether the search of the bag was unlawful.

*State v. Wilson*, No. 47275, 2020 WL 4876845 (Idaho Ct. App. Aug. 20, 2020) *rev'd*, 495 P.3d 1030 (Idaho 2021). An officer encountered Wilson and his passengers in the drive-through lane of a fast food restaurant following a known informant's report of a drunk driver. The officer saw empty beer cans in the car, smelled the strong odor of alcohol, and asked Wilson to pull into the parking lot where the officer arrested Wilson for driving under the influence. The district court granted Wilson's suppression motion, rejecting the State's argument that the officer was performing a community caretaking function and ruling that reasonable suspicion did not support Wilson's detention because the presence of empty cans and the odor of alcohol did not establish Wilson himself had consumed alcohol. The Idaho Court of Appeals reversed this decision, ruling that the officer's observations in the drive-through lane established reasonable suspicion. The Idaho Supreme Court reversed, ruling that the State failed to preserve for appellate review whether the officer had reasonable suspicion to detain Wilson when he ordered Wilson to pull into the parking lot.

The Idaho Supreme Court affirmed the Idaho Court of Appeals' decisions in the following cases, which I authored, but criticized my ruling:

*State v. Neimeyer*, No. 46857, 2020 WL 2534003 (Idaho Ct. App. May 19, 2020), *aff'd*, 490 P.3d 9 (Idaho 2021). Neimeyer appealed her judgment of conviction for possession of methamphetamine, marijuana, and drug paraphernalia. Neimeyer argued the district court erred by taking judicial notice of and relying on a local ordinance prohibiting an open container of alcohol in her vehicle to deny her suppression motion. The Idaho Court of Appeals affirmed the district court's decision ruling that the court properly took judicial notice of the ordinance. On review, the Idaho Supreme Court also affirmed the district court's denial of the suppression motion. It ruled, however, that Neimeyer failed to preserve for appeal the issue of whether the district court erred by judicially noticing the ordinance and declined to address the merits of the issue.

*State v. Riley*, No. 47372, 2021 WL 454250 (Idaho Ct. App. Feb. 9, 2021), *aff'd*, 514 P.3d 982 (Idaho 2022). A Boise police officer initiated a traffic stop of Riley for expired registration tags. During the stop, the officer inquired whether Riley had contraband in the car. Then, while writing Riley a ticket, the officer had a conversation with backup officers who arrived on the scene with a drug dog. The videos from the officers' body cameras captured these conversations. After the

drug dog alerted on Riley's car, officers discovered drugs and drug paraphernalia. Riley moved to suppress this evidence, arguing the officer's conversations unrelated to the traffic stop unlawfully extended the stop. The district court granted the motion, finding it could not conclude whether conversations unlawfully extended the stop. The State appealed, arguing this finding was clearly erroneous. The Idaho Court of Appeals ruled that a review of the synchronized videos showed the conversations did not unlawfully extend the stop. On review of this decision, the Idaho Supreme Court likewise reversed the district court ruling, holding that the videos showed the conversations did not extend the stop unlawfully. The Court, however, criticized the Court of Appeals for relying on a case, *State v. Still*, 453 P.3d 220 (Idaho Ct. App. 2019), which the Idaho Supreme Court overruled after the Idaho Court of Appeals issued its decision in *Riley*.

*State v. Glodowski*, No. 45285, 457 P.3d 917 (Idaho Ct. App. 2019), *aff'd*, 457 P.3d 917 (2019). Glodowski was required to register as a sex offender in Wisconsin and relocated to Idaho. The Idaho State Police Bureau of Criminal Identification reviewed Glodowski's Wisconsin conviction and concluded that his conduct was "substantially equivalent" to a violation of Idaho law and that he was required to register as a sex offender in Idaho. Glodowski did not challenge this conclusion and registered in Idaho. Thereafter, the State charged him with failure to register when he failed to return his quarterly verification form. Before trial, the State moved *in limine* for a ruling that Glodowski's Wisconsin's conviction was "substantially equivalent" to a violation of Idaho law, and the district court ruled that it was. On appeal, Glodowski challenged this ruling, and the Idaho Court of Appeals concluded the Bureau's order was final; the district court lacked authority to review the order and re-determine the issue; and thus, it lacked jurisdiction. The Idaho Supreme Court affirmed, concluding that the district court improperly allowed the State to seek determination of the Bureau's order but that the error did not deprive the court of jurisdiction; rather, it was harmless error.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

To date, I have authored 203 opinions, 23 of which have been published. The remaining opinions are unpublished, although all of those unpublished opinions are available in Westlaw. Additionally, all my opinions are reported on the Idaho Supreme Court's website, https://isc.idaho.gov, and stored in the Court's network.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

I have not authored any significant opinions on federal or state constitutional issues. The Idaho Court of Appeals is an error correcting court and does not address significant federal or state constitutional issues. *See* Idaho Code

§ 2406(2) (noting "error review and correction functions" of Idaho Court of Appeals).

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on any federal court of appeals.

14. Recusal: If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I assess the necessity or propriety of recusal based on the Idaho Judicial Code of Conduct. I have never been requested to recuse myself on any case. I, however, have sua sponte recused myself in one appeal before the Idaho Court of Appeals. In that case, an individual convicted of a crime in Ada County, Idaho, filed a civil action against public officials including the Ada County Prosecutor, who is a personal friend. Because the plaintiff filed the action against her individually (not in her capacity as the county prosecutor), I determined that my impartiality might reasonably be questioned and that the issue was incurable. I have searched both the Court's electronic database and publicly-available electronic databases and have been unable to locate the case's citation, although I believe the appeal was filed in 2019.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Other than my position as a judge on the Idaho Court of Appeals, I have not held any public offices. In 2018, I unsuccessfully applied for an appointed position on the Idaho Supreme Court.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have not ever held any memberships or offices or rendered any services to any political party or election committee. I have also not held any position or played any role in any political campaign, other than my 2020 reelection campaign.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 1993 to 1995 I clerked for Judge Thomas G. Nelson of the U.S. Court of Appeals for the Ninth Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

1995 – 2013
Holland & Hart LLP
800 West Main Street, Suite 1750
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Partner (2003 – 2013)
Associate (1995 – 2002)

2013 – 2018
Andersen Schwartzman Woodard Brailsford PLLC (now defunct)
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Member (2013-2017)
Counsel (2018)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in any alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I began my law practice as an associate at Holland & Hart LLP, in the Boise, Idaho office. From 1995 into 1997, the nature of my practice was very general. I did not have an assigned department, but rather I assisted all senior attorneys in the Boise office (and occasionally other Holland & Hart offices) in their practice areas including general business, civil litigation, bankruptcy, employment law, and environmental law.

In 1998, I began focusing my practice primarily on employment law, including both litigation and business advising, although I also continued to support senior attorneys in their respective practice areas. During this time, much of my practice involved advising employers on human resources issues and defending employers in litigation, in both state and federal courts, and before the Equal Employment Opportunity Commission and the Idaho Human Rights Commission.

In 2002, I became a partner at Holland & Hart and my practice focused primarily on civil litigation. During this time, I handled all aspects of civil litigation, including managing clients and litigation teams; conducting written and deposition discovery; working with expert witnesses; briefing and arguing motions, including discovery and substantive legal issues; participating in mock trials; preparing for and presenting at trial; and handling post-trial proceedings. Beginning in about 2006, much of the civil litigation I handled was complex in nature, requiring intensive management and involving issues on a national level.

In 2013, I formed a new law firm, Andersen Schwartzman Woodard Brailsford PLLC (formerly known as Andersen Banducci PLLC). My practice continued to focus on complex civil litigation, including national multi-district class actions, until I resigned as a member from the firm in 2017. During 2018, I worked for the firm on a contract basis on numerous civil litigation matters.

Since 2019, I have served as a judge for the Idaho Court of Appeals.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

From 1995 until about 1998, the types of clients I represented were diverse and included individuals, small businesses, closely held corporations or similar business entities, and corporations having legal issues in Idaho. Beginning in 1999, my clients were most often employers, although I occasionally represented corporate executives or physicians in employment law matters in Idaho.

Beginning in 2002 until about 2011, my client base shifted to corporations and Idaho agricultural producers organized under various types of legal entities ranging from sole proprietorship to large corporations. From 2011 until 2018, my clients continued to be Idaho agricultural producers but also included agricultural cooperatives, some individuals, business entities, law firms, and a public university.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

From 1995 until about 2002, my practice was at least 50 percent in civil litigation. After 2002, my practice was nearly 100 percent civil litigation. I frequently appeared in court at all stages of litigation including appearing at court hearings for preliminary injunctions; motions to dismiss for failure to state a claim or lack of jurisdiction; discovery related motions; summary judgment motions; motions *in limine*, including *Daubert* motions; mock trials; trial proceedings in both jury and court trials; post-trial motions; and appellate arguments.

i. Indicate the percentage of your practice in:

| | |
|---|---|
| 1. federal courts: | 60% |
| 2. state courts of record: | 35% |
| 3. other courts: | 0% |
| 4. administrative agencies: | 5% |

ii. Indicate the percentage of your practice in:

| | |
|---|---|
| 1. civil proceedings: | 100% |
| 2. criminal proceedings: | 0% |

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As an associate or other support attorney, I estimate I assisted on approximately 20 cases in state or federal court that were tried to verdict. Additionally, I handled the following trial responsibilities: As sole counsel, I tried one case to verdict in a bench trial; as co-counsel I tried one case to verdict in a bench trial; as co-counsel, I tried two cases to verdict in jury trials, including one trial lasting 17 weeks in federal court. I also estimate that I either handled as sole counsel or assisted on at least 20 cases resolved by summary judgment.

i. What percentage of these trials were:
   1. jury: 75%
   2. non-jury: 25%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United Potato Growers of America, Inc., et al. v. Jones, Waldo, Holbrooke & McDonough, P.C., et al.*, Idaho State Court, Fifth Judicial District, Twin Fall County, Case No. CV42-15-4106 (Bevan, J.).

I assisted lead counsel in this case representing the plaintiffs, including two potato cooperatives and several of their grower members, against their former legal counsel, which negligently advised them that their marketing and other activities were immune from antitrust liability under the Capper-Volstead Act, 7 U.S.C. § 291. This inaccurate legal advice resulted in the cooperatives being sued in multi-district class actions causing them to incur liability for purported damages and significant legal fees. My involvement in this case included preparing pleadings; propounding and responding to written

discovery; and assisting in preparing pretrial motions. The case resolved through mediation. My representation in this case spanned from approximately 2017 to 2018.

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Primary Opposing Counsel:
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2. *Clark et al. v. Jones Gledhill Fuhrman Gourley, et al.*, Idaho State Court, Fourth Judicial District, Ada County, Case No. CV-OC-2016-04633 (Hoagland, J.).

I was lead counsel in this litigation and represented the defendants, the Jones Gledhill law firm and two of its attorneys in an action brought by Mr. Clark. Mr. Clark alleged Jones Gledhill had failed to protect his interest in an attorney fee lien under Idaho Code § 3-205. The underlying action was a wrongful death action arising from the carbon dioxide poisoning death. Mr. Clark co-counseled with the Spence Law Firm to represent the plaintiffs in that wrongful death action; Jones Gledhill represented the defendants in that case. When the underlying action settled, Jones Gledhill transmitted the settlement funds to the Spence Law Firm and not to Mr. Clark, whose representation the plaintiffs had previously terminated. Mr. Clark sued Jones Gledhill for failing to protect his purported attorney fee lien against the settlement funds. My participation in this case included briefing and arguing the motion to dismiss for failure to state a claim, which the district court granted, and briefing and arguing the appeal. The Idaho Supreme Court affirmed the dismissal. My representation in this case spanned from approximately 2016 to 2017.

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Kirton McConkie
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Primary Opposing Counsel:
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(physical address unknown)
Eagle, ID
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Reported Decisions:
*Clark v. Jones Gledhill Fuhrman Gourley, P.A.*, 409 P.3d 795 (Idaho 2017).

3. *Clark et al. v. The Spence Law Firm et al.*, Idaho State Court, Third Judicial District, Canyon County, Case No. CV-2016-06347 (Perry, J.).

I was lead counsel in this case brought by the plaintiff, Mr. Clark, against three of his former clients in a wrongful death action; his former co-counsel in that case, the Spence Law Firm; and two Spence attorneys. The plaintiffs alleged under numerous different theories that his former clients and co-counsel owed him fees for recoveries occurring after the clients terminated his representation in the wrongful death case. My participation in this case included propounding and responding to voluminous discovery, drafting and arguing numerous discovery and other motions, including summary judgment motions. The case resolved in mediation. My representation in this case spanned from approximately 2015 to 2017.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Primary Opposing Counsel:
Eric R. Clark
(physical address unknown)
Eagle, ID
(208) 830-8084

4. *Pinnacle Great Plains Operating Company, LLC v. Wynn Dewsnup Revocable Trust, et al.*, D. Idaho, Case No. 4:13 cv-00106-EJL-CWD (Dale, M.J.).

In this case, I was lead counsel representing the plaintiff, a corporate farm investor, which asserted fraud and breach of contract claims against the seller of a farm, alleging the seller failed to disclose the poor quality of underground irrigation water. Eventually, the investor also asserted claims against its own realtor for fraudulently concealing the irrigation water quality problem in violation of the Idaho Real Estate Brokerage Representation Act, Idaho Code §§ 54-2082 - 2097. *Pinnacle Great Plains Operating Company, LLC v. 1 Stop Realty, Kirk Swenson*, Case No. 1:17-cv-00120-BLW (D. Idaho) (Dale, M.J.). I handled all aspects of this litigation from its inception including briefing and arguing motions; propounding and responding to written discovery; taking and defending depositions; retaining and working with experts to prepare their reports; and briefing and arguing various pretrial motions. The case settled in mediation shortly before trial. My representation in this case spanned from approximately 2013 to 2017.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Primary Opposing Counsel:
Matthew McGee
Boise State University
Office of the General Counsel
University Plaza
960 South Broadway Avenue, Suite 250
Boise, ID 83725
(208) 426-1203

Reported Decisions:
*Pinnacle Great Plains Operating Co., LLC v. Wynn Dewsnup Revocable Trust*, 996 F. Supp. 2d 1026 (D. Idaho 2014).

5. *Boise State University v. The American Athletic Conference*, Idaho State Court, Fourth Judicial District, Ada County, Case No. CV CV-2013-6584 (Copsey, J.).

I was co-lead counsel representing Boise State University against the American Athletic Conference (formerly known as the Big East Conference) for breach of contract and a declaratory judgment that a $5 million contractual penalty was inapplicable for BSU's decision not to have its football program join the ACC. My involvement in this case included managing the client relationship; drafting pleadings; managing information released to the press; propounding and responding to discovery requests; developing an electronic discovery protocol; briefing and arguing discovery motions, including a complicated attorney-client privilege motion; taking and defending depositions; and participating in mediation. The case settled at mediation. My representation in this case spanned from approximately 2013 to 2014.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Primary Opposing Counsel:
Benjamin C. Block
Covington & Burling LLP
One CityCenter
850 Tenth Street, Northwest

Washington, DC 20001
(202) 662-6000

6. *In re Fresh and Process Potatoes Antitrust Litigation Class Action*, D. Idaho, Multi-District Litigation, Case No. 4:10-MDL-2186-BLW-CWD (Winmill, J.; Dale, M.J.).

In this national class action, I was co-lead counsel representing two agricultural cooperatives organized under the Capper-Volstead Act, 7 U.S.C. § 291, and approximately 18 Idaho potato growers, processors, and marketers, who were allegedly members of or otherwise participated in these cooperatives. The case arose out of the cooperatives' activities to stabilize potato prices both in Idaho and nationally under the Capper-Volstead Act, which provides growers with immunity for collectively processing, preparing for market, handling, and marketing their produce. The plaintiffs included two classes of potato purchasers—direct and indirect purchasers—who disputed defendants' immunity and alleged $5 billion in damages. Under antitrust laws, each defendant faced joint and several liability for these damages. My participation in this case included all aspects of its preparation for trial including handling voluminous, complicated discovery disputes and the related briefing and oral arguments; defending approximately 30 depositions; managing client relations; communicating and coordinating with co-defendants' counsel; and participating in numerous mediations. After extensive, complex discovery and multiple mediations, the case settled for $19 million. My representation of these defendants also involved related litigation, including two cases brought by plaintiffs who opted out of the class action: *Associated Wholesale Grocers, Inc. v. United Potato Growers of America*, Case No. 13-cv-2182 JAR/DJW (D. Kan.), and *Winn-Dixie Stores, Inc. and Bi-Lo Holding, LLC v. United Potato Growers of America*, Case No. 3:15-cv-1243-J-34MCR (M.D. Fl.). My representation in these cases spanned from approximately 2011 to 2016.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Bob Rosenfeld (deceased)
Orrick, Herrington & Sutcliff
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

Christopher E. Ondeck
Proskauer Rose LLP
1001 Pennsylvania Avenue, Northwest
Suite 600 South
Washington, DC 20004

(202) 416-6800

Primary Opposing Counsel:
James J. Pizzirusso
Hausfeld LLP
888 16th Street, Northwest
Washington, DC 20006
(202) 540-7200

Reported Decisions:
*In re Fresh and Process Potatoes Antitrust Litigation*, 834 F. Supp. 2d 1141 (D. Idaho 2011); 744 F. Supp. 2d 1381 (D. Idaho 2010).

7. *Truckstop.net LLC v. Sprint Communications Co.*, D. Idaho, Case Nos. CV-04-561-S-BLW, CV-05-138-BLW (Winmill, J.).

I was co-lead counsel in this litigation representing the plaintiff, a wireless internet provider, which contracted with Sprint Communications to install wireless internet access at truckstops across the United States. The plaintiff alleged a breach of contract claim against Sprint Communications and a claim for tortious interference against its parent company, Sprint, which instructed Sprint Communications to breach the contract. My participation in this case included assisting in the temporary restraining order filings and related hearing; drafting and responding to extensive, voluminous discovery; taking and defending numerous depositions; briefing an interlocutory appeal; briefing and arguing numerous discovery and pretrial motions, including summary judgment motions; working with experts to prepare expert reports; preparing for trial including preparing fact and expert witnesses, deposition designations, preparing exhibits and exhibit lists; presenting at a mock trial; arguing pretrial motions; and participating in settlement negotiations. The case settled on the eve of trial for a significant but confidential amount. My representation in this case spanned from approximately 2005 to 2010.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Timothy Getzoff
Holland & Hart LLP
1800 Broadway, Suite 300
Boulder, CO 80302
(303) 473-2734

Primary Opposing Counsel:
Dane H. Butswinkas

Williams & Connolly LLP
680 Maine Avenue, Southwest
Washington, DC 20024
(202) 434-5000

Stephen R. Thomas
Hawley Troxell
877 West Main Street
Boise, ID 83702
(208) 344-6000

Reported Decisions:

*Truckstop.Net, LLC v. Sprint Corp.*, 547 F.3d 1065 (9th Cir. 2008).

8. *Intermountain Eye and Laser Centers, PLLC v. Miller*, Idaho State Court, Fourth Judicial District, Ada County (McLaughlin, J.).

I was lead counsel in this litigation and represented the defendant, a doctor, whose former employer brought a breach of contract claim against him alleging he violated a post-termination, non-competition clause. I handled all aspects of this litigation including propounding and responding to discovery, briefing and arguing discovery motions, taking and defending depositions, briefing and arguing the summary judgment motion, briefing and arguing the appeal, and handling mediation. The defendant prevailed on summary judgment; the Idaho Supreme Court reversed the judgment on appeal; and the case settled shortly thereafter for a nominal amount. My representation in this case spanned from approximately 2003 to 2006.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Primary Opposing Counsel:
Hon. Warren Jones (deceased)

Neil McFeeley
Eberle Berlin
1111 West Jefferson Street, Suite 530
Boise, ID 83701
(208) 344-8535

Reported Decisions:
*Intermountain Eye and Laser Centers, PLLC, v. Miller*, 127 P.3d 121 (Idaho 2005).

9. *Adams et al. v. United States et al.*, D. Idaho, Civ. No. 03-0049-E-BLM (Winmill, J.).

I was co-lead counsel in this litigation representing approximately 130 Idaho growers with farming operations in southeastern Idaho who alleged tort claims against the Bureau of Land Management (BLM) and numerous product liability claims against E. I. du Pont de Nemours and Company (DuPont). These claims arose out of the BLM's application of a potent herbicide manufactured by DuPont, Oust, on large swaths of burnt, barren Idaho rangelands. Following the BLM's Oust applications, winds blew Oust off-target and onto thousands of acres of Idaho farmland, contaminating those lands for as many as four years from 2000 through 2004. My participation in this case included preparing tort claims; researching and drafting the complaint against DuPont; collecting voluminous documentation about the growers' farming operations; managing and handling all matters related to discovery, including numerous voluminous document productions, taking and defending approximately 80 depositions, and preparing expert witnesses; handling numerous pretrial motions; arguing pending motions; preparing and supervising the preparation of exhibit lists, deposition designations, trial witnesses, and demonstratives; presenting at multiple mock trials; drafting a jury questionnaire; assisting in the jury selection; preparing witnesses; preparing and supervising the preparation of trial motions related to evidentiary issues and directed verdicts; preparing jury instructions; and assisting with post-trial motions. The jury rendered a verdict for the four-bellwether plaintiffs and awarded them $17.8 million in damages. I prepared a motion and briefing seeking preclusive effect of the jury's verdict and the district court's findings of fact and conclusions of law, and the court ruled the bellwether trial conclusively established the defendants' liability and causation. I assisted in the preparation of briefing for subsequent appeals. Thereafter, the remaining 126 growers settled each of their claims after a very complex mediation in which I participated. This representation spanned from approximately 2002 to 2011.

Co-Counsel:
Steven B. Andersen
Kirton McConkie
1100 West Idaho Street
Boise, ID 83702
(208) 370-3325

Peter C. Houtsma
6613 South Prescott Way
Littleton, CO 80120
(303) 669-6756

Primary Opposing Counsel:
Christina M. Falk
U.S. Department of Justice
Civil Division, Environmental Tort Litigation Section
950 Pennsylvania Avenue, Northwest

Washington, DC 20530
(202) 514-2000

The Honorable Regina M. Rodriguez
Arraj United States Courthouse
901 19th Street
Denver, CO 80294
(303) 335-2170

Reported Decisions:

*Adams v. United States*, 658 F.3d 928 (9th Cir. 2011); 622 F. Supp. 2d 996 (D. Idaho 2009)

10. *Spur Products Corp. v. Stoel Rives*, Idaho State Court, Fourth Judicial District, Ada County (Wilper, J.).

I was lead counsel in this litigation and represented the defendant, a regional law firm, against its former client, which alleged the law firm committed malpractice by demanding the client either become current on its billings or settle its case at mediation. The plaintiff alleged $6 million in damages. I handled all aspects of this case, including propounding and responding to discovery, briefing and arguing discovery motions, meeting with and preparing expert witnesses, taking and defending depositions, preparing and arguing multiple summary judgment motions, preparing and arguing two appeals, and preparing the case for trial. Ultimately, the defendant prevailed at trial. My representation in this case spanned from approximately 2002 to 2008.

Co-Counsel:
Walter H. Bithell
Bithell Law
175 North Capitol Boulevard
Boise, ID 83702
(208) 336-4440

Primary Opposing Counsel:
Jeffrey Strother
1036 East Iron Eagle Drive, Suite 156
Eagle, ID 83616
(208) 342-2425

Reported Decisions:
*Spur Products Corp. v. Stoel Rives*, 153 P.3d 1158 (Idaho 2007); 122 P.3d 300 (Idaho 2005).

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not

involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In addition to my involvement in significant litigation, I was actively involved in various aspects of firm administration as a partner at Holland & Hart. For example, I was the hiring partner for the Boise office from 2003 until about 2010. As the hiring partner, I was responsible for the recruitment of associates and non-partner attorneys and the Boise office summer associate program. During this time, I was also a member of the firm's recruitment committee, which oversaw firm-wide hiring of associates and non-partner attorneys and the firm's summer associate program. I participated in the firm's taskforce to evaluate the firm's associate review process and requirements for attaining partnership. During my time at Holland & Hart, I actively mentored numerous litigation and other associates in all aspects of the practice of law, including helping to develop their skills and to support their progress towards partnership.

Later, I became a founding member of a litigation boutique, Andersen Banducci. In forming this law firm, I was responsible for all aspects of the firm's startup including finances, budgeting, staffing, human resources, technology, and business development. After the firm's formation, I remained responsible for all aspects of its management and the day-to-day business operations, including most particularly the human resources function, which involved hiring and managing staff and non-partner attorneys. I continued mentoring junior attorneys to help them in developing their litigation skills and attaining partnership.

Since becoming a judge on the Idaho Court of Appeals, I have continued mentoring junior attorneys, including law clerks and staff attorneys. My goal is to assist them in developing their research, writing, and appellate skills and in becoming independent thinkers with the necessary skills to succeed in the practice of law. Additionally, I have volunteered my time to present to law students at the University of Idaho College of Law about ethical issues and professional development and to participate in mock interviews with students who are preparing to enter into the job market.

Outside of the practice of law, I was a founding member of the Idaho Chapter of the Federal Bar Association. As a committee member, I recruited other members, assisted with organization, scheduled and attended meetings, and kept meeting minutes. Additionally, I was the chair of the nominating committee. Further, until recently, I have been a member of the Idaho Supreme Court's Evidence Rules Advisory Committee, which is charged with updating and revising the Idaho Rules of Evidence. While on this committee, I reviewed proposed revisions, researched numerous issues, and reported to the committee regarding possible revisions. Recently, the Idaho Supreme Court requested that I chair the Civil Jury Instruction Committee for purposes of updating the Idaho's civil jury instructions. I am currently working on recruiting members for the committee.

I have not performed any lobbying activities or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    None.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    When my nomination is formally submitted to the Senate, I will file my Financial Disclosure Report and will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

No family members or other persons, parties, categories of litigation, or financial arrangements are likely to present potential conflicts of interest for me; I do not anticipate any conflicts.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would resolve any matters involving actual or potential conflicts of interest by applying 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other relevant ethical canons or rules.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My pro bono commitment has included my membership on the Board of Directors from 1996 through 2000 for the Silver Sage Girl Scouts Council, Inc., a non-profit organization governing Girl Scouts in Idaho and parts of Oregon and Nevada. My commitment to this organization included generally giving pro bono legal advice, including on personnel matters and real property issues; interviewing prospective employees; participating in fundraising and other events on a regular basis; and regularly attending emergency, quarterly, and annual meetings. After my term on the Board expired in 2000, I continued to provide pro bono legal advice to Girl Scouts on a regular basis.

From 2007 until 2011, I served as a member of the Law Advisory Council for the University of Idaho, College of Law. The Council assists and advises the dean and other College personnel. As a member of the Council, I assisted in identifying and acquiring financial support for the College, advocated for the College, gave advice on the College's programs, built working relationships within the University, and assisted the College's placement and recruitment programs. I remain an emeritus member.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On January 14 and 18, 2022, Idaho Senator Mike Crapo's chief of staff contacted me about my interest in the position. On January 25, I spoke to Senator Crapo about that subject. On February 3, Idaho Senator Jim Risch's chief of staff interviewed me; on February 15, both Senators' chiefs of staff interviewed me; and then on February 22, Senators Crapo and Risch interviewed me. On March 17, Senators Crapo and Risch notified me they had submitted my name to the White House for consideration.

On April 22, 2022, I interviewed with attorneys from the White House Counsel's Office, and I have had contact with White House Counsel's Office officials since that date. On April 29, I was notified that my name was being submitted to the Office of Legal Policy at the Department of Justice for vetting. Since May 2, 2022, I have been in contact with officials from the Office of Legal Policy. On January 18, 2023, the President announced his intent to nominate me.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name**: State full name (include any former names used).

   Shane Kato Crews
   S. Kato Crews
   Kato Crews

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the District of Colorado

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   United States District Court for the District of Colorado
   Byron G. Rogers Courthouse
   1929 Stout Street, C-250
   Denver, Colorado 80294

4. **Birthplace**: State year and place of birth.

   1975; Pueblo, Colorado

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1997 – 2000, University of Arizona James E. Rogers College of Law; J.D., 2000

   1993 – 1997, University of Northern Colorado; B.A., 1997

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2018 – present
   United States District Court for the District of Colorado

Byron G. Rogers Courthouse
1929 Stout Street, C-250
Denver, Colorado 80294
United States Magistrate Judge

2013 – 2018
Waggener & Foster LLP d/b/a Hoffman Crews Nies Waggener & Foster LLP
5350 South Roslyn Street, Suite 100
Greenwood Village, Colorado 80111
Partner

2011 – 2013
Mastin Law Firm P.C. d/b/a Mastin Hoffman & Crews LLC
5750 South Ulster Circle E, #300
Greenwood Village, Colorado 80111
Member

2001 – 2010
Rothgerber Johnson & Lyons LLP
1200 Seventeenth Street, Suite 3000
Denver, Colorado 80202
90 South Cascade Avenue, Suite 1100
Colorado Springs, Colorado 80903
Partner (2008 – 2010)
Associate (2001 – 2008)

2000 – 2001
United States National Labor Relations Board, Region 27
Byron Rogers Federal Building
1961 Stout Street, #13-103
Denver, Colorado 80294
Attorney

Summer 1999
Exxon Mobil Corporation
13501 Katy Freeway
Houston, Texas 77079
Legal Intern

Spring 1999
Snell & Wilmer LLP
1 South Church Avenue
Tucson, Arizona 85701
Intern

Summer 1998

Sears, Roebuck & Co.
3333 Beverly Road
Hoffman Estates, Illinois 60179
Public Relations Intern

Other Affiliations (Uncompensated):

2018 – present
Colorado Bar Association CLE, Inc.
1290 Broadway, Suite 1700
Denver, Colorado 80203
Board Member

2015 – 2018
University of Northern Colorado
501 20th Street
Greeley, Colorado 80639
Trustee

2014 – 2018
Colorado Lawyer Trust Account Foundation (COLTAF)
1120 Lincoln Street, #701
Denver, Colorado 80203
Board President (2018)
Board Vice President (2016 – 2017)
Discretionary Grants Committee Chair (2015 – 2018)

2012 – 2018
CHOICE Education Foundation
5350 South Roslyn Street, Suite 100
Greenwood Village, CO 80111
Board Member and Scholarship Committee Chair (2012 – 2018)

2010 – 2012
Colorado Humanities
7935 East Prentice Avenue, Suite 450
Greenwood Village, Colorado 80111
Board Member

2007 – 2010
Urban League of the Pikes Peak Region, Inc.
506 East Moreno Avenue
Colorado Springs, Colorado 80903
Board President (2008 – 2010)

2004 – 2005

City of Commerce City
7887 East 60th Avenue
Commerce City, Colorado 80022
Alternate Hearing Officer

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I did not serve in the military. I timely registered for the selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   University of Northern Colorado
   - Board of Trustees' Resolution, in recognition of outstanding leadership and service to the University of Northern Colorado (2018)
   - Distinguished Young Alumni (2010)
   - Journalism and Mass Communications Departmental Scholar (1997)
   - Future Black Leader and Achiever, presented by Black faculty and staff (1994)

   Fellows Emeritus, Colorado Bar Foundation (2017)

   Superlawyers, Business Litigation (2017)

   Superlawyers, Employment and Labor (2016)

   Superlawyers, Colorado Rising Star, Employment and Labor (2009 – 2015)

   Outstanding Contributions to the Colorado Municipal Clerks Association by a Non-Clerk (2012)

   Colorado Springs Business Journal Rising Star (2008)

   Colorado Bar Association Leadership Training Program (2007)

   American Bar Association, Tort Trial & Insurance Practice Section Leadership Academy (2007)

   University of Arizona, James E. Rogers College of Law
   - *Arizona Law Review* (1998 – 2000)
   - Dean's List (1998, 1999)
   - O'Connor Cavanagh Outstanding Appellate Brief (1997)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Bar Association (approximately 2001 – 2010, 2021)
Tort Trial & Insurance Practice Section Leadership Academy (2007)

Arapahoe County Bar Association (2012 – 2018)

Colorado Bar Association (2001 – present)
Colorado Bar Association Leadership Training (COBALT) Program (2007)
COBALT Programs Committee Co-Chair (2008)
COBALT Gathering Whisperer (2009 – 2014)
Colorado Bar Association CLE, Inc., Board Member (2018 – present)
Our Courts Colorado (approximately 2002, 2019 – present)

Colorado Judicial Well-Being Committee (2020 – present)

Colorado Lawyer Trust Account Foundation (COLTAF), Board Member (2014 – 2018)
Board President (2018)
Board Vice President (2016 – 2017)
Discretionary Grants Committee Chair (2015 – 2018)

Denver Bar Association (approximately 2001 – 2005, 2019, 2020)

El Paso County Bar Association (approximately 2006 – 2011)

Faculty of Federal Advocates, Member (2018 – present)

Federal Bar Association, Member (2021 – present)

Federal Magistrate Judges Association (2018 – 2023)
Diversity Committee, Member (2018 – 2023)

Honorable Kristen L. Mix, Public Interest Diversity Internship Program (MixDIP)
Participant (2018 – present)
Co-coordinator (2022 – present)

National Bar Association, Member (approximately 2001 – 2002)

Sam Cary Bar Association, Member (approximately 2001 – 2010, 2015 – 2016, 2020 – present)

Tenth Circuit Judicial Council, Magistrate Judge Observer (2022 – present)
Magistrate Judge Committee (2022 – present)

Thompson G. Marsh Inn of Court (2019 – 2021)

United States District Court for the District of Colorado (2018 – present)
Pro Se Working Group
Member (2019 – present)
Chair (2022 – present)
Federal Limited Appearance Program (FLAP), Founder (2020)
Roadways to the Bench, City Co-Chair (2022 – 2023)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Colorado, 2000

There have been no lapses in membership. I have been registered as inactive in Colorado since my appointment as a magistrate judge in 2018.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Tenth Circuit, 2001
United States District Court for the District of Colorado, 2001
United States Immigration Court, 2012

There have been no lapses in membership.

11. **Memberships:**

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Colorado Attorney Mentoring Program (2015 – present)

Colorado Beautillion-Cotillion, Inc., Mentor (approximately 2013 – 2017)

Colorado Abraham Lincoln Bicentennial Commission, Member (2009)

Law School Yes We Can, Senior Mentor (2019 – present)

NITA Miranda Trial Advocacy Institute, Faculty (2007, 2009)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

I have searched my personal files and the internet in an effort to identify all requested published writings responsive to this question. It is possible I may have omitted one or more inadvertently.

*Without Respect to Persons*, Law Week Colorado (July 2020), THE DOCKET (Aug./Sept. 2020). Copy supplied.

*New DOL Guidance Says Most Independent Contractors are Employees*, Hoffman Crews Nies Waggener & Foster online article (July 2015). Copy supplied.

*New Ruling: Medical Pot use Not Protected Under Lawful Activities Statute*, Hoffman Crews Nies Waggener & Foster online article (June 2015). Copy supplied.

*Corporate Officer Liability Under Colorado's Mechanics' Lien Statute*, Hoffman Crews Nies Waggener & Foster online article (Dec. 2013). Copy supplied.

*When a Civil Case to Enforce a Non-Competition Agreement Turns Criminal*, Mastin Hoffman & Crews online article (Mar. 2013). I am unable to locate a copy.

*Continued Employment is Now Sufficient Consideration in Colorado for a Later-Signed Non-competition Agreement*, Mastin Hoffman & Crews online article (June 14, 2011). Copy supplied.

With Joan Rennekamp, *Raising the Stakes for Misclassifying Workers as Independent Contractors*, Rothgerber Johnson & Lyons (Aug. 2010). Copy supplied.

*The Privacy Limits of Accessing Employee Emails*, Rothgerber Johnson & Lyons E-alert (May 3, 2010). Copy supplied.

*Understanding the Legality of Unpaid Summer Internships*, Rothgerber Johnson & Lyons, E-Alert (Apr. 13, 2010). Copy supplied.

*Employers Must Comprehend the Employee Free Choice Act*, Rothgerber Johnson & Lyons, Employment Law Update (Spring 2009). Copy supplied.

*When is an Undocumented Worker a Lawful "Employee?"*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2008/2009). Copy supplied.

*Supreme Court Holds Retaliation Claims Allowed Under Section 1981 and Federal-Sector ADEA Provision*, Rothgerber Johnson & Lyons, Employment Law Update (Summer 2008). Copy supplied.

*Timely Notify Your Insurer to Prevent Loss of Insurance Coverage for Employment Claims*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2008). Copy supplied.

*Small Employers Speak Up Early Lest Liability Await*, Rothgerber Johnson & Lyons, Employment Law Update (Fall 2007). Copy supplied.

With Joan Rennekamp, *Conducting Effective Investigations of Employee Complaints*, Rothgerber Johnson & Lyons, Employment Law Update (Summer 2007). Copy supplied.

*An Uptick in Discrimination Lawsuits Based on Family Responsibilities*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2006). Copy supplied.

*When Non-union Workers' Rights and Mandatory Arbitration Policies Collide*, Rothgerber Johnson & Lyons, Employment Law Update (Fall 2006). Copy supplied.

With Susan S. Sperber, *The Problem With the "My-Employer-Is-Picking-on-Me" Claim*, Rothgerber Johnson & Lyons, Employment Law Update (Summer 2006). Copy supplied.

*Organizing the Union-Free Company: A Salty Proposition*, Rothgerber Johnson & Lyons, Employment Law Update (Summer 2006). Copy supplied.

*Some Say "Alito," Some Say "Scalito": What Does it Mean to Employment Law?* Rothgerber Johnson & Lyons, Employment Law Update (Spring 2006). Copy supplied.

*Supreme Court Lets Stand NLRA Preemption of State Law Claims Against Union "Salt,"* Rothgerber Johnson & Lyons, Employment Law Update (Summer 2005), re-printed online by Mondaq (Sept. 2005). Copy supplied.

*Trucking Operations: A Taste of the Davis-Bacon Act*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2005), re-printed online by Mondaq (Jan. 2005). Copy supplied.

*To Vote or Not to Vote? That is the Question*, Rothgerber Johnson & Lyons, Employment Law Update (Spring 2005), re-printed online by Mondaq (Mar. 2005). Copy supplied.

*New Law Eliminates "Double Taxation" of Attorneys' Fees*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2005), re-printed online by Mondaq (Jan. 2005). Copy supplied.

*Warning! WARN Act a Quagmire of Confusion*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2004). Copy supplied.

*Weingarten Rights and Nonunion Employees: The NLRB Returns to Its Thinking of Old*, Rothgerber Johnson & Lyons, Employment Law Update (Summer 2004), re-printed online by Mondaq (July 2004). Copy supplied.

*Employee Handbooks: Ripe for the Picking*, Rothgerber Johnson & Lyons, Employment Law Update (Summer 2003), re-printed online by Mondaq (Sept. 2003). Copy supplied.

*Nonunion Companies Beware the National Labor Relations Act*, Rothgerber Johnson & Lyons, Employment Law Update (Winter 2003). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

*Proposal for Approval of Pro Se Limited Appearance Program* (Apr. 2020).

Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

In May/June 2022, I joined letters from the Federal Judges Association in support of the Daniel Anderl Judicial Security and Privacy Act. Copies supplied.

From 2015 to 2018, I served on the Board of Trustees of the University of Northern Colorado. Copies of available meeting minutes are supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have searched my personal files, calendar, and the internet in an effort to identify all events responsive to this question. I may have omitted one or more events inadvertently.

June 30, 2022: Co-presenter, What to Know About Rule 30(b)(6) Depositions, Denver Bar Association Young Lawyers Division, Denver, Colorado. Copy of attendee handout I prepared is supplied.

May 20, 2022, October 21, 2021, September 23, 2021, February 18, 2021, August 28, 2020, July 17, 2020, June 28, 2019, May 26, 2019, and February 15, 2019: Presiding Judge, Naturalization Ceremonies, United States District Court for the District of Colorado, Denver, Colorado. The remarks for each ceremony were substantially the same as those for the May 20, 2022, ceremony, which are supplied.

May 12, 2022: Panelist, Critique of Direct Examination, CBA CLE, Inc., Denver, Colorado. This panel critiqued a mock direct examination. I have no notes, transcript, or recording. The address for CBA CLE, Inc., is 1290 Broadway, Suite 1700, Denver, Colorado 80203.

May 10, 2022: Presenter, What Do I Do with This Evidence?, CBA CLE, Inc., Denver, Colorado. Copy of attendee handout I prepared is supplied.

April 22, 2022: Presenter, The Basics of Trial: Litigation Nuts and Bolts, Some Bench Tips, Colorado Bar Association Young Lawyers Division, Denver, Colorado. Copy of attendee handout I prepared is supplied.

April 8, 2022: Panelist, Judicial Walking Tour, University of Denver Sturm College of Law Asian Pacific American Law Students Association, University of Denver Law School Office of Diversity, Equity & Inclusion, University of Colorado Law School Black Law Students Association, Colorado Supreme Court, Asian Pacific American Bar Association, and Faculty of Federal Advocates. This panel discussed personal paths to the bench and diversity in the legal profession. I have no notes, transcript, or recording. The address for the University of Denver Law School is Sturm College of Law, University of Denver, 2255 East Evans Avenue, Denver, Colorado 80208. The address for the Colorado Supreme Court is Ralph L. Carr Colorado Judicial Center, Two East 14th Avenue, Denver, Colorado 80203. The address for the Asian Pacific American Bar Association is 224 South 14th Avenue, Brighton, Colorado 80601. The address for the Faculty of Federal Advocates is P.O. Box 12025, Denver, Colorado 80212.

January 14, 2022, February 14, 2020, January 10, 2019, January 14, 2015: Presenter, Grow as You Go, Colorado Bar Association Leadership Training Program, Denver, Colorado. My remarks for each presentation were substantially the same as those for the January 14, 2022, presentation, of which the PowerPoint slides I prepared are supplied.

December 7, 2021: Moderator, Don't Approach Discovery Like a Honey Badger: An Overview, CBE CLE, Inc., Denver, Colorado. PowerPoint slides prepared by the co-panelists are supplied.

November 11, 2021: Panelist, Trial Dos and Don'ts: Perspectives From the Bench, CBA CLE, Inc., and Sam Cary Bar Association, Denver, Colorado. PowerPoint slides I jointly prepared with a co-panelist are supplied.

October 13, 2021: Panelist, Storming the Bench, Colorado Women's Bar Association, Denver, Colorado. This panel discussed the application process for the federal magistrate judge bench. I have no notes, transcript, or recording. The address of the Colorado Women's Bar Association is P.O. Box 1918, Denver, Colorado 80201.

September 10, 2021: Panelist, Judicial Walking Tour, University of Denver Sturm College of Law Black Law Students Association, University of Denver Law School Office of Diversity, Equity & Inclusion, University of Colorado Law School Black Law Students Association, Colorado Supreme Court, Sam Cary Bar Association, and Faculty of Federal Advocates. This panel discussed personal paths to the bench and diversity in the legal profession. I have no notes, transcript, or recording. The address for the University of Denver Law School is Sturm College of Law, University of Denver, 2255 East Evans Avenue, Denver,

Colorado 80208. The address for the Colorado Supreme Court is Ralph L. Carr Colorado Judicial Center, Two East 14th Avenue, Denver, Colorado 80203. The address for the Sam Cary Bar Association is P.O. Box 300205, Denver, Colorado 80203. The address for the Faculty of Federal Advocates is P.O. Box 12025, Denver, Colorado 80212.

August 12, 2021: Co-presenter, Much Ado about Rule 30(b)(6) Depositions, Faculty of Federal Advocates, Denver, Colorado. Copy of attendee handout I prepared is supplied.

June 25, 2021: Panelist, Federal Practice Update 2021, Colorado Bar Association, Denver, Colorado (virtual). The panel of magistrate judges discussed practical tips for litigating in the District of Colorado. I have no notes, transcript, or recording. The address for the Colorado Bar Association is 1290 Broadway, Suite 1700, Denver, Colorado 80203.

May 21, 2021: Presenter, Priming the Pipeline Toward Diversifying the Bench, Colorado Women's Bar Association, Denver, Colorado (virtual). I hosted a roundtable segment discussing opportunities for diversifying the bench. I have no notes, transcript, or recording. The address of the Colorado Women's Bar Association is P.O. Box 1918, Denver, Colorado 80201.

April 29, 2021: Co-presenter, New to Federal Practice: What You Need to Know, Faculty of Federal Advocates, Denver, Colorado (virtual). I discussed aspects of practicing in federal court. I have no notes, transcript, or recording. The address of the Faculty of Federal Advocates is 3700 Quebec Street #100-389, Denver, Colorado 80207.

April 23, 2021: Opening Remarks, Colorado Bar Association Federal *Pro Se* Clinic, Denver, Colorado. Remarks supplied.

April 8, 2021: Panelist, Diverse Pathways to the Bench, Colorado Bar Association Young Lawyers Division, Denver, Colorado (virtual). This moderated panel discussed judicial appointments for state and federal courts. I have no notes, transcript, or recording. The address of the Colorado Bar Association Young Lawyers Division is 1290 Broadway, Suite 1700, Denver, Colorado 80203.

March 31, 2021: Panelist, From Bystander to Upstander: How to Respond to Sexual Harassment in the Legal Profession, CBE CLE, Inc. and Colorado Women's Bar Association, Denver, Colorado (virtual). Copy of outline I prepared and spoke from is supplied.

February 19, 2021: Panelist, Underappreciated Lawyer Skills, American Bar Association, Denver, Colorado (virtual). The panel discussed skills of effective lawyers. I have no notes, transcript, or recording. The address for the American Bar Association is 321 North Clark Street, Chicago, Illinois 60654.

February 16, 2021: Presenter, Monarch High School Black Student Union, Denver, Colorado (virtual). Copy of PowerPoint slides I prepared is supplied.

February 2, 2021: Panelist, Federal Clerkships, University of Arizona James E. Rogers College of Law, Denver, Colorado (virtual). The panel discussed federal court clerkships. I have no notes, transcripts, or recording. The address of the James E. Rogers College of Law is 1201 East Speedway Boulevard, Tucson, Arizona 85721.

January 13, 2021: Panelist, Learning On The Job – Magistrate Judges Crews And Neureiter Assess Their First Two Years On The Bench, Faculty of Federal Advocates, Denver, Colorado (virtual). Copy of notes I referred to for my remarks is supplied.

October 8, 2020: Introductory Speaker, Expanding Our Reach: The Future of *Pro Bono* Service Delivery for Federal Practitioners, Faculty of Federal Advocates, Denver, Colorado (virtual). Copy supplied.

September 30, 2020: Co-presenter, Federal Limited Appearance Program (FLAP) Orientation, Colorado Bar Association Young Lawyers Division, Denver, Colorado (virtual). PowerPoint slides prepared by the co-presenter are supplied.

June 16, 2020: Panelist, Your Microphone is Muted! Navigating Virtual Settlement Conferences, Faculty of Federal Advocates, Denver, Colorado (virtual). PowerPoint slides prepared by the co-panelists are supplied.

June 12, 2020: Presenter, Keeping Your Cool When Others Turn Up the Heat, CBA CLE, Inc., Solo-Small Firm Institute, Denver, Colorado. Copy of attendee handout I prepared is supplied.

May 21, 2020: Speaker, University of Denver Sturm College of Law, Extern Swearing-in Ceremony, Denver, Colorado. Remarks supplied.

February 13, 2020: Panelist, Best Practices in *Pro Se* Litigation, Faculty of Federal Advocates, Denver, Colorado. Copy of attendee handout is supplied; I prepared pages four through seven.

February 11, 2020: Panelist, You Be the Judge Coffee Connect, Colorado Bar Association Young Lawyers Division and CBA CLE, Inc., Denver, Colorado. The panel discussed paths to become a judicial officer. I have no notes, transcripts, or recording. The address of the Colorado Bar Association Young Lawyers Division and CBA CLE, Inc., is 1290 Broadway, Suite 1700, Denver, Colorado 80203.

September 27, 2019: Panelist, Candor to the Tribunal and Fellow Members of the

Bar (What crosses the line when negotiating with the court and opposing counsel?), CBA CLE, Inc., Denver, Colorado. PowerPoint slides and a handout prepared by one or more of the co-panelists are supplied.

August 16, 2019: Speaker, Law Student Clinic Swearing-in Ceremony, University of Denver Sturm College of Law, Denver, Colorado. Remarks supplied.

July 25, 2019: Speaker, Closing Remarks Volunteer Appreciation Event, Federal *Pro Se* Clinic, Denver, Colorado. Notes supplied.

June 21, 2019: Panelist, Federal Practice Update 2019, Colorado Bar Association, Denver, Colorado. The panel of magistrate judges discussed practical tips for litigating in the District of Colorado. I have no notes, transcript, or recording. The address for the Colorado Bar Association is 1290 Broadway, Suite 1700, Denver, Colorado 80203.

June 18, 2019: Presenter, Finding Your Authentic Leadership Self, First Judicial District Probation Department, Golden, Colorado. PowerPoint slides I prepared are supplied.

May 24, 2019: Presenter, A View from the Bench, Colorado Bar Association Young Lawyers Division, Denver, Colorado. Notes supplied.

May 16, 2019: Speaker, Law Extern Swearing-in Ceremony, University of Denver Sturm College of Law, Denver, Colorado. My remarks were substantially the same as those for the May 21, 2020, law student swearing-in ceremony, which are supplied.

May 3, 2019: Graduate School Commencement Speaker, University of Northern Colorado, Greeley, Colorado. Video available at https://www.youtube.com/watch?v=URei6JYN8pM.

March 21, 2019: My Path to the Federal Bench & What I've Learned So Far as a Magistrate Judge, Faculty of Federal Advocates, Denver, Colorado. I discussed my path to the bench and what I learned as a judicial officer. I have no notes, transcript, or recording. The address of the Faculty of Federal Advocates is 3700 Quebec Street #100-389, Denver, Colorado 80207.

January 3, 2019: Speaker, Law Extern Swearing-in Ceremony, University of Denver Sturm College of Law, Denver, Colorado. These remarks were substantially the same as those for the May 21, 2020, law student swearing-in ceremony, which are supplied.

November 30, 2018: Magistrate Judge Investiture Remarks, United States District Court for the District of Colorado, Denver, Colorado. Remarks supplied.

October 26, 2018: Introductory Remarks, Denver Bar Association Access to Justice Committee National *Pro Bono* Week Celebration, Denver, Colorado. Remarks supplied.

July 28, 2018: Presenter, Cultural Competence, Colorado Bar Association Young Lawyers Division, Colorado Springs, Colorado. PowerPoint slides I prepared are supplied.

July 19, 2018: Introductory Remarks, Colorado Bar Foundation Young Lawyers Division, Denver, Colorado. Remarks supplied.

July 16, 2018: Thank You Remarks, Lewis Roca Rothgerber Christie LLP reception, Denver, Colorado. Notes supplied.

April 20, 2018: Cultural Competence in the Workplace, CBE CLE, Inc., Denver, Colorado. Materials supplied; I authored only the three slides on PDF pages 26 and 27 of the attachment, which were also incorporated into Section I of the related handout.

August 17, 2016: Co-presenter, Less Common Employment Claims Brought by Employees, Colorado Springs Human Resources Association, Colorado Springs, Colorado. I discussed less common employment law claims brought against employers. I have no notes, transcripts, or recording. The address of the Colorado Springs Human Resources Association is P.O. Box 26676, Colorado Springs, Colorado 80962.

April 2016 (specific date unknown): Panelist, The Generation Gap: Fostering Professional Communication Between Generations of Lawyers, Colorado Bar Association Young Lawyers Division and Colorado Attorney Mentoring Program, Denver, Colorado. The panel discussed tools to bridge the generational gap between lawyers. I have no notes, transcript, or recording. The address of the Colorado Bar Association Young Lawyers Division is 1290 Broadway, Suite 1700, Denver, Colorado 80203. The address of the Colorado Attorney Mentoring Program is 1300 Broadway, Suite 230, Denver, Colorado 80203.

April 2016 (specific date unknown): Panelist, Colorado Bar Association Leadership Training Program. The panel discussed diversity in leadership. I have no notes, transcripts, or recording. The address of the Colorado Bar Association is 1290 Broadway, Suite 1700, Denver, Colorado 80203.

July 16, 2015: Presenter, Real Estate Litigation Potpourri: A Few Topical Case Studies, Colorado Bar Association Real Estate Section 33rd Annual Real Estate Symposium, Steamboat Springs, Colorado. Copy of attendee handout I prepared is supplied.

April 21, 2015: Panelist, University of Northern Colorado, Greeley Colorado.

The panel discussed their respective paths to their professional careers. I have no notes, transcript, or recordings. The address of the University of Northern Colorado is 501 20th Street, Greeley, Colorado 80639.

February 18, 2015: Presenter, Colorado Springs Human Resources Association, Colorado Springs, Colorado. I presented on common law claims implicated in discharge decisions. I have no notes, transcript, or recordings. The address of the Colorado Human Resources Association is P.O. Box 26676, Colorado Springs, Colorado 80962.

February 19, 2014: Presenter, Colorado Springs Human Resources Association, Colorado Springs, Colorado. I presented on noncompetition, non-solicitation, and non-disclosure agreements. I have no notes, transcript, or recordings. The address of the Colorado Springs Human Resources Association is P.O. Box 26676, Colorado Springs, CO 80962.

May 12, 2011: Presenter, Employment Law Issues for Closely Held Businesses, CBE CLE, Inc., Denver, Colorado. Copy of attendee handout I prepared is supplied.

May 28, 2005: Speaker, Class of 2005 Rye High School Commencement Ceremony, Rye, Colorado. I delivered remarks to the graduating class of my alma mater encouraging them to find fulfillment and never believe they have arrived in life. I have no notes, transcript, or recording, but press coverage is supplied. The address of Rye High School is 1 High School Drive, Rye, Colorado 81069.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Appearance (non-speaking) in video explaining the Federal Limited Appearance Program (Aug. 30, 2021). Video available at https://www.youtube.com/watch?v=_PwMCvdlWAI.

Kristen L. Mix, *Federal Pro Se Clinic in Colorado Helps the Public Navigate Our Federal Courts*, Institute for the Advancement of the American Legal System Blog (Mar. 30, 2021). Copy supplied.

Kevin Cheney, *Gettin' Legal with It Podcast, Judge S. Kato Crews*, Colorado Bar Association Young Lawyers Division (June 25, 2020). Audio available at https://www.youtube.com/watch?v=LHLdRZatiw0.

Terry Kraus, *1993 RHS Graduate Sits as Magistrate Judge in Denver Federal Court*, GREENHORN VALLEY VIEW (Apr. 23, 2020). Copy supplied.

Robert Boczkiewicz, *From "Crewser" to federal judge*, PUEBLO CHIEFTAIN (Oct. 21, 2019). Copy supplied.

University of Arizona James E. Rogers College of Law, *Denver Alumnus Judge Kato Crews ('00)*, Wildcat Wednesday, LETTER OF THE LAW (July 3, 2019). Copy supplied.

Ronald M. Sandgrund, Esq., *InQ., Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community*, COLORADO LAW (Jan. 2016). Copy supplied.

University of Northern Colorado, *The UNC Bear Den*, Q&A (Feb. 8, 2014). Copy supplied.

Bill Reed, *President of Urban League Fired*, THE GAZETTE (Colorado Springs, Colorado) (Apr. 22, 2009). Copy supplied.

Debbie Kelley, *Attorney Works for Community*, THE GAZETTE (Colorado Springs, Colorado) (Mar. 9, 2008). Copy supplied.

Colorado Bar Association, statement on volunteering (2008). Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have served as a United States magistrate judge for the District of Colorado since August 3, 2018. I was appointed by the active-duty district judges.

The United States District Court is a court of limited jurisdiction, with jurisdiction over cases involving the United States government, the United States Constitution or federal laws, or controversies between states or between the United States government and foreign governments. The court also has diversity jurisdiction over cases between citizens of different states where the amount in controversy exceeds $75,000. The jurisdiction or authority of magistrate judges is further limited by 28 U.S.C. § 636. In criminal cases, magistrate judges: consider petitions for issuance of search warrants; conduct preliminary proceedings; and preside over the trial and final disposition of misdemeanor cases. In the District of Colorado, civil cases are randomly drawn directly to both magistrate judges and district judges. In those cases where the parties do not consent to the magistrate judge handling all matters, both a district and magistrate judge are assigned to the case. In those cases, magistrate judges conduct pretrial matters, evidentiary proceedings, and post-trial matters on referral from the district judge. In civil cases where the parties consent to the magistrate judge handling all matters, the magistrate judge presides over the entirety of the case.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over six cases that have gone to verdict or judgment. Five of the cases were jury trials and one was a bench trial.

i. Of these cases, approximately what percent were:

| | |
|---|---|
| jury trials: | 83% |
| bench trials: | 17% |

ii. Of these cases, approximately what percent were:

| | |
|---|---|
| civil proceedings: | 100% |
| criminal proceedings: | 0% |

b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list of opinions.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Gonzalez v. Englewood Lock and Safe, Inc.*, No. 1:20-cv-03686-SKC (D. Colo. Feb. 15, 2023)

The *pro se* plaintiff, Ms. Gonzalez, brought this action against her former employer alleging a constructive discharge, and sex discrimination, sexual harassment, and retaliation, all in violation of Title VII. The matter was before me on the parties' consent. I presided over the entirety of the case, to include the two-day jury trial and all pre-trial matters. I granted the defendant's oral motion made under Federal Rule of Civil Procedure 50(a) after the close of the plaintiff's evidence.

The plaintiff proceeded *pro se*

Counsel for the Defendant:
Gary M. Kramer
Gary Kramer Law, LLC
1730 Chapel Hills Drive, Suite 100
Colorado Springs, CO 80920
(719) 694-2783

2. *Brooks v. Colorado Department of Corrections*, No. 1:13-cr-02894-SKC (D. Colo. Dec. 16, 2022)

The plaintiff, Mr. Brooks, who was incarcerated during the relevant events, suffered from ulcerative colitis. He requested a specific meal or movement pass as a reasonable accommodation to his disability to access the cafeteria outside his scheduled mealtimes. He sued the Colorado Department of Corrections (CDOC) claiming a failure to accommodate his disability under Title II of the Americans with Disabilities Act after the CDOC denied his request for a pass. Mr. Brooks sought compensatory damages. The matter was before me on consent of the parties. I presided over the case in its entirety, including the five-day jury trial. The jury returned a verdict in his favor and against the CDOC and awarded Mr. Brooks compensatory damages. I granted the parties' request to temporarily stay post-trial proceedings.

Counsel for the Plaintiff:
Kevin D. Homiak
Homiak Law LLC
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(505) 385-2614

Counsel for the Defendant:
Kelley M. DzieDzic
Joshua G. Urquhart
Rachel M. Lieb
Colorado Attorney General's Office
Civil Litigation & Employment Law Section
1300 Broadway, 10th Floor
Denver, CO 80203
(720) 508-6000

3. *United States v. Goochey*, No. 1:22-po-07000-SKC (D. Colo. Aug. 19, 2022)

This was a matter in which the defendant faced five non-violent misdemeanors. Based on her court appearances, multiple *pro se* filings, and her various communications with court staff, I *sua sponte* ordered a competency evaluation pursuant to 18 U.S.C. § 4241. Based on the resulting, confidential competency evaluation report, I informed counsel I was prepared to find the defendant competent to enter a plea with the advice of counsel. I set the matter for a plea hearing, or in the alternative, a competency hearing. On the eve of the hearing, the Government moved to dismiss the Information, without prejudice, which I granted.

Counsel for the Government:

Brett William Tobin
U.S. Army Judge Advocate General's Corps
1633 Mekong Street
Building 6222
Fort Carson, CO 80913
(719) 526-6469

Counsel for the Defendant:
Rebecca Lowell Briggs
The Law Office of Becky Briggs
315 Colorado Avenue
Pueblo, CO 81003
(434) 989-0847

4. *Scherbarth v. Woods et al.*, No. 1:16-cv-02391-SKC (D. Colo. Apr. 22, 2022)

The plaintiff brought excessive use of force claims under 42 U.S.C. § 1983 against two Aurora police officers. He alleged he sustained nerve damage, a concussion, and lacerations resulting from an arrest for a nonviolent misdemeanor where he was not resisting arrest or fleeing. I denied the officers' motion for summary judgment, which they sought on grounds of qualified immunity, because there were genuine disputes of material facts that bore on the applicability of immunity. The matter was before me on consent of the parties. I presided over the entirety of the case, including the five-day jury trial. Based on the jury's answers to special interrogatories at the close of all evidence, I found the defendants were entitled to qualified immunity and entered judgment in their favor.

Counsel for the Plaintiff:
Edwin Packard Aro
Christopher Bruner
Arnold & Porter Kaye Scholer LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202
(303) 863-1000

Kathleen K. Custer
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Counsel for the Defendants:
Heidi J. Hugdahl

Bruno Colin & Lowe, P.C.
1999 Broadway, Suite 4300
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(303) 831-1099

Isabelle Sabra Evans
Aurora City Attorney's Office
15151 East Alameda Parkway
Aurora, CO 80012
(303) 739-7030

5. *Hutchison v. Walmart Inc.*, No. 1:19-cv-01496-SKC (D. Colo. Aug. 7, 2021)

This was a slip and fall case with a claim under Colorado's premises liability statute. The matter was before me on the parties' consent. I presided over the entirety of the case, including the five-day jury trial. The jury rendered a defense verdict.

Counsel for the Plaintiff:
John Keith Killian
Killian Davis Richter & Mayle, P.C.
202 North 7th Street
Grand Junction, CO 81501
(970) 241-0707

Counsel for the Defendant:
Jacquelyn S. Booker
Lily E. Nierenberg
Sutton Booker PC
4949 South Syracuse Street, Suite 500
Denver, CO 80237
(303) 730-6204

6. *United States v. Zamorano*, No. 1:19-cr-00531-WJM, 2020 WL 1820498 (D. Colo. Apr. 10, 2020), *aff'd*, 2020 WL 2512839 (D. Colo. May 15, 2020)

This was a felony criminal matter in which I ordered the defendant's pretrial detention after a hearing. She later filed a motion to reconsider and sought release due to the COVID-19 pandemic and based on her claim of new information regarding the availability of a third-party custodian. I held a hearing on her motion and denied it, finding the defendant failed to establish a basis for her release under the Bail Reform Act, or a basis to reopen her prior detention hearing, largely because she presented no new evidence unknown to her at the time of the original detention hearing, her proposed third-party custodian was not suitable, and her potential for COVID-19 exposure while detained was an insufficient basis for her release considering her circumstances. The defendant

filed objections to my order with the presiding district judge. The district judge overruled the defendant's objections and affirmed my ruling. The district judge also agreed the defendant's temporary release under 18 U.S.C. § 3142(i) was not warranted.

Counsel for the Government:
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United States Attorney's Office
1801 California Street, Suite 1600
Denver, CO 80202
(303) 454-0100

Counsel for the Defendant:
Laura Suelau
Office of the Federal Public Defender
633 Seventeenth Street, Suite 1000
Denver, CO 80202
(303) 294-7002

7. *Kim v. McAleenan*, No. 1:19-cv-01212-SKC, 2020 WL 1026494 (D. Colo. Mar. 3, 2020)

This matter was before me on consent. The plaintiff, Mr. Kim, was a citizen of South Korea and a lawful permanent resident of the United States. He brought this action under 8 U.S.C. § 1447(b) for a judicial determination of his N-400 application after the United States Citizenship and Immigration Services (USCIS) failed to make a final determination on his application for at least three years. The defendants moved to remand the matter to the USCIS, arguing that misrepresentations Mr. Kim made about his divorce in a form filed with the USCIS caused delay in its investigation and required additional proceedings. I determined the government unnecessarily delayed the adjudication of the plaintiff's application and denied the defendants' motion. The parties eventually filed a stipulated motion to dismiss and did not seek a ruling from me on Mr. Kim's application as part of their dismissal.

Counsel for the Plaintiff:
Jennifer Rilen Casey
Kolko & Associates, P.C.
303 East 17th Avenue, Suite 585
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(303) 371-1822

David Lawrence Kolko
Kolko and Casey, P.C.
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Greenwood Village, CO 80111

(303) 371-1822

Counsel for the Defendants:
Kyle W. Brenton
United States Attorney's Office
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Denver, CO 80202
(303) 454-0126

8. *Shields v. U.S. Postal Service*, No. 1:16-cv-02517-SKC (D. Colo. Oct. 28, 2019)

This case involved the *pro se* plaintiff's claims arising under the Equal Pay Act against her former employer, the United States Postal Service. The matter was before me on consent of the parties. I presided over the entirety of the case, including the half-day bench trial. At trial, the plaintiff called one adverse witness, the human resources manager, during her case-in-chief and then rested. She called no other witnesses and refused to testify on her own behalf despite my explanations to her that without her testimony there would be very little evidence in support of her claim and she would risk dismissal on a Federal Rule of Civil Procedure 50(a) motion. The defendant made an oral motion for judgment as a matter of law under Rule 50(a). I granted the motion in an oral ruling from the bench and entered judgment in favor of the defendant.

The plaintiff proceeded *pro se*

Counsel for the Defendant:
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9. *St. Michael v. Rocky Mountain Festivals*, Inc., No. 1:16-cv-02969-SKC (D. Colo. July 26, 2019)

The plaintiff, Ms. St. Michael, sued her former employer under Title VII for sexual harassment and gender discrimination. She performed tarot card reading at the Colorado Renaissance Festival for more than 30 years and the defendant owned and operated the Festival. The matter was before me on the parties' consent. I presided over the entirety of the case, including the five-day jury trial. The jury rendered a defense verdict.

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10. *Ralston v. Cannon*, No. 1:14-CV-00247-SKC, 2019 WL 8223559 (D. Colo. Mar. 12, 2019), *aff'd*, No. 19-1146, 2021 WL 3478634 (10th Cir. Aug. 9, 2021)

This matter was before me on consent after being assigned to me upon my appointment as a magistrate judge. The defendant previously filed an appeal with the Tenth Circuit after the prior magistrate judge issued an order denying the defendant's motion for summary judgment on the plaintiff's 42 U.S.C. § 1983 claim. The Tenth Circuit dismissed that appeal for lack of appellate jurisdiction, but in a footnote, left it to the district court's discretion to revisit the propriety of summary judgment given the possibility that the defendant relied on an improper standard throughout the litigation. I held two hearings on the defendant's motion to reconsider the denial of his summary judgment motion. I granted the motion to reconsider and granted the defendant's motion for summary judgment. The Tenth Circuit affirmed on appeal.

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d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys

who played a significant role in the case.

1. *Clark v. Hyatt Hotels Corp.*, No. 1:20-CV-01236-RM-SKC, 2022 WL 19416 (D. Colo. Jan. 3, 2022), *objections to discovery order overruled*, 2022 WL 884282 (D. Colo. Mar. 25, 2022).

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2. *McKnight v. Brown*, No. 120-cv-03678-PAB-SKC, 2022 WL 488607 (D. Colo. Feb. 17, 2022)

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3. *Scherbarth v. Woods*, No. 1:16-CV-02391-SKC, 2020 WL 1538755 (D. Colo. Mar. 31, 2020)

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4. *Est. of Burgaz by & through Zommer v. Bd. of Cnty. Commissioners for Jefferson Cnty. Colorado*, No. 1:19-CV-01383-SKC, 2021 WL 168441 (D. Colo. Jan. 19, 2021), *aff'd*, 30 F.4th 1181 (10th Cir. 2022)

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5. *Kim v. McAleenan*, No. 1:19-CV-01212-SKC, 2020 WL 1026494 (D. Colo. Mar. 3, 2020)

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6. *K.S. v. Mesa Cty. Valley Sch. Dist. 51*, No. 1:18-cv-2238-SKC, 2020 WL 996868 (D. Colo. Mar. 2, 2020)

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7. *Hale v. Marques*, No. 1:19-cv-00752-WJM-SKC, 2020 WL 2309619 (D. Colo. Feb. 3, 2020), *R & R adopted as modified*, 2020 WL 1593339 (D. Colo. Mar. 30, 2020)

The plaintiff proceeded *pro se*

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8. *Ralston v. Cannon*, No. 1:14-CV-00247-SKC, 2019 WL 8223559 (D. Colo. Mar. 12, 2019), *aff'd*, No. 19-1146, 2021 WL 3478634 (10th Cir. Aug. 9, 2021)

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9. *Handy et al. v. Fisher et al.*, No. 1:18-cv-00789-RBJ-SKC, 2019 WL 1014595 (D. Colo. Mar. 4, 2019), *R & R adopted*, 2019 WL 1375677 (D. Colo. Mar. 27, 2019)

The plaintiffs proceeded *pro se*

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10. *Estate of Strong v. City of Northglenn*, No. 1:17-cv-1276-WJM-SKC, 2018 WL 6589813 (D. Colo. Dec. 14, 2018)

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e. Provide a list of all cases in which certiorari was requested or granted.

To the best of my knowledge and upon searching legal databases, certiorari has not been requested or granted in any of my cases.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

*Schwartz v. City and County of Denver, et al.*, Civil Action No. 21-CV-02160-CNS-SKC (D. Colo. Sept. 19, 2022), *R & R affirmed and adopted in part, and denied in part*, 2023 WL 1879305 (D. Colo. Feb. 10, 2023). Before me on referral was the defendant's Rule 12(b)(6) motion to dismiss. I recommended dismissing the plaintiff-estate's municipal liability claim brought under 42 U.S.C. § 1983 on the grounds that the amended complaint failed to plausibly allege the city defendant had a municipal policy or custom that caused the violation of the plaintiff's constitutional rights when a sheriff's deputy assaulted the now deceased person while in custody. Copy supplied. The presiding district judge adopted the portion where I recommended dismissal of the municipal liability claim that was based on a theory of post-conduct ratification, and denied the portion where I recommended dismissal of the claim that was based on a theory of failure to train.

*Vyanet Operating Group, Inc. v. Maurice et al.*, Civil Action No. 21-CV-02085-CMA-SKC (D. Colo. Aug. 3, 2022), *R & R partially rejected*, 2022 WL 4008043 (D. Colo. Sept. 2, 2022). I issued a report and recommendation finding the economic loss rule barred the plaintiff's intentional tort claims. Copy supplied. The presiding district judge determined "the legal landscape of the economic loss rule has shifted" based on recent Tenth Circuit precedent suggesting Colorado's economic loss rule does not bar claims for intentional torts, including common law fraud, and rejected that portion of my recommendation.

*Lucas v. Board of County Commissioners of the County for Larimer County Colorado, et al.*, Civil Action No. 1:19-CV-01251-RMR-SKC (D. Colo. Aug. 24, 2021), *order vacated*, 2022 WL 3704079 (D. Colo. July 26, 2022). I issued an order granting the plaintiff leave to file a third amended complaint. Copy

supplied. In part, I declined to entertain the defendants' additional argument regarding futility of amendment explaining that, in my view, it is more efficient to address futility arguments in the context of a motion to dismiss rather than based on a response to a motion for leave to amend due to the lack of briefing on the issue. The presiding district judge decided to entertain the futility argument and construed my order as a report and recommendation, which she respectfully rejected and found the proposed amendment(s) futile.

*Brooks v. Colorado Dep't of Corr.*, No. 1:13-CV-02894-SKC, 2019 WL 8323948 (D. Colo. Sept. 30, 2019), *aff'd in part, rev'd in part, dismissed in part*, 12 F.4th 1160 (10th Cir. 2021). This matter was before me on consent of the parties. Mr. Brooks was an incarcerated person who suffered from ulcerative colitis. He sued the Colorado Department of Corrections and its employees asserting claims for violation of Title II of the Americans with Disabilities Act based on their failure to accommodate his disability. I entered summary judgment for the defendants, finding the prison's ADA inmate coordinator's denial of Mr. Brook's request for a movement or special meal pass did not violate the Eighth Amendment. The Tenth Circuit affirmed my determination that the ADA inmate coordinator's denial of Mr. Brooks' request did not violate the Eighth Amendment, but found fact issues remained as to whether the prison officials' offer of adult undergarments was a reasonable accommodation. It reversed and remanded the matter.

*Vreeland v. Vigil*, No. 1:18-cv-03165-PAB-SKC, 2021 WL 4306643 (D. Colo. Aug. 16, 2021), *R & R rejected*, 2022 WL 168739 (D. Colo. Jan. 19, 2022), and *Vreeland v. Huss*, No. 1:18-cv-00303-PAB-SKC, 2021 WL 4192106 (D. Colo. Aug. 10, 2021), *R & R rejected*, 2022 WL 833369 (D. Colo. Mar. 21, 2022). I issued a report and recommendation in these related cases, recommending that the court administratively close the cases until the *pro se* incarcerated plaintiff could demonstrate he was able to fully prosecute them; he previously indicated he was unable to prosecute because he lacked access to his legal materials. After the plaintiff filed a document stating he agreed his cases should be administratively closed, he later filed a motion stating he could now prosecute. Finding the circumstances had changed since I issued my recommendation, the district judge rejected my recommendation and did not administratively close the cases.

*Vreeland v. Olson*, No. 1:20-cv-02330-PAB-SKC, 2021 WL 4556212 (D. Colo. Aug. 10, 2021), *R & R adopted in part, rejected in part*, 2021 WL 4237269 (D. Colo. Sept. 16, 2021). The *pro se* incarcerated plaintiff brought First Amendment retaliation claims alleging prison guards denied him two meals in retaliation for his having filed grievances against the guards, and they announced this punishment in front of other incarcerated persons. In relevant part, I issued a report and recommendation to deny qualified immunity to the defendant guards finding the plaintiff's rights were clearly established. The district judge disagreed and rejected this portion of my recommendation. The district judge adopted my additional recommendation to dismiss a co-defendant from the case.

*A.C. v. Jefferson Cnty. R1 Sch. Dist.*, No. 1:20-cv-00078-CMA-SKC, 2021 WL 1946453 (D. Colo. Feb. 22, 2021), *R & R adopted in part, rejected in part*, 2021 WL 4438036 (D. Colo. Sept. 28, 2021). The plaintiffs initiated this action alleging the School District and certain school officials violated Title IX as well as the minor-plaintiff's constitutional rights. The district judge rejected and "respectfully disagree[d]" only with that portion of my report and recommendation wherein I recommended finding the plaintiffs failed to allege the appropriate comparators to establish the similarly-situated prong of her gender discrimination claim.

*Vreeland v. Vigil*, No. 1:18-cv-03165-PAB-SKC, 2020 WL 6293387 (D. Colo. Oct. 16, 2020), *R & R rejected*, 2021 WL 231450 (D. Colo. Jan. 22, 2021). The *pro se* incarcerated plaintiff sought leave to amend his complaint to satisfy requirements under the Colorado Governmental Immunity Act (CGIA). I issued an opinion recommending the request be denied based on the district judge's prior rejection of the same, or a similar, argument previously made by the plaintiff. The district judge rejected my recommendation based on intervening Tenth Circuit case law.

*KeyBank Nat'l Ass'n v. Williams*, No. 1:19-cv-03714-CMA-SKC, 2020 WL 6257180 (D. Colo. Sept. 11, 2020), *R & R adopted in part, rejected in part*, 2020 WL 6255293 (D. Colo. Sept. 28, 2020). I presided over a multi-day evidentiary hearing regarding the plaintiff's motion for a preliminary injunction. My opinion recommended denying the motion for preliminary injunction, but granting only the portion of the motion which sought the return or destruction of certain of the plaintiff's confidential reports in the defendants' possession. The district judge rejected that portion of my recommendation, stating that "because the Court agrees with Judge Crews that Plaintiff has failed to demonstrate irreparable harm, the Court finds that Plaintiff's Motion should be denied in its entirety."

*Blake v. United States*, No. 1:18-cv-00570-RBJ-SKC, 2020 WL 7249090 (D. Colo. Aug. 14, 2020), *R & R adopted in part, rejected in part*, 2020 WL 6482691 (D. Colo. Nov. 4, 2020). I issued a report and recommendation addressing four separate motions. One of the plaintiff's motions sought to extend the deadline for filing a certificate of review under Colo. Rev. Stat. § 13-20-602 (in claims alleging the negligence of a licensed professional, the attorney or party must execute a certificate declaring they consulted a person with expertise in the area of alleged negligent conduct, and the person concluded the claim does not lack substantial justification). I recommended denying this motion finding the plaintiff had not established good cause for an extension. The district judge rejected that portion of my recommendation.

*Vreeland v. Vigil*, No. 1:18-cv-03165-PAB-SKC, 2020 WL 8258356 (D. Colo. July 23, 2020), *R & R rejected*, 2021 WL 229288 (D. Colo. Jan. 22, 2021). In this case involving a *pro se* incarcerated person, I construed a motion filed by the

plaintiff as one seeking a preliminary injunction and issued an opinion recommending the motion be denied for failing to meet the elements for a preliminary injunction. The district judge instead construed the motion as seeking a remedy akin to a discovery dispute and rejected my recommendation.

*Reneau v. Cardinas*, No. 1:17-cv-02595-PAB-SKC, 2020 WL 4511051 (D. Colo. Mar. 9, 2020), *R & R adopted in part, rejected in part*, 2020 WL 2783445 (D. Colo. May 29, 2020), *aff'd in part, rev'd in part, and remanded*, 852 F. App'x 311 (10th Cir. 2021). I issued an opinion recommending, in part, the denial of a motion for summary judgment as to one of the defendants. The plaintiff, an incarcerated person appearing *pro se*, alleged that a prison nurse refused to examine his injuries after he fell from his bunk bed, tearing his rotator cuff and breaking his leg. I found a reasonable factfinder could conclude this defendant chose to ignore a substantial risk of serious harm to the plaintiff on his Eighth Amendment claim. The district judge rejected that portion of my recommendation, holding the plaintiff failed to present evidence the defendant in fact chose to ignore a substantial risk of serious harm. On March 31, 2021, the Tenth Circuit reversed the district judge on this issue and remanded for further proceedings. The matter remains pending.

*Moudden v. Univ. of Colorado Boulder*, No. 1:18-cv-02514-WJM-SKC, 2019 WL 7833974 (D. Colo. Sept. 4, 2019), *R & R adopted in part, rejected in part*, 2019 WL 6975015 (D. Colo. Dec. 20, 2019). I issued an opinion recommending a portion of the plaintiff's Title VII failure-to-hire claim be dismissed for failure to plausibly allege the fourth factor in the *McDonnell Douglas* burden shifting framework. The district judge rejected that portion of my recommendation. After the defendant later filed a motion for summary judgment, the district judge adopted my recommendation that the defendant's motion for summary judgment be granted.

*Hernandez v. United Builders Serv., Inc.*, No. 1:18-cv-02019-RM-SKC, 2019 WL 5790702 (D. Colo. Aug. 19, 2019), *R & R adopted in part, rejected in part*, 2019 WL 4744788 (D. Colo. Sept. 30, 2019). I issued an opinion recommending the defendant's motion to dismiss be granted in part and denied in part. I analyzed the motion under Rule 12(b)(1) and recommended granting the motion, in part, based on the lack of RICO and COCCA (Colorado Organized Crime Control Act) standing. The district judge instead analyzed the matter under Rule 12(b)(6) and rejected that portion of my recommendation regarding dismissal under Rule 12(b)(1), but accepted my recommendation of dismissal on different grounds.

*Scott v. Carry*, No. 1:18-cv-00610-WJM-SKC, 2019 WL 7289015 (D. Colo. July 5, 2019), *R & R adopted in part, rejected in part*, 2019 WL 5957295 (D. Colo. Nov. 12, 2019), *aff'd*, 829 F. App'x 334 (10th Cir. 2020). I issued an opinion on the defendants' partial motion to dismiss recommending it be granted in part and denied in part. I recommended the state law claims be dismissed finding the plaintiff failed to adequately allege compliance with the Colorado Governmental

Immunity Act's (CGIA) notice provision by failing to plausibly allege the entity to whom the plaintiff sent notice. The district judge rejected that portion of my recommendation.

*Vista Partners, Inc. v. BrainScope Co., Inc.*, No. 1:19-cv-00138-CMA-SKC, 2019 WL 4920649 (D. Colo. Apr. 11, 2019), *R & R adopted in part, rejected in part*, 2019 WL 3543625 (D. Colo. Aug. 5, 2019). I issued a recommendation on the defendant's motion to transfer under 28 U.S.C. § 1404(a). I recommended the motion be granted but that certain claims be severed with some litigated in Maryland and others in Delaware in consideration of Fed. R. Civ. P. 1. The district judge rejected that portion of my recommendation.

*Gerstenberger v. Internal Revenue Serv.*, No. 1:17-cv-02184-PAB-SKC, 2019 WL 1322630 (D. Colo. Feb. 19, 2019), *R & R adopted*, 2019 WL 1584521 (D. Colo. Mar. 18, 2019), *order amended and superseded*, 2019 WL 1317659 (D. Colo. Mar. 21, 2019), *and R & R adopted in part, rejected in part*, 2019 WL 1317659 (D. Colo. Mar. 21, 2019). I issued an opinion recommending the plaintiff's motion for leave to amend the complaint be denied based on futility, and the case be dismissed with prejudice. The district judge originally accepted my recommendation and dismissed the case. Thereafter, the district judge *sua sponte* revisited the matter and determined dismissal with prejudice was not appropriate, rejecting that portion of my recommendation.

*Janny v. Gamez*, No. 1:16-cv-002840-SKC, 2018 WL 8188008 (D. Colo. Sept. 20, 2018), *R & R adopted in part, rejected in part*, 2019 WL 1034587 (D. Colo. Mar. 5, 2019). I issued an opinion recommending the defendants' respective motions to dismiss be granted. I recommended one defendant-group be dismissed finding the complaint failed to plausibly allege these defendants were state actors. The district judge rejected this portion of my recommendation.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

As a magistrate judge the majority of my decisions are unpublished opinions, although some are captured and reported by Westlaw and LexisNexis. The Court's e-filing system, CM/ECF, captures and permanently stores all opinions and orders I have issued. One hundred percent of my opinions and orders are available on the CM/ECF system or through Pacer unless a case is sealed.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

*Ralston v. Cannon*, No. 1:14-CV-00247-SKC, 2019 WL 8223559 (D. Colo. Mar. 12, 2019), *aff'd*, No. 19-1146, 2021 WL 3478634 (10th Cir. Aug. 9, 2021)

*Hale v. Marques*, No. 1:19-cv-00752-WJM-SKC, 2020 WL 2309619 (D. Colo. Feb. 3, 2020), *R & R adopted as modified*, 2020 WL 1593339 (D. Colo. Mar. 30, 2020)

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have never sat by designation on any federal court of appeals.

14. **Recusal**: If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.). Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

The United States District Court for the District of Colorado has an automated conflict checking program to identify conflicts of interest for each judge. Judges in the District of Colorado give the Clerk's Office a list of individuals and entities in whose cases we would recuse. I have provided, and regularly update, such a list to the Clerk's Office.

Aside from the conflict-checks program, in determining the necessity or propriety of recusal, I am guided by 28 U.S.C. § 455(a), which provides a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and § 455(b), which specifies circumstances in which a judge must recuse. I also refer to the Judicial Canons from the Code of Conduct for United States Judges, Published Advisory Opinions, and the Ethics Deskbook for United States Judges. I remain cognizant that a judge has as strong a duty to sit when there is no legitimate reason to recuse as she does to recuse when the law and facts require.

In those circumstances where I determine a current or prior relationship to a party or

attorney before the court will neither affect nor influence my impartiality, but one or more parties could feel my impartiality might reasonably be questioned, I will disclose the possible basis for my disqualification and follow the remittal of disqualification procedures from Canon 3(D) ("The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate.").

Below is a list of cases where either a party requested my recusal or I recused *sua sponte*:

*Franklin v. Sulzer*, 1:22-cv-01963-RMR-SKC (D. Colo. Dec. 17, 2022): I recused *sua sponte* because a former intern and current mentee of mine was defense counsel in the case. While this relationship would not have affected my impartiality, I concluded a reasonable person might reasonably question my impartiality under these circumstances given the recency of our relationship.

*Lindenthaler v. Burtlow et al.*, 1:22-cv-01013-CNS-SKC (D. Colo. Oct. 14, 2022): I recused *sua sponte* because a member of my staff had a familial relationship with a party to the case and I determined it was not reasonably feasible to "wall off" this staff member.

*Messeri v. Zak*, No. 1:20-cv-2184-WJM-SKC, 2021 WL 492489 (D. Colo. Feb. 10, 2021): The *pro se* plaintiff filed a motion seeking my recusal because, from December 2013 to March 2014, the defendant University engaged me to investigate an internal complaint of discrimination and harassment involving a separate matter not connected to the plaintiff's case. I reviewed 28 U.S.C. § 455 and the Ethics Deskbook for United States Judges, and conducted additional legal research to determine whether the issues raised by the plaintiff caused my impartiality to be reasonably questioned. I declined to recuse concluding no reasonable person, knowing all the relevant facts, would harbor doubts about my impartiality, and further there was no reasonable basis to question my impartiality considering: when the prior representation ended; the nature and duration of the prior representation; the lack of any ongoing personal relationship with the client; and there was no mandatory recusal under § 455(b). I issued a written decision with my analysis and reasons.

*Lexion v. CWI Inc.*, 1:20-cv-00241-WJM-NYW (D. Colo. Sept. 28, 2020): I recused *sua sponte*. It came to my attention that I have a familial relationship with a material witness in the case. I determined my recusal was warranted under § 455(a).

*Brown-Smith v. Board of Trustees of the University of Northern Colorado*, 1:20-cv-03271-SKC (D. Colo. Nov. 17, 2020): I recused *sua sponte*. I served on the defendant's Board of Trustees from January 1, 2015, to June 30, 2018. While I did not believe my former service on the Board of Trustees alone required recusal, I remained involved with the University and certain of its initiatives. I determined my recusal was warranted under § 455(a).

Cases in which attorneys from my prior law firms, Rothgerber Johnson & Lyons LLP (or its successor), and Hoffman Crews Nies Waggener & Foster LLP, entered an appearance from August 3, 2018, to August 3, 2020: I recused, *sua sponte*, from any matters involving my former law firms. Although I had not worked at Rothgerber since December 31, 2010, the firm held a reception for me in about June 2018, after my selection as magistrate judge. I relied on the guidance of Advisory Opinion No. 24, which recommends that new judges consider a recusal period of two years in all cases in which the judge's former law firm appears before the judge. These *sua sponte* recusals involving the Rothgerber law firm were automatic in some cases and are too numerous to list here. Those recusals involving the Hoffman law firm were automatic and resulted in one such *sua sponte* recusal in *Contiguglia v. Mitchell Law Firm PC et al.*, 1:20-cv-00307-CMA-KLM (D. Colo. Feb. 15, 2020).

*Reneau v. Cardinas et al.*, 1:17-cv-02595-PAB-SKC (D. Colo. May 14, 2020): The plaintiff, a *pro se* incarcerated person, filed a motion seeking my recusal. The plaintiff was dissatisfied with a prior motion he filed that I effectively granted by extending an applicable deadline, but where I also advised him to avoid his reliance on speculation and conjecture in his motions. The plaintiff felt these comments demonstrated bias against him. I declined to recuse, concluding the issues the plaintiff raised equated to a dissatisfaction with a judicial ruling, which is not a valid basis for recusal.

*Colorado Seminary v. Hiscox Ins. Co., Inc.*, 1:20-cv-00678-DDD-KLM (Mar. 24, 2020): My recusal arose after my remittal of disqualification to the parties. I disclosed the plaintiff was a former client for whom I had performed significant work, with that relationship ending in July 2018. I afforded the parties time to confer outside my presence, and ordered them to file a form I developed titled, "Election Concerning Possible Basis for Disqualification." This form allows the parties to check a box indicating either no party seeks my recusal, or at least one party seeks my recusal. The parties filed the election form indicating at least one party sought my recusal. I determined the parties' election, the nature and degree of my prior relationship with that client, and the time-period associated with my last association to the client, all warranted my recusal consistent with § 455(a).

*Brown et al. v. Colorado Judicial Branch*, 1:19-cv-03362-MEH (D. Colo. Feb. 24, 2020): I recused *sua sponte*. It came to my attention that one of my law clerks had certain involvement in the underlying facts of this case. I determined my recusal was warranted under § 455(a).

*Carbajal et al. v. Falk et al.*, 1:19-cv-01387-PAB-NYW (D. Colo. Dec. 18, 2019): I recused *sua sponte*. I issued a recommendation in a separate matter involving one of these plaintiffs, and a related party, wherein I found these individuals lacked credibility and they had perpetuated a charade on the court. I determined my recusal was warranted under § 455(a).

*Vreeland v. Vigil et al.*, 1:18-cv-03165-PAB-SKC (D. Colo. Oct. 2, 2019) and *Vreeland v. Huss*, 1:18-cv-00303-PAB-SKC (D. Colo. Oct. 2, 2019): The plaintiff, a *pro se*

incarcerated person, filed the same motion in two of his cases, which I construed as seeking my recusal. The plaintiff claimed I had an improper *ex parte* communication with defense counsel—the plaintiff was represented by counsel at the time—after I had ordered a discovery hearing at which the plaintiff's attorney failed to appear. I held the hearing in his absence in open court and on the record. I declined to recuse concluding no improper *ex parte* communication occurred and there was no basis under § 455 supporting recusal.

*Byrd v. GMAC Mortgage, LLC*, 1:19-cv-000651-DDD-STV (D. Colo. Apr. 1, 2019): I recused *sua sponte*. The plaintiff was a former client for whom I had done significant work, and he remained a personal friend. I determined my recusal was warranted under § 455(a).

*Borgers v. State Farm Fire and Casualty Co.*, 1:18-cv-00415-PAB-NYW (D. Colo. Oct. 3, 2018): I recused *sua sponte*. The matter involved a motion referred to the magistrate judge that required the magistrate judge to analyze the reasonableness of certain insurance policy language. I had the same insurance policy with the same language and same carrier. I determined my recusal was warranted under § 455(a).

*Makeen Investment Group, LLC et al. v. WoodStream Falls Condominium Association*, Inc et al, 1:16-cv-01250-WJM-NYW (D. Colo. Aug. 7, 2018): I recused *sua sponte*. I represented a non-party (while in private practice) in another of this plaintiff's cases with regard to a motion to quash subpoenas he served on my client. I determined my recusal was warranted under § 455(a).

15. **Public Office, Political Activities and Affiliations**:

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

    From January 2015 to June 2018, I served as a Trustee on the University of Northern Colorado Board of Trustees. I was appointed by then Governor John Hickenlooper.

    In 2009, I served as a Member of the Colorado Abraham Lincoln Bicentennial Commission. I was appointed by then Governor Bill Ritter.

    From 2004 to 2005, I served as an Alternate Hearing Officer for the City of Commerce City. I was hired based on a response I submitted to a Request for Proposal.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever

held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career**: Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I did not serve as a law clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

2000 –2001
United States National Labor Relations Board, Region 27
Byron Rogers Federal Building
1961 Stout Street, #13-103
Denver, Colorado 80294
Attorney

2001 –2010
Rothgerber Johnson & Lyons LLP
1200 Seventeenth Street, Suite 3000
Denver, Colorado 80202
90 South Cascade Avenue, Suite 1100
Colorado Springs, Colorado 80903
Associate (2001 – 2008)
Partner (2008 – 2010)

2004 – 2005
City of Commerce City
7887 East 60th Avenue
Commerce City, Colorado 80022
Alternate Hearing Officer

2011 – 2013
Mastin Hoffman & Crews LLC
(no longer in business)
Member

2013 – 2018
Hoffman Crews Nies Waggener & Foster LLP
5350 South Roslyn Street, Suite 100
Greenwood Village, Colorado 80111
Partner

2018 – present
United States District Court, District of Colorado
Byron G. Rogers United States Courthouse
1929 Stout Street, C250
Denver, Colorado 80294
United States Magistrate Judge

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in alternative dispute resolution proceedings. I have conducted settlement conferences in my capacity as a United States Magistrate Judge.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I started my legal career in August 2000 as an attorney with the U.S. National Labor Relations Board, Region 27, in Denver. I was responsible for enforcing the National Labor Relations Act (NLRA), to include investigating and prosecuting unfair labor practice charges and conducting union-representation elections. A significant aspect of my work involved investigating employers for violations of 29 U.S.C. § 157, which affords employees the right to form or join a union, to engage in other concerted activities for their mutual aid or protection, or to refrain from these activities. I made recommendations to the Regional Director to issue complaints against employers where my investigation determined employees' rights under the NLRA had been violated.

I entered private practice in September 2001. I was a civil litigator throughout my time in private practice. When working as an associate attorney and then partner at Rothgerber Johnson & Lyons LLP, I was a

member of the firm's labor and employment law practice group, where I primarily represented employers, but not exclusively. For example, in 2005 I represented a union, the Pikes Peak Musicians Association, in an appeal before the Tenth Circuit; in 2007 I sued a construction company in federal court on behalf of my female client alleging discriminatory failure to promote, constructive discharge, hostile work environment, and unlawful retaliation, all in violation of Title VII. I also represented clients in other civil matters, such as construction defect litigation and contract disputes. I made partner at the Rothgerber law firm in 2008.

I left Rothgerber and began practicing in a small law firm on January 1, 2011. The nature of my practice did not change significantly other than I began to represent more employees in employment law matters.

Since 2018, I have served as a United States Magistrate Judge on the United States District Court for the District of Colorado.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Throughout my career I specialized in employment and traditional labor law. Prior to moving my practice to a small law firm in January 2011, my typical employment and labor law clients were mid-sized to large corporations, but I also represented a union in a Tenth Circuit appeal and an employee in a Title VII lawsuit I filed in federal court. Thereafter, my employment and labor law clients included companies ranging from non-profit organizations and small businesses, to large corporations and individuals. My representation of employees expanded during this time. My typical employee clients ranged from blue collar workers to highly compensated individuals. Because my practice varied outside the labor and employment law context, the nature of my clients ran the gamut to include companies of all sizes and individuals of all socio-economic status, and those for whom I performed services pro bono. My probate clients included estates, personal representatives, and estate beneficiaries.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As a lawyer, 100 percent of my practice was in litigation. I appeared in court frequently throughout my career.

i. Indicate the percentage of your practice in:

1. federal courts: 20%
2. state courts of record: 76%
3. other courts: 0%

4. administrative agencies: 4%

ii. Indicate the percentage of your practice in:
1. civil proceedings: 100%
2. criminal proceedings: 0%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

When I was a practicing lawyer, I tried approximately 18 cases to verdict, judgment, or final decision. Six of the cases involved jury trials in which I was chief counsel in four, and associate counsel in two. Eight involved bench trials in which I was sole counsel in six, chief counsel in one, and associate counsel in one. The other four involved administrative hearings in which I was sole counsel.

i. What percentage of these trials were:
1. jury: 33%
2. non-jury: 67%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Bernal v. Diamond Elite et al.*, No. 2017-cv-31075, Adams County District Court

I represented the individual defendant, Ms. Waterhouse, in this civil action involving a dispute between former business partners. The plaintiff alleged breach of fiduciary duty, civil theft, fraud, and related claims. The matter proceeded to a bench trial. I prevailed on a motion for judgment as a matter of law made after the close of plaintiff's case-in-chief. The Honorable Edward Moss presided. The dates of representation were approximately 2017 to 2018.

Opposing Counsel:
Adam O'Rourke
O'Rourke Law Firm LLC
1355 South Colorado Boulevard, Suite C502
Denver, CO 80222
(303) 848-2907

2. *Smith v. Board of Governors of the Colorado State University System*, Civil Action No. 1:15-cv-00770-REB-KMT (D. Colo.)

I represented the defendant University as lead counsel. The plaintiff began his employment with the University as a police officer and alleged he suffered a hostile work environment and harassment motivated by his race, culminating in his discriminatory discharge in violation of Title VII. I deposed the plaintiff, managed discovery, and drafted the summary judgment motion. We prevailed on summary judgment and judgment was entered in favor of our client. The Honorable Robert Blackburn presided and the Honorable Kathleen Tafoya served in the magistrate judge referral role. The dates of representation were 2015 to 2017.

Co-counsel:
Jessamyn Jones
3i Law Firm
2000 South Colorado Boulevard, Tower 1, Suite 10,000
Denver, CO 80222
(720) 245-2100

Opposing Counsel:
Allan Ewert
Alexander Ewert LLC
2625 Redwing Road, Suite 200
Fort Collins, CO 80526
(970) 725-6626

3. *Parking Authority LLC v. Perri*, 2015-cv-031757, Jefferson County District Court

I represented the defendant, Mr. Perri, as lead trial counsel. The plaintiff brought claims against my client alleging breach of non-competition and non-solicitation agreements. We tried the case to a jury and received a defense verdict. The Honorable Diego G. Hunt presided. The dates of representation were approximately 2015 to 2016.

Co-counsel:
Madalyn McElwain
McElwain Law
429 East 5th Street
Leadville, CO 80461
(303) 915-0658

Opposing Counsel:
Derek Blass
Blass Law LLC
3900 East Mexico Avenue, Suite 300
Denver, CO 80210
(303) 726-7959

4. *Kaufman's Men's Wear v. Doan et al.*, 2014-cv-33297, Arapahoe County District Court

I represented the defendant, Mr. Doan, in this case as lead trial counsel. My client was a Vietnamese immigrant and sole proprietor who worked as an independent contractor for the plaintiff and provided tailoring services for customers who purchased the plaintiff's line of clothing for big and tall men. The claims against my client included claims of fraud and civil theft, among others. The plaintiff alleged my client improperly and fraudulently charged the plaintiff for tailoring services. We tried the case to a jury which returned a verdict for the plaintiff. The Honorable Charles M. Pratt presided. The dates of representation were approximately 2015 to 2016.

Co-counsel:
Jessamyn Jones
3i Law Firm
2000 South Colorado Boulevard, Tower 1, Suite 10,000
Denver, CO 80222
(720) 245-2100

Opposing Counsel:
Valissa Tsoucaris
Tsoucaris Law Conflict Resolution Services
3000 Holly Street
Denver, CO 80207
(303) 229-1090

5. *Steele v. Colorado Springs Early Colleges et al.*, No. 1:14-cv-03016-KLM (D. Colo.)

I represented the defendant charter school and its school administrators as lead trial counsel. The plaintiff sued my clients alleging First Amendment retaliation after my clients did not renew the plaintiff's teaching contract. We tried the case to a jury and

received a defense verdict. The Honorable Kristen L. Mix presided. The dates of representation were 2014 to 2016.

Co-counsel:
Emily Coleman
Higher Ground Law LLC
5023 West 120th Avenue, #158
Broomfield, CO 80020
(720) 437-9517

Opposing Counsel:
Ian Kalmanowitz
Cornish & Dell'Olio, P.C.
431 North Cascade Avenue, Suite 1
Colorado Springs, CO 80903
(719) 475-1204

6. *Phi Kappa Sigma Bldg Corp. of Colorado et al. v. Colorado Seminary et al.*, 2013-cv-034834, Denver District Court

I represented Colorado Seminary/University of Denver in this case as lead trial counsel. The plaintiff fraternal corporation sued the University alleging breach of a lease agreement between the parties, and related claims. We tried the case to a jury, which found for the defense on some claims, and for the plaintiff on others, resulting in a smaller monetary award of damages and judgment in the plaintiff's favor. The Honorable Kenneth M. Laff presided. The dates of representation were approximately 2013 to 2014.

Co-counsel:
Emily Coleman
Higher Ground Law LLC
5023 West 120th Avenue, #158
Broomfield, CO 80020
(720) 437-9517

Opposing Counsel:
Alan B. Hendrix
Genesee Center I
602 Park Point Drive, #240
Golden, CO 80401
(303) 759-9111

7. *Watershed, LLC v. Estate of Altrogge*, 2011-pr-844, Denver Probate Court

I represented the defendant family members and estate in this case as lead trial counsel. The plaintiff sued the defendant Estate and certain family members and beneficiaries of

the Estate, alleging breach of contract, fraud, and related claims involving a life settlement agreement purportedly signed by the deceased. The defendants asserted counterclaims for abuse of process, among others. The case went to a bench trial in Denver Probate Court. The judge rendered a defense verdict on all claims asserted against our clients, and we prevailed on our clients' counterclaim. The judgment in our clients' favor included an award of monetary damages and attorney's fees. The Honorable Elizabeth S. Leith presided. The dates of representation were approximately 2011 to 2014.

Co-counsel:
Mychael Dave
Hoffman Nies Dave & Myer LLP
5350 South Roslyn Street, Suite 100
Greenwood Village, CO 80111
(720) 390-3461

Opposing Counsel:
Michael Glaser (deceased)

Michael Murphy
Franklin D. Azar Associates P.C.
14426 East Evans Avenue
Aurora, CO 80014
(303) 900-5595

8. *Ellsworth v. Nunn Construction, Inc.*, Civil Action No. 1:07-cv-01392-WDM-MEH (D. Colo.)

I represented the plaintiff as sole counsel in this sex discrimination case alleging claims under Title VII, to include discriminatory failure to promote, hostile work environment, and unlawful retaliation. The plaintiff also alleged constructive discharge. As sole counsel I handled all drafting and discovery. The matter settled prior to dispositive motions being filed. The Honorable Walker Miller presided and the Honorable Michael Hegarty served in the magistrate judge referral role. The dates of representation were 2007 to 2008.

Opposing Counsel:
Amy L. Miletich
Miletich PC
717 17th Street, Suite 1510
Denver, CO 80202
(303) 825-5500

9. *Tradewinds Group LLC v. Martin at al.*, Civil Action No. 2006-cv-001425, El Paso County District Court, *judgment reversed and remanded*, No. 08CA1300, 2009 WL 1629960 (Colo. App. June 11, 2009)

I was second chair in this breach of contract matter representing the plaintiff. Our client sued the defendants alleging breach of an agreement related to our client's purchase of an airplane hangar. I helped manage and conduct discovery, took and defended depositions, and was second chair at trial, where I delivered the opening statement, examined certain witnesses, argued the halftime motion, and prepared and finalized jury instructions. The jury found in favor of our client. The defendants appealed and the judgment was reversed and the matter remanded. I argued the appeal before the Colorado Court of Appeals. The dates of representation were approximately 2006 to 2009.

Co-Counsel:
Edward Gleason
Nussbaum Speir Gleason PLLC
2 North Cascade Avenue, Suite 1430
Colorado Springs, CO 80903
(719) 428-2326

Opposing Counsel:
Murray Weiner
Mulliken Weiner Berg Jolivet P.C.
102 South Tejon Street, Suite 900
Colorado Springs, CO 80903
(719) 635-8750

10. *Peters v. Pikes Peak Musicians Association*, 462 F.3d 1265 (10th Cir. 2006)

I was the primary drafter of an appellate brief filed in the Tenth Circuit on behalf of a trade union, the Pikes Peak Musicians Association. The appeal arose from a bankruptcy case in which the employer contested the payment of its musicians' wages and benefits due under a collective bargaining agreement as administrative expenses from the bankrupt employer's estate. In bankruptcy court, the union sought and obtained payment of their post-petition wages and benefits as administrative expenses, which receive first priority under the Bankruptcy Code. The bankruptcy trustee appealed first to the U.S. District Court and then to the Tenth Circuit. I represented the union in the Tenth Circuit appeal, where the decision below was affirmed. The dates of representation were 2005 to 2006.

Co-Counsel:
Brent Cohen
Lewis Roca Rothgerber Christie LLP
1601 19th Street, Suite 1000
Denver, CO 80202
(303) 623-9000

Opposing Counsel:
Philip Arthur Pearlman (inactive)

Spencer Fane LLP
1901 Locust Street
Denver, CO 80220
(303) 316-5050

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Many of my most significant legal activities outside of litigation matters have involved my volunteer efforts around access to justice. I have served on the Board of Directors of CBA CLE, Inc., the nonprofit educational arm of the Colorado Bar Association and the Denver Bar Association. Its mission is to provide continuing legal education to Colorado's lawyers. I have served on this board since about July 2018. We meet quarterly (at a minimum), and monthly as matters require. I also serve on the Board's Executive Committee. Outside of my service on the Board, I have presented numerous continuing legal education programs (on a volunteer basis) sponsored by CBA CLE Inc., the Faculty of Federal Advocates, and other local or national legal associations.

Since taking the bench I have served as a Senior Mentor for the Law School Yes We Can program founded by United States District Judge Christine M. Arguello. I also serve as a mentor with the Colorado Attorney Mentoring Program, and mentor both law and undergraduate students informally by making myself an available resource to them. As part of my mentoring efforts, I developed a program in my Chambers called Crews' Crew Chit Chats. These Chit Chats are to occur each semester in my courtroom and provide diverse law students from our two local law schools the opportunity to engage with diverse local legal professionals.

Since taking the bench I have also participated in United States Magistrate Judge Kristen L. Mix's MixDIP program where I am paired with at least one 2L intern in my chambers during the fall semester. In 2022 I began to assist Judge Mix with coordinating this program in light of her planned retirement from the bench in August 2023, to help ensure the program continues.

I also regularly offer internships and externships to law students and undergraduate students outside of MixDIP. The undergraduate students typically join me during one or both of my criminal duty weeks; they observe criminal proceedings and prepare a paper I assign.

I have served on the Colorado Judicial Well-Being Committee since about August 2020. Our focus is to strengthen performance on the bench, enhance job satisfaction and work-life balance, and foster community within our profession.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    None.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    I am party to a 2018 agreement with my prior law firm, Hoffman Crews Nies Waggener and Foster LLP, regarding the receipt of fees collected, if any, in the future for work I performed prior to leaving the firm in July 2018. I do not anticipate the further collection of fees under this agreement, if any, as those fees are likely now uncollectable.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the supplied financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I am not aware of any persons, parties, categories of litigation, or financial arrangements that are likely to present potential conflicts of interest if I am confirmed to the position to which I have been nominated.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I will continue to evaluate and resolve any potential conflict of interest by applying Canon 3 of the Code of Conduct for United States Judges, 28 U.S.C. § 455, and any other applicable statutes, canons, and rules. I will also continue to use the court's automated conflict checking system and regularly update my conflicts list with the Clerk's Office.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Within my first two years as a magistrate judge, I founded the Federal Limited Appearance Program (FLAP) in conjunction with the Colorado Bar Association Young Lawyers Division. This is a volunteer-driven program developed by the U.S. District Court for the District of Colorado and the CBA YLD, in coordination with the existing Federal Pro Bono Panel and the Faculty of Federal Advocates. It is designed to provide *pro se* litigants with legal representation during certain non-dispositive court hearings. My discussions with the CBA YLD about developing this program began in 2019. We developed a proposal in conjunction with the court's *Pro Se* Working Group and *Pro Se* Standing Committee, that was submitted to, and approved by, the district judges. The program officially launched in December 2020.

In about March 2019 I became a member of the U.S. District Court's *Pro Se* Working Group. I was appointed Chair by the Chief Judge toward the end of 2021. Our charge is to investigate and consider how the court can best facilitate *pro se* access to the court and how *pro se* cases can be handled in the most efficient and economical way possible. This includes consideration of how *pro se* cases and parties come to the court, the manner in which they file pleadings, the assistance they need to navigate court processes and where it can be obtained, as well as the best procedures to handle *pro se* filed pleadings and cases.

As a lawyer I served on the COLTAF (Colorado Lawyer Trust Account Foundation) Board of Directors from 2014 to August 2018. I was Board President in 2018, Board Vice President in 2016 and 2017, and chaired the Discretionary Grants Committee from 2015 to 2018. COLTAF is a partnership between the legal and banking communities whereby the interest on lawyers' pooled trust accounts is used to make grants to improve access to civil justice statewide.

My pro bono work also included direct client representation. For example, in 2012 I was sole counsel representing a South Korean man on a pro bono basis through a program developed by the Rocky Mountain Immigrant Advocacy Network. The Government sought my client's removal and I sought to assist him with his Form I-485 application to become a lawful permanent resident because he qualified as the parent of a United States citizen who was at least 21 years old. The matter went to a bench trial in the United States Immigration Court before the Honorable James P. Vandello. The court ruled in my client's favor and granted his application.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On March 28, 2022, I submitted an application to the Advisory Committee established by Senators Michael Bennet and John Hickenlooper for a vacancy on the United States District Court for the District of Colorado. On April 18, 2022, I interviewed with the Advisory Committee. On April 22, 2022, I interviewed with Senators Bennet and Hickenlooper and two members of their staff. On May 18, 2022, I interviewed with attorneys from the White House Counsel's Office. On August 3, 2022, an attorney from the White House Counsel's Office informed me that I would be vetted for a judgeship. Since August 3, 2022, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On February 22, 2023, the President announced his intent to nominate me.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name**: State full name (include any former names used).

   Molly Rebecca Silfen

2. **Position**: State the position for which you have been nominated.

   Judge, United States Court of Federal Claims

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Madison West, 8th Floor
   600 Dulany Street
   Alexandria, Virginia 22314

   Residence: Washington, District of Columbia

4. **Birthplace**: State year and place of birth.

   1980; Philadelphia, Pennsylvania

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   2003 – 2006, Harvard Law School; J.D., 2006

   1998 – 2002, Yale College; B.S., 2002

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2013 – present
   Office of the Solicitor
   U.S. Patent and Trademark Office

Madison West, 8th Floor
600 Dulany Street
Alexandria, Virginia 22314
Associate Solicitor

2011 – present
George Mason Antonin Scalia Law School
3301 Fairfax Drive
Arlington, Virginia 22201
Adjunct Law Professor (currently uncompensated; have been compensated occasionally in the past)

2021 – 2023
U.S. Senate Committee on the Judiciary
Office of Senator Patrick Leahy
Dirksen Senate Office Building, Room 218
Washington, DC 20002
Counsel (detailee)

2015 – 2016
Appellate Staff, Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, Northwest, 7th Floor
Washington, DC 20530
Attorney (detailee)

2006 – 2008; 2010 – 2013
Finnegan, Henderson, Farabow, Garrett, and Dunner, LLP
901 New York Avenue, Northwest
Washington, DC 20001
Associate Attorney

2008 – 2010
United States Court of Appeals for the Federal Circuit
717 Madison Place Northwest
Washington, DC 20005
Law Clerk to the Honorable Alan D. Lourie

January 2006
Office of Strategic Planning and Community Development
Metro Regional Government
600 Northeast Grand Avenue
Portland, Oregon 97232
Intern (uncompensated)

Fall 2005

Harvard Law School
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
Research Assistant to Professor William (Terry) Fisher

Summer 2005
Finnegan, Henderson, Farabow, Garrett, and Dunner, LLP
901 New York Avenue Northwest
Washington, DC 20001
Summer Associate

Summer 2005
Morrison Foerster
250 West 55th Street
New York, New York 10019
Summer Associate

Spring 2005
Somerville Mayor's Office
93 Highland Avenue
Somerville, Massachusetts 02143
Intern (uncompensated)

2004 – 2005
Harvard School of Engineering and Applied Sciences
29 Oxford Street
Cambridge, Massachusetts 02138
Teaching Fellow

2004 – 2006
Harvard Mediation Program
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
Mediator (uncompensated)

Summer 2004
United States District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007
Intern to the Honorable Naomi Reice Buchwald (uncompensated)

Summer 2004
Needle and Rosenberg LLC (now Ballard Spahr LLP)
999 Peachtree Street Northeast, Suite 1600
Atlanta, Georgia 30309
Summer Associate

Summer 2002; Summer 2003
Jordan and Hamburg LLP (now dissolved)
Assistant to Office Manager

January – February 2003
Apple orchard near Blenheim, New Zealand (I do not recall further details on the name of the orchard)
Apple Picker

November 2002 – January 2003
Willing Workers on Organic Farms
Aniseed Valley
Richmond 7081
Tasman
New Zealand
Volunteer (with room and board supplied)

Other Affiliations (uncompensated)

2020 – present
Women in Intellectual Property Law Network, District of Columbia Chapter
No Physical Address
Steering Committee Member

2016 – present
Edward Coke Appellate Inn of Court
No Physical Address
Member

2014 – 2021
Federal Circuit Bar Association
1620 Eye Street, Northwest, Suite 801
Washington, DC 20006
Committee Chair and Vice Chair

2010 – 2012
Association of Former Law Clerks of the Federal Circuit
No Physical Address
Co-Chair

2008 – 2012
Giles S. Rich American Inn of Court
No Physical Address
Member

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I did not serve in the military. I was not required to register for the selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Gold Medal Award, U.S. Department of Commerce, the Department's highest recognition (2023)

   Office of the General Counsel Distinguished Attorney Award, U.S. Department of Commerce (2020)

   Bronze Medal Award for superior performance, U.S. Department of Commerce (2020)

   Special Act Award for work on a complex appeal, U.S. Patent and Trademark Office (2020)

   Director's Award for excellence in litigating a particular case, U.S. Patent and Trademark Office (2019)

   Burling Memorial Fund fellowship for academic research, Harvard Law School (2006)

   Outstanding Engineering Student Award, Yale College Chapter of the American Society of Mechanical Engineers (2002)

   Yale College

      McCrosky Prize "for the senior who is deserving of the greatest distinction for scholarly achievement in fields related to mechanics and its applications" (2002)

      Class of '59 Fellowship for public service abroad (2002)

   Certified by National Council of Examiners for Engineering, Fundamentals of Engineering Exam (2002)

   Member, Yale College Chapter of the Tau Beta Pi engineering honor society (2000 – 2002)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Association of Former Law Clerks of the Federal Circuit
Co-Chair (2010 – 2012)

Edward Coke Appellate Inn of Court
Barrister (2019 – present)
Associate (2016 – 2019)

Federal Circuit Bar Association
Chair, U.S. Patent and Trademark Office Committee (2020 – 2021)
Member, Bench and Bar Planning Committee (2020 – 2021)
Vice-Chair, U.S. Patent and Trademark Office Committee (2017 – 2020)
Vice-Chair, Rules Committee (2014 – 2017)

Giles S. Rich American Inn of Court
Member (2008 – 2012)

Women in Intellectual Property Law Network, District of Columbia Chapter
Steering Committee Member (2020 – present)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York, 2007
District of Columbia, 2008

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2015
United States Court of Appeals for the Fourth Circuit, 2015
United States Court of Appeals for the Fifth Circuit, 2015
United States Court of Appeals for the Eleventh Circuit, 2015
United States Court of Appeals for the District of Columbia Circuit, 2015
United States Court of Appeals for the Federal Circuit, 2007
United States Court of Appeals for Veterans Claims, 2011
United States Patent and Trademark Office, Registration to Practice, 2008

To the best of my knowledge, there have been no lapses in my membership in any of these bodies except the United States Patent and Trademark Office. For the

United States Patent and Trademark Office, I inactivated my registration in 2013, when I became an employee of the Office; employees of the Office are prohibited from having active registrations to practice and are required to inactivate registrations upon beginning employment there.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Sitar Arts Center, volunteer after-school sewing teacher (2009 – 2011)

Yale College Alumni Committee on Engineering Curriculum (2006 – 2010)

Yale College Alumni Interviewer (2006 – 2010)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

With Daniel Kazhdan, "Inventors Beware: The Dangers of Getting Too Many Patents," 60 *Santa Clara Law Review* 289 (2020). Copy supplied.

With Jason Melvin and Andrew Renison, "2012 Trademark Law Decisions of the Federal Circuit," 62 *American University Law Review* 991 (2013). Copy

supplied.

"Molly Silfen," *55 Successful Harvard Law School Application Essays* 168 (The Harvard Crimson, 2007). Copy supplied.

With Donald Dunner and Brenda Huneycutt, "Federal Rules of Appellate Procedure and the Local Rules of the Federal Circuit: Procedural Appellate Traps for the Unwary," *The IP Litigator* 34 (July/Aug. 2006). Copy supplied.

"Claim Interpretation: Recommendations for the Federal Circuit Court of Appeals from *Phillips v. AWH*," 14 *University of Baltimore Intellectual Property Journal* 47 (2005). Copy supplied.

"How will California's Funding of Stem Cell Research Impact Innovation?" 18 *Harvard Journal of Law and Technology* 459 (2005). Copy supplied.

"I Want My Information Back: Evidentiary Privilege Following the Partial Birth Abortion Cases," 38 *Journal of Health Law* 121 (2005). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Letter to Speaker Paul Ryan, in opposition to President Trump's appointment of Stephen Bannon as White House Chief Strategist (2016). Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

November 1, 2022: Guest speaker, Advanced Intellectual Property seminar at The George Washington University Law School, Washington, DC. I guest taught a class, hosted by Professors Terry Rea and Mark Traphagen, covering my government career trajectory and intellectual property issues I have encountered both on Capitol Hill and at the United States Patent and Trademark Office. I have no notes, transcript, or recording. The address for The George Washington University Law School is 2000 H Street Northwest, Washington, DC 20052.

October 13, 2022: Panelist, "Intellectual Property Protections—Have we gone too far?," International Intellectual Property Summit, Boston College Law School, Boston, Massachusetts (virtual appearance). Notes supplied.

September 29, 2022: Participant, "Patent Trial and Appeal Board Roundtable," The George Washington University Law School, Washington, DC. I participated as a representative of Senator Leahy's office in a roundtable discussion of how things are working at the Patent Trial and Appeal Board and what legislative changes may happen in the future. I have no notes, transcript, or recording. The address for The George Washington University Law School is 2000 H Street, Northwest, Washington, DC 20052.

September 28, 2022: Panelist, "Legislative Branch," International Copyright Institute at the United States Copyright Office, Washington, DC. I participated in a panel about the legislative process in the United States and how to go about trying to update the law to address copyright issues in the digital age. I have no notes, transcript, or recording. The address for the United States Copyright Office is 101 Independence Avenue, Southeast, Washington, DC 20559.

June 17, 2022: Panelist, "Pro Bono Now and Zen, Views from Bench and Bar," Federal Circuit Bar Association Bench and Bar Conference, Sea Island, Georgia. Notes and slides supplied.

June 15, 2022: Panelist, "The Work of Congress—Making and Remaking Intellectual Property Law," Foundation for Advancement of Diversity in Intellectual Property Law of the American Intellectual Property Law Association, Washington, DC. I participated in a panel speaking to a group of law students about working on Capitol Hill in the field of intellectual property. I have no notes, transcript, or recording, but the discussion questions for the panelists are supplied. The address for the Foundation for Advancement of Diversity in Intellectual Property Law of the American Intellectual Property Law Association is 1400 Crystal Drive, Suite 600, Arlington, Virginia 22202.

June 8, 2022: Panelist, "Capitol Hill Panel," Intellectual Property Law Institute of the Hispanic National Bar Association, Washington, DC. I participated on a panel, speaking to law students about what it is like to work on Capitol Hill. I have no notes, transcript, or recording. The address for the Hispanic National Bar Association is 2020 Pennsylvania Avenue Northwest, Suite 279, Washington, DC

20006.

March 24, 2022: Panelist, "Legislative Priorities," Patent Trial and Appeal Board Bar Association, Washington, DC. Notes supplied.

March 15, 2022: Panelist, "Fresh Start Discussion," The Naples Roundtable Leahy Institute (virtual appearance). Notes supplied.

March 10, 2022: Panelist, "Women Practitioner Panel," Women in Intellectual Property Law Network, DC Chapter (virtual appearance). Notes supplied.

December 3, 2021: Panelist, "Patent Trial and Appeal Board Review: Effects of *Arthrex* and Potential Future Reforms," Federal Circuit Bar Association (virtual appearance). Notes supplied.

September 21, 2021: Panelist, "Intellectual Property Issues: A View from the Hill," Judge Paul R. Michel Intellectual Property Inn of Court (virtual appearance). I spoke about the types of issues that arise on Capitol Hill and the interactions between the executive and legislative branches of government. I have no notes, transcript, or recording, but the discussion questions are supplied. The address for the Judge Paul R. Michel Intellectual Property Inn of Court is care of V. Monica Mandel, Executive Director, Fulwider Patton LLP, 6060 Center Drive, Tenth Floor, Los Angeles, California 90045.

July 28, 2021: Participant, "The America Invents Act at 10," Berkeley Center for Law and Technology (virtual appearance). I participated as a representative of Senator Leahy's office on a panel about how the America Invents Act has fared over the last ten years. I have no notes, transcript, or recording. The address for the Berkeley Center for Law and Technology is Room 421 Law Building, North Addition, University of California at Berkeley, School of Law, Berkeley, California, 94720.

June 24, 2021: Panelist, "Administrative Law," Federal Circuit Bar Association Bench and Bar Conference (virtual appearance). Notes and slides supplied.

April 13, 2021: Panelist, "Patent Case Roundup," American Bar Association Intellectual Property Law Section (virtual appearance). Slides supplied.

May 14, 2020: Panelist, "The Federal Circuit's Emergency Measures," Federal Circuit Bar Association (virtual appearance). Notes supplied.

November 12, 2019: Panelist, "Trademarks After *Iancu v. Brunetti*," Giles S. Rich American Inn of Court, Washington, DC. Notes supplied.

June 13, 2019: Moderator, "Patent Trial and Appeal Board: All Things Considered," Federal Circuit Bar Association Bench and Bar Conference,

Colorado Springs, Colorado. Slides supplied.

September 28, 2018: Panelist, "Patent Trial and Appeal Board: A Look Back, A Look Ahead," Virginia State Bar, Intellectual Property Section, Alexandria, Virginia. Slides supplied.

June 21, 2018: Panelist, "All Things Patent Trial and Appeal Board," Federal Circuit Bar Association Bench and Bar Conference, Coronado, California. Slides supplied.

June 17, 2017: Guest teacher, Supreme Court Summer Institute of Street Law, Washington, DC. I co-taught a class on Supreme Court advocacy to high school teachers covering the *Matal v. Tam* Supreme Court argument, where participants gave a mock argument. I have no notes, transcript, or recording. The address for Street Law is 1010 Wayne Avenue, Suite 860, Silver Spring, Maryland 20910.

March 2, 2017: Panelist, "Practical Impacts of Administrative Law," Federal Circuit Bar Association, Washington, DC. Slides supplied.

April 17, 2015: Panelist, "Post-Grant Procedures at the Patent Office—Timely Cure or New Disease?," University of Baltimore School of Law, Baltimore, Maryland. I participated in a panel discussing the United States Patent and Trademark Office's implementation of the America Invents Act. I have no notes, transcript, or recording. The address for the University of Baltimore School of Law is 1420 North Charles Street, Baltimore, Maryland 21201.

October 2, 2014: Moderator, "Federal Circuit Rules, Nuts and Bolts," Federal Circuit Bar Association, Washington, DC. Recording supplied.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

"Frequency Boost: Amplifying Diverse Voices in Media and Technology," Icarus, Media and Technology Committee, American Bar Association Section of Antitrust Law (Summer 2022). Copy supplied.

"Leadership in the Profession," Podcast guest, Federal Circuit Bar Association (May 1, 2019). Recording supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

   i. Of these cases, approximately what percent were:

      jury trials: ___%
      bench trials: ___% [total 100%]

   ii. Of these cases, approximately what percent were:

      civil proceedings: ___%
      criminal proceedings: ___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

    I have not served as a judge.

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. **Public Office, Political Activities and Affiliations**:

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

    None.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

    I have not held any formal office in any political party, election committee, or campaign. I knocked on doors and made phone calls for Barack Obama in 2008 in Pennsylvania and Delaware. I also volunteered doing voter protection for the Democratic Party of Virginia in November 2016, November 2017, November 2018, November 2019, March 2020, and October and November 2020. In November 2022, I made voter protection phone calls to assist voters in curing their ballots.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 2008 to 2010, I served as a law clerk to the Honorable Alan D. Lourie of the United States Court of Appeals for the Federal Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

2013 – present
Office of the Solicitor
United States Patent and Trademark Office
Madison West, 8th Floor
600 Dulany Street
Alexandria, Virginia 22314
Associate Solicitor

2021 – 2023
U.S. Senate Committee on the Judiciary
Office of Senator Patrick Leahy
Dirksen Senate Office Building, Room 218
Washington, DC 20002
Counsel Detailee

2015 – 2016
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, Northwest, 7th Floor
Washington, DC 20530
Attorney Detailee

2006 – 2008; 2010 – 2013
Finnegan, Henderson, Farabow, Garrett, and Dunner, LLP
901 New York Avenue, Northwest
Washington, DC 20001

Associate Attorney

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

Since graduating from law school I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My law practice has primarily involved civil trial and appellate court litigation in federal courts throughout the United States. During my recent detail to Capitol Hill, I had a policy role, working for the United States Senate, and I occasionally worked on policy issues for the United States Patent and Trademark Office in the seven years before that. When I worked at a law firm earlier in my career, my practice involved a mix of litigation and transactional work, from filing and prosecuting patent applications to licensing and opinion work.

From 2021 to January 2023, I served on a detail as counsel to Senator Patrick Leahy on the Senate Judiciary Committee. I worked on issues for the Intellectual Property Subcommittee, which Senator Leahy chaired. Those issues ranged from patents to trademarks to copyrights to international trade and antitrust issues. The types of work varied as well—I drafted and pursued legislation, drafted oversight letters to agencies and private-sector companies, organized subcommittee hearings, drafted statements for the Congressional Record and for speaking engagements, met with stakeholders, and spoke to a wide variety of organizations about Senator Leahy's views on intellectual property issues.

Since 2013, I have been an Associate Solicitor at the United States Patent and Trademark Office, representing the agency in court. I spend most of my time briefing and arguing appeals at the Court of Appeals for the Federal Circuit, though I also regularly litigate in district court and the Supreme Court. My Federal Circuit cases address a wide variety of legal issues, including substantive patent and trademark law; statutory interpretation; administrative law issues like deference to agency rulemaking; and constitutional questions such as the Appointments Clause, Article III standing, takings, due process, and the First Amendment and its intersection with trademark law.

Since 2013, I have also represented the agency in district court on a

similarly complex variety of issues. I have also represented the agency in a wide variety of district court suits under the Administrative Procedure Act, including facial challenges to Patent Office rules and applications of those rules, challenges to the agency's failure to issue rules, a suit involving the Paperwork Reduction Act, and a suit over whether a patent owner was entitled to a single day of additional patent term.

From 2015 to 2016, I spent a little more than a year on detail to the Department of Justice, in the Appellate Staff of the Civil Division. There, my appeals covered many of the thirteen circuit courts of appeals, and I represented a wide variety of federal agencies on constitutional, statutory, and administrative law issues. I also worked on several Supreme Court cases while at the Department of Justice.

From 2006 to 2008 and 2010 to 2013, I was an associate attorney at Finnegan, Henderson, Farabow, Garrett, and Dunner LLP. There I litigated patent and trademark issues at the Federal Circuit, in district court, in the International Trade Commission, and at the Second Circuit. I also worked on other patent-related issues such as licensing, freedom to operate, and the patent application process.

As a law-firm lawyer, I also participated in a number of pro bono proceedings, including representing a client at the Social Security Agency seeking disability payments, representing a client in criminal proceedings, working as a guardian ad litem, and representing a veteran before the Department of Veterans Affairs.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Since joining the federal government in 2013—at the United States Patent and Trademark Office and while on detail to the United States Department of Justice and the United States Senate—my client has been, broadly speaking, the United States.

From 2006 to 2008 and 2010 to 2013, at the law firm of Finnegan, Henderson, Farabow, Garrett, and Dunner LLP, my clients ranged from individual patent owners to large companies that were either asserting patent rights or defending patent rights. Those companies included semiconductor manufacturers, medical device manufacturers, and food packaging companies, among others. I also represented individuals, for example in pro bono litigation involving Social Security benefits, criminal defense, guardian ad litem, and veterans' benefits.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of

your appearances in court varied, describe such variance, providing dates.

From 2021 to the beginning of 2023, while on detail to the Senate, I litigated and appeared in court only occasionally, returning to the United States Patent and Trademark Office to argue three appeals that I had briefed while at the Patent Office.

From 2013 to 2021 and since my return in 2023, at the United States Patent and Trademark Office and while on detail to the Appellate Staff of the Civil Division of the United States Department of Justice, I appeared in court frequently. I argued approximately four appeals per year at the Federal Circuit or other federal courts of appeals, and I also appeared in district court, arguing motions and serving as first chair in a trial, presenting the opening and closing arguments, taking the direct testimony of witnesses, and cross-examining witnesses.

In private practice, from 2006 to 2008 and 2010 to 2013, I appeared in court occasionally, particularly in pro bono cases.

i. Indicate the percentage of your practice in:
   1. federal courts: 98%
   2. state courts of record: 0%
   3. other courts: 0%
   4. administrative agencies: 2%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 99%
   2. criminal proceedings: 1%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I was chief counsel for the United States in two district court cases that I tried to judgment. I was also chief counsel in one Social Security Administration case that I tried to judgment. I was associate counsel in an additional nine district court cases that I tried to judgment. In addition, over the course of my career, I have argued 23 appeals, mostly in the Federal Circuit but also in the D.C. Circuit and Eighth Circuit.

i. What percentage of these trials were:
   1. jury: 0%
   2. non-jury: 100%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any

oral argument transcripts before the Supreme Court in connection with your practice.

I have not presented oral argument in any cases before the Supreme Court of the United States. I have served as counsel of record in five merits cases at the Supreme Court of the United States:

*United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (cert. petition, 2020 WL 3545866; cert. reply, 2020 WL 4227873; government's brief, 2020 WL 7024946; government's reply and response, 2021 WL 260644) (cert. granted, judgment vacated and remanded)

*Thryv, Inc. v. Click-to-Call Technologies LP*, 140 S. Ct. 1367 (2020) (cert. opposition, 2019 WL 1972722; respondent's brief, 2019 WL 4201258; respondent's reply, 2019 WL 6464593) (cert. granted, judgment vacated and remanded)

*United States Patent and Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298 (2020) (cert. petition, 2019 WL 2966240; cert. reply, 2019 WL 2354729; petitioner's brief, 2020 WL 114444; petitioner's reply 2020 WL 1433997) (cert. granted, judgment affirmed)

*Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (cert. petition, 2018 WL 4331883; cert. reply, 2018 WL 6566656; petitioner's brief, 2019 WL 913833; petitioner's reply 2019 WL 1489050) (cert. granted, judgment affirmed)

*Matal v. Tam*, 137 S. Ct. 1744 (2017) (cert. petition, 2016 WL 1593780; cert. reply, 2016 WL 3752565; petitioner's brief, 2016 WL 6678795; petitioner's reply brief, 2017 WL 117333) (cert. granted, judgment affirmed)

In one other merits case, while my name was not listed as counsel of record, I participated in drafting briefs:

*Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853 (2019) (cert. opposition, 2018 WL 4298029; respondent's brief, 2019 WL 169139) (cert. granted, judgment reversed)

I served as counsel of record in cert-stage briefing in six additional cases:

*Iancu v. Fall Line Patents, LLC*, 141 S. Ct. 2843 (2021) (cert. petition, 2020 WL 7714428) (cert. granted, judgment vacated, and case remanded)

*United States v. Image Processing Technologies LLC*, 141 S. Ct. 728 (2020) (cert. petition, 2020 WL 4286908) (cert. dismissed)

*Hyatt v. Iancu*, 140 S. Ct. 45 (2019) (brief in opposition, 2019 WL 3027473)

(cert. denied)

*Vitreo Retinal Consultants of the Palm Beaches, P.A. v. Department of Health and Human Services*, 137 S. Ct. 1396 (2017) (brief in opposition, 2017 WL 744976) (cert. denied)

*Interval Licensing LLC v. Lee*, 136 S. Ct. 2506 (2016) (brief requesting holding pending outcome of another case, 2016 WL 946685) (held and then cert. denied)

*New Hampshire Right to Life v. Department of Health and Human Services*, 136 S. Ct. 383 (2015) (brief in opposition, 2015 WL 4550358) (cert. denied)

I participated in drafting two amicus briefs at the Supreme Court of the United States, but my name was not listed as counsel of record:

*Apple Inc. v. Qualcomm Inc.*, 142 S. Ct. 2868 (2022) (amicus brief of Senator Patrick Leahy and Congressman Darrell Issa in support of cert., 2021 WL 6102297) (cert. denied)

*Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016) (amicus brief of United States in support of petitioners, 2015 WL 3523409) (judgment affirmed by an equally divided court)

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Hyatt v. Iancu*, 332 F. Supp. 3d 83 (D.D.C. 2018) (Judge Lamberth), *part remaining pending on appeal and part reversed and remanded sub nom. Hyatt v. Hirshfeld*, 998 F.3d 1347 (Fed. Cir. 2021) (Judges Reyna, Wallach, and Hughes), *expenses affirmed in part, vacated in part, and remanded*, 9 F.4th 1372 (Fed. Cir. 2021) (Judges Moore, Reyna, and Hughes)

From 2016 to 2021 I served as lead counsel for the United States in this case involving a number of issues: statutory patentability questions of anticipation, obviousness, and

written description; the equitable doctrine of prosecution laches due to an applicant's delay in pursuing a patent; and whether expert witness fees should be considered "expenses of the proceedings," under a statute that specifies that "[a]ll the expenses of the proceedings shall be paid by the applicant."

Initially, the case involved expert report preparation and trial preparation for a de novo case on the merits of patentability of hundreds of patent claims. I was lead counsel for that week-long bench trial, giving the opening statement, doing a direct examination of our expert witness and cross examination of the opposing side's witness, arguing motions in limine and for judgment as a matter of law, giving the closing statement, and writing all of the post-trial briefs. Meanwhile, other government attorneys handled three related trials on other patent applications from Mr. Hyatt and a bench trial on a bigger issue of prosecution laches—whether Mr. Hyatt had unduly delayed the patenting process and was prohibited from receiving any of these patents. The court issued a mixed judgment, finding some claims patentable and others unpatentable in each of the three patent applications, and finding no prosecution laches. And the court found that Mr. Hyatt did not owe the United States Patent and Trademark Office its expert witness fees.

I then handled the appeal as co-lead counsel, briefing all of the statutory patentability issues based on three of the four trials and supporting on the prosecution laches issue. The Federal Circuit vacated and remanded on the prosecution laches issue and held the statutory patentability issues in abeyance pending the outcome of a new trial on prosecution laches. That new trial has not yet been scheduled.

Finally, I was lead counsel on the appeal from the district court's judgment on expenses of the proceeding. The Federal Circuit affirmed in part, vacated in part, and remanded.

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2. *United States v. Arthrex, Inc.*, 953 F.3d 760 (Fed. Cir. 2020) (denial of rehearing en banc), *vacated and remanded*, 141 S. Ct. 1970 (2021)

From 2019 to 2021 I served as associate counsel for the United States in this case on whether the appointments for the more than 250 Administrative Patent Judges at the United States Patent and Trademark Office violated the Constitution's Appointments Clause. The Federal Circuit had stripped those Administrative Patent Judges of their civil service employment protections, allowing them to be fired at will.

The Federal Circuit denied rehearing en banc. The Supreme Court granted cert and ultimately found the appointments unconstitutional but adopted the government's argument that the constitutionality of the Administrative Patent Judges' appointments and civil service protections could be preserved by providing for Director review of the proceedings.

I began working on the case after the Federal Circuit's panel decision. I worked on the government's petition for rehearing en banc, cert petition, and briefing at the merits stage at the Supreme Court of the United States. In addition to working on the merits of the case, I organized the government's response to many dozens of briefs and petitions to the Patent Office, Federal Circuit, and Supreme Court, at all stages of the process, where the private parties argued that, because the Administrative Patent Judges had been unconstitutionally appointed, those many dozens of cases needed to be unwound and reheard by constitutionally appointed officers.

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3. *Click-to-Call Techs., LP v. Ingenio, Inc.*, 899 F.3d 1321 (Fed. Cir. 2018) (Judges O'Malley, Taranto, and Stark, en banc in part), *rev'd sub nom. Thryv, Inc. v. Click-to-Call Techs.*, 140 S. Ct. 1367 (2020)

From 2018 to 2020, I served as lead counsel for the United States at the Federal Circuit, which took the case en banc sua sponte to address an important issue, and then as associate counsel at the Supreme Court, through cert-stage and merits-stage briefing and supporting the United States Department of Justice in oral argument preparation. The issue was whether an agency decision on the preliminary question of a time bar is reviewable on appeal under the Patent Act and, if so, whether the agency had correctly decided that the time bar did not apply. It was a procedurally complicated case, with the United States not entirely aligning with any party.

I served as lead counsel on the Federal Circuit appeal, representing the United States Patent and Trademark Office as intervenor. I briefed and argued the position that a complaint that was served and then dismissed without prejudice was not "served" for purposes of the time bar, which the court took en banc and decided. The court reversed the agency, holding that the dismissal without prejudice did not render the initial service of the complaint a nullity. The issue decided en banc was decided by the full Federal Circuit, with Judges Lourie and Dyk dissenting.

After that, I drafted the Patent Office's cert-stage brief, arguing that the important issue was whether the time-bar question was reviewable at all, when the statute says preliminary decisions by the agency are final and nonappealable. At the Supreme Court merits stage, I served as associate counsel and worked with the Justice Department on briefs, with the result that certain intermediate Patent Office decisions are unreviewable on appeal.

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4. *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891 (E.D.Va. Aug. 9, 2017) (Judge Brinkema), *judgment amended and expenses addressed*, 2017 WL 4853755, *aff'd*, 915 F.3d 171 (4th Cir. 2019) (Judges King, Duncan, and Wynn), *rehearing en banc denied, aff'd sub nom. United States Patent and Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298 (2020)

From 2016 to 2020, I represented the United States Patent and Trademark Office in district court, at the Fourth Circuit, and then at the Supreme Court in a case about trademark genericness. I served as lead counsel at times, arguing motions and writing briefs, and associate counsel at times, playing a supporting role during discovery and depositions, reviewing briefs, and supporting the lead counsel during summary judgment arguments. The issue was whether the combination of a generic word plus ".com" can create a non-generic term that can be registered as a trademark. A subsidiary issue involved whether trademark applicants who choose to sue the United States Patent and Trademark Office in district court have to pay the agency's expert witness expenses, when the statute states that "all the expenses of the proceeding shall be paid by the party bringing the case." The district court issued a mixed decision, requiring the agency to register some of the trademarks and prohibiting registration of others. The court of appeals and Supreme Court affirmed, holding that the combination of a generic word plus ".com" can create a non-generic term. On the expenses issue, Booking.com ultimately prevailed in its argument that it did not have to pay the expert witness expenses of the United States Patent and Trademark Office.

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5. *Hyatt v. United States Patent and Trademark Office*, No. 2:16-cv-1490, 2017 WL 663058 (D. Nev. Feb. 17, 2017) (Judge Jones), *aff'd*, 904 F.3d 1361 (Fed. Cir. 2018) (Judges Reyna, Wallach, and Hughes), *rehearing en banc denied, cert. denied*, 140 S. Ct. 45 (2019)

From 2016 to 2019, I served as lead counsel for the United States in this case that involved allegations that the United States Patent and Trademark Office should have and failed to institute a particular policy using notice and comment rulemaking. That policy had to do with the agency's internal review process—when a patent applicant is allowed

to appeal from a patent examiner's rejection to a panel of administrative patent judges within the agency. That policy was not promulgated through notice and comment but rather was discussed in the Manual of Patent Examining Procedure. The applicant petitioned the agency twice to change its policy, asking for rulemaking on the question. When the agency declined, the applicant sued in district court. The issue was whether the Patent Office has authority under the Patent Act to allow examiners to reopen prosecution post-appeal brief and whether the question was reviewable.

I served as chief counsel at the district court, Federal Circuit panel, and en banc stages. I wrote all of the briefs and presented the only oral argument in the case, which was at the Federal Circuit panel stage. I was also the principal drafter of the brief in opposition to cert at the Supreme Court. Each court agreed with the agency's position that it had properly implemented its policy.

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6. *Mayne Pharma International v. Merck Sharp and Dohme Corp.*, 927 F.3d 1232 (Fed. Cir. 2019) (Judges Lourie, Dyk, and O'Malley)

From 2018 to 2019, I served as lead counsel for the United States as intervenor in this appeal. The issue on which the government intervened was whether the United States Patent and Trademark Office has the statutory authority to allow a party to refile a petition for inter partes review to correct an error in naming real parties in interest to the petition, or whether that filing requires a new filing date that would implicate a statutory time bar. A subsidiary issue was whether the Court of Appeals for the Federal Circuit had authority to consider that issue or whether it was within the discretion of the Patent Office.

I wrote the intervenor's brief and represented the United States in the oral argument. The Federal Circuit agreed with the government that the Patent Office has the authority to allow amendments to fix clerical or typographical mistakes without impacting the filing date and declined to decide the appealability question.

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7. *In re Tam*, 785 F.3d 567 (Fed. Cir. 2015) (Judges Lourie, Moore, and O'Malley), *rev'd by* 808 F.3d 1321 (Fed. Cir. 2015) (en banc), *aff'd sub nom. Matal v. Tam*, 137 S. Ct. 1744 (2017)

From 2014 to 2017, I handled this case for the United States, including while I was at the United States Patent and Trademark Office and while I was on detail to the United States Department of Justice. The issue was whether the Lanham Act's prohibition on registering disparaging trademarks was constitutional under the First Amendment. The United States argued that the band name "The Slants" was disparaging to persons of Asian descent and that Federal Circuit precedent foreclosed finding the statute unconstitutional. The panel agreed with the government. The Federal Circuit then took the case en banc and reversed the panel. The Supreme Court affirmed the en banc court.

I served as lead counsel at the Federal Circuit panel stage, writing the brief and arguing the appeal. At the en banc, cert, and Supreme Court merits stages I served as associate counsel, working with the Justice Department on strategy and briefing.

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8. *U.S. Department of Justice v. Daniel Chapter One*, No. 15-5155, 2016 WL 3040815 (D.C. Cir. May 18, 2016) (Judges Tatel, Sentelle, and Randolph)

From 2015 to 2016, I served as lead counsel for the United States on this appeal over whether the Federal Trade Commission's statute, which provides for an injunction, includes other equitable remedies such as disgorgement of profits. I drafted the brief and helped prepare another attorney for oral argument. The D.C. Circuit affirmed the district court on an alternative ground that the United States had argued under a different provision of the statute.

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9. *Steuben Foods, Inc. v. HP Hood, LLC*, No. 12-cv-211A, 2012 WL 7829014 (W.D.N.Y. Oct. 3, 2012) (Magistrate Judge McCarthy), *report and recommendation adopted by* 2013 WL 1337318 (W.D.N.Y. Mar. 29, 2013) (Judge Arcara)

From 2012 to 2013, I served as associate counsel for HP Hood on this district court case, a patent infringement case covering a method of aseptically filling bottles of juice or milk by first cleaning the bottles with hydrogen peroxide and then drying the bottles. I worked closely with the client and wrote briefs on summary judgment arguing that Steuben's claims should be barred by the equitable doctrine of laches. The district court denied the motion without prejudice to renewal at a later date.

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10. *Markem Corp. v. Zipher Ltd.*, No. 07-cv-6, 2008 WL 4116666 (D.N.H. Aug. 28, 2008) (Judge Barbadoro)

From 2007 to 2008, I served as associate counsel for Markem on this district court case, a patent infringement case between two manufacturers of thermal transfer printers that stamp expiration dates on flexible product packaging. I deposed the opposing side's expert witness, wrote briefs in preparation for a claim construction hearing, and prepared our expert witness and lead counsel for the claim construction hearing. I also kept track of parallel litigation in the United Kingdom. The court issued a mixed ruling on claim construction. The case continued after I left the firm to clerk at the Federal Circuit, but I was no longer involved.

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18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

From 2006 to 2008 and from 2010 to 2013, I maintained a practice that included, in addition to litigation, a significant patent transactions practice. That included filing patent applications and pursuing patents through all stages of the application process at the United States Patent and Trademark Office. My biggest client for the patent application process was a medical device company, but I also represented an individual inventor with a medical device, semiconductor manufacturers, and the United States Postal Service, among others. My practice also included patent licensing and writing opinions of counsel of noninfringement. My biggest clients in that practice were medical device companies, food packaging companies, and a dairy company.

Since 2013, my practice at the United States Patent and Trademark Office has included some non-litigation work, as intellectual property counsel to the agency. I present to others within and outside the agency on recent relevant decisions. I also calculate risks and recognize possible losses, taking steps to mitigate them. For example, I assess litigation risks and at times convince the agency not to litigate and instead to take cases back where it seems that the appeal may result in bad law. I have reviewed drafts written by administrative patent judges and administrative trademark judges. I have reviewed changes to the Manual of Patent Examining Procedure, a guidance document for examiners on how to apply the law as direction from the United States Court of Appeals for the Federal Circuit and from the Director of the United States Patent and Trademark Office evolves. I also work with the Patent Trial and Appeal Board and other business units within the agency to make sure work is flowing smoothly on complex cases. I

periodically review proposed statutory changes either coming from Congress or coming from within the agency that result from court decisions. I also periodically review proposed regulatory changes and work on the notice-and-comment process. I routinely participate in moot courts for other attorneys, even though I am not an attorney of record in those cases. And I routinely review court cases to determine if they warrant intervention by the Patent Office, either because they raise issues that are important to the patent system or because they raise issues that are likely to recur, involving interpretations of rules or procedure.

From 2021 to 2023, I worked on policy almost exclusively. I served on a detail as counsel to Senator Patrick Leahy on the Senate Judiciary Committee. I worked on issues for the Intellectual Property Subcommittee, which Senator Leahy chaired. Those issues ranged from patents to trademarks to copyrights to international trade and antitrust issues. The types of work varied as well—I drafted and pursued legislation, drafted letters of oversight of agencies and private-sector companies, organized subcommittee hearings, drafted statements for the Congressional Record and for speaking engagements, met with stakeholders, and spoke to a wide variety of organizations about Senator Leahy's views on intellectual property issues.

Throughout my career, I have been an active participant in bar associations. I've chaired or vice-chaired committees for the Federal Circuit Bar Association, planning panel discussions and helping the organization to attract new members. I am currently an active member of the steering committee for the District of Columbia chapter of the Women in Intellectual Property Law Network, planning events, both social and educational, and helping to compile lists of opportunities for young attorneys in court and before administrative agencies.

I have never performed any lobbying activities or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Since 2011, I have co-taught two seminars at the George Mason University Antonin Scalia Law School, teaching one of them nearly every semester. Both courses are practical classes on practicing appellate litigation in front of the Court of Appeals for the Federal Circuit. In the fall semester course, students study appellate advocacy, learn the court's rules and preferences, and are expected to write a brief and present an oral argument on a moot court problem. In the spring semester course, the students participate in the national Giles S. Rich Moot Court Competition put on by the American Intellectual Property Law Association. Students write a brief and present an oral argument in an intra-school competition, and the top two George Mason teams then participate in the national competition. In 2022, one of the George Mason teams won the entire southeast regional competition and participated in the national competition. Syllabi for both courses over the years supplied.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    I am currently teaching a class as an adjunct professor at the George Mason University Antonin Scalia Law School. I am teaching the class without compensation.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    When my nomination is formally submitted to the Senate, I will file my Financial Disclosure Report and will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

        Although unlikely, it is possible that a dispute filed in the United States Court of Federal Claims could be related to a matter that I worked on in government or private practice. If I am confirmed, and if that situation presents itself, I would apply the standards of 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other pertinent principles of judicial ethics, to determine whether to recuse myself from that matter.

        I am unaware of any other individuals, family or otherwise, that are likely to

present potential conflicts of interest.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would consult applicable rules, canons, and decisions addressing conflicts of interest, including 28 U.S.C. § 455 and the Code of Conduct for United States Judges, and any other materials addressing conflicts of interest and appearances of conflicts of interest. In any close cases, or if any issue arose in which there was a question, I would consult other judges and any persons designated by the court or judicial organizations to provide advice on such questions as they arise.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

From 2008 to 2010 and since 2013, I have worked in public service, as a law clerk on the Court of Appeals for the Federal Circuit and then in the United States Patent and Trademark Office, with details to the United States Department of Justice and the United States Senate. During these years, I have been restricted in my ability to engage in the practice of law on behalf of any entity other than the federal government. My teaching position, while it has occasionally provided a small stipend, is currently and has for most of the years since 2011 been a volunteer position. There, I teach law students once a week about appellate advocacy, encouraging future advocates to improve their skills and to develop a love of appellate advocacy.

In addition, I have volunteered my time in other ways, speaking with students about pursuing a career in science, technology, engineering, and math or in intellectual property law. I volunteer on an ad hoc basis with a number of organizations. I volunteered with Chiefs in Intellectual Property (an organization for advancing women in intellectual property law) and spent about 10 hours working with high school girls from underserved schools, teaching them about possible careers in law and particularly in intellectual property law. I've since kept up with one of the girls who was interested in starting her own business and wanted to register a trademark for her business. I volunteered for about 5 hours on a weekend with Street Law, teaching middle school teachers about advocacy through a case study in its Supreme Court Summer Institute.

From 2006 to 2008 and 2010 to 2013, I worked at a law firm. There, I spent significant time on pro bono legal work. My representations included criminal defense work, a guardian ad litem matter, and assisting a Vietnam veteran pursuing disability compensation from the Department of Veterans Affairs.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In March 2022, Senator Patrick Leahy sent a letter to the White House recommending me for a position on the United States Court of Federal Claims. I am aware that in September 2022 Senator Thom Tillis also sent a letter recommending me for a position on the United States Court of Federal Claims. On November 22, 2022, I was contacted by an attorney in the White House Counsel's Office regarding my interest in being considered for a seat on the United States Court of Federal Claims. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On February 22, 2023, the President announced his intent to nominate me.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Judge Amanda Kathleen Brailsford**
**Nominee to be United States District Judge for the District of Idaho**

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

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

3. Please define the term "living constitution."

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

5. What is implicit bias?

6. Is the federal judiciary affected by implicit bias?

7. Do you have any implicit biases? If so, what are they?

8. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?

9. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

10. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

11. Please identify a Ninth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

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

13. Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

15. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."
    a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?
    c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

16. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."
    a. Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?
    c. Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

17. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
b. Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.
c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

19. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."
    a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?
    c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

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

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

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

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

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

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

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

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

QUESTIONS SUBMITTED TO HON. AMANDA K. BRAILSFORD
BY SENATOR HIRONO

**Written Questions for Judge Amanda K. Brailsford**
**Nominee to the United States District Court for the District of Idaho**
**March 29, 2023**

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

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

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

**Senator Mike Lee**
**Questions for the Record**
**Amanda Brailsford, Nominee to the United States District Court for the District of Idaho**

1. How would you describe your judicial philosophy?

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

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

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

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

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

6. What are the constitutional requirements for standing?

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

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

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

10. What rights are protected under substantive due process?

11. 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?

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

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

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

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

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

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

18. 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?

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

20. 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?

21. 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.

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

23. 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?

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

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

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

27. How do you define "systemic racism?"

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

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

**Senator Josh Hawley**
**Questions for the Record**

**Amanda Brailsford**
**Nominee, U.S. District Court for the District of Idaho**

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

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

3. **Do you consider legislative history when interpreting legal texts?**
   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**
   b. **When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**a. If so, what are they?**

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

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

**a. Do you agree with Judge Learned Hand?**

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

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

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

**17. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?**
   **a. Do you believe that identical texts should be interpreted identically?**
   **b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?**

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

**19. Do federal courts have the legal authority to issue nationwide injunctions?**
   **a. If so, what is the source of that authority?**
   **b. In what circumstances, if any, is it appropriate for courts to exercise this authority?**

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

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

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

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

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

**25. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."**
   **a. What is your view of the scope of the First Amendment's right to free exercise of religion?**
   **b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?**
   **c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?**
   **d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?**

e. **Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?**
f. **Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.**

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

27. **The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).**
    a. **Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?**
    b. **In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?**
    c. **If you disagree with either of these statements, please explain why and provide examples.**

28. **U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.**
    a. **Do you believe it is appropriate for courts to issue "unpublished" decisions?**
    b. **If yes, please explain if and how you believe this practice is consistent with the rule of law.**
    c. **If confirmed, would you treat unpublished decisions as precedential?**
    d. **If not, how is this consistent with the rule of law?**
    e. **If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?**
    f. **Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.**
    g. **Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.**

**29. In your legal career:**
- **a. How many cases have you tried as first chair?**
- **b. How many have you tried as second chair?**
- **c. How many depositions have you taken?**
- **d. How many depositions have you defended?**
- **e. How many cases have you argued before a federal appellate court?**
- **f. How many cases have you argued before a state appellate court?**
- **g. How many times have you appeared before a federal agency, and in what capacity?**
- **h. How many dispositive motions have you argued before trial courts?**
- **i. How many evidentiary motions have you argued before trial courts?**

**30. If any of your previous jobs required you to track billable hours:**
- **a. What is the maximum number of hours that you billed in a single year?**
- **b. What portion of these were dedicated to pro bono work?**

**31. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."**
- **a. What do you understand this statement to mean?**

**32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."**
- **a. What do you understand this statement to mean?**
- **b. Do you agree or disagree with this statement?**

**33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."**
- **a. What do you think Justice Holmes meant by this?**
- **b. Do you agree or disagree with Justice Holmes? Please explain.**

**34. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?**
- **a. If yes, please provide appropriate citations.**

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

**36. What were the last three books you read?**

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

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

**39. Have you ever taken a position in litigation that conflicted with your personal views?**
- **a. How did you handle the situation?**

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

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

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

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

**43. Do you now or have you ever owned a firearm?**

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

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

**46. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**
- **a. *Roe v. Wade*, 410 U.S. 113 (1973)?**
- **b. The Supreme Court's substantive due process precedents?**
- **c. Systemic racism?**
- **d. Critical race theory?**

**47. Do you currently hold any shares in the following companies:**
- **a. Apple?**
- **b. Amazon?**
- **c. Google?**
- **d. Facebook?**
- **e. Twitter?**

**48. Have you ever authored or edited a brief that was filed in court without your name on the brief?**
- **a. If so, please identify those cases with appropriate citation.**

**49. Have you ever confessed error to a court?**
- **a. If so, please describe the circumstances.**

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

**Senator John Kennedy**
**Questions for the Record**

**Judge Amanda Brailsford**

1. Please describe your judicial philosophy. Be as specific as possible.

2. Do you believe the meaning of the Constitution is immutable or does it evolve over time?

3. Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?

4. Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?

5. What First Amendment restrictions can the owner of a shopping center place on private property?

6. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

7. Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?

8. At what point is a human life entitled to equal protection of the law under the Constitution?

9. A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.

    a. Do you agree?

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

10. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?

11. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

12. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.

13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

    a. How many factors are necessary to provide a special justification for overturning precedent?

    b. Is one factor alone ever sufficient?

14. Please explain the difference between judicial review and judicial supremacy.

15. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

16. Under former U.S. Supreme Court Justice Stephen Breyer's view of 'active liberty', is the Ninth Amendment evolving?

17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

    a. Who is included within the meaning of *'the people*'?

    b. Is the term's meaning consistent in each amendment?

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

21. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

22. Could the Privileges or Immunities Clause within the Fourteenth Amendment a source of unenumerated rights?

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

26. How does the Constitution limit the powers of Congress? Please provide examples.

27. Please describe the modern understanding and limits of the Commerce Clause.

28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

32. Please describe your understanding and limits of the anti-commandeering doctrine.

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

34. Is the death penalty constitutional?

35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

37. What restrictions on First Amendment activities can owners of a private shopping center put on their property?

38. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

39. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

40. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

41. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

42. Please describe the legal basis that allows federal courts to issue universal injunctions.

**Questions from Senator Thom Tillis**
**for Amanda Kathleen Brailsford**
**Nominee to be United States District Judge for the District of Idaho**

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

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

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

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

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

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

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

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

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?

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?

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

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

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

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

a. What experience do you have with copyright law?

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

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

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

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice.

However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

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

c. Do you believe that awareness of facts and circumstances from which copyright

infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

    a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

    b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

    c. Do you think it is ***ever*** appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

    d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

**Senator Dick Durbin**
**Chair, Senate Judiciary Committee**
**Written Questions for Judge S. Kato Crews**
**Nominee to be United States District Judge for the District of Colorado**
**March 29, 2023**

1. You have served as a federal magistrate judge since 2018. During your confirmation hearing, you noted that you have issued over 1,500 recommendations and orders while in this role.

   a. **Please give a general overview of your role as a federal magistrate judge. What types of cases do you routinely handle?**

   b. **In how many cases have your decisions been reversed by a reviewing court or affirmed with significant criticism of your substantive or procedural rulings?**

   c. **How many of those cases involved a partial reversal or were the result of new legal developments in the Tenth Circuit?**

2. Federal district court judges are trial court judges. District court judges must be familiar with trial court practice and procedure.

   a. **While in private practice, how many cases did you try to verdict, judgment, or final decision?**

   b. **While serving as a federal magistrate judge, how many cases have you presided over that have gone to verdict or judgment?**

3. All judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a range of legal issues they have not confronted beforehand in their professional practice or judicial service.

   **What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your professional practice or judicial service?**

4. During your confirmation hearing, you were asked several questions pertaining to *Brady v. Maryland*, 373 U.S. 83 (1963) that you said you had not had occasion to address during your time as a magistrate judge. Please provide answers in writing to these questions.

**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Judge Shane Kato Crews**
**Nominee to be United States District Judge for the District of Colorado**

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

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

3. Please define the term "living constitution."

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

5. What is implicit bias?

6. Is the federal judiciary affected by implicit bias?

7. Do you have any implicit biases? If so, what are they?

8. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?

9. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

10. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

11. Please identify a Tenth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

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

13. Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

15. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."
    a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?
    c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

16. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."
    a. Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?
    c. Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

17. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
b. Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.
c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

19. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."
    a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?
    c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

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

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

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

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

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

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

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

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

QUESTIONS SUBMITTED TO HON. S. KATO CREWS
BY SENATOR HIRONO

**Written Questions for Judge S. Kato Crews**
**Nominee to the United States District Court for the District of Colorado**
**March 29, 2023**

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

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

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

**Senator Mike Lee**
**Questions for the Record**
**S. Kato Crews, Nominee to the United States District Court for the District of Colorado**

1. How would you describe your judicial philosophy?

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

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

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

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

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

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

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

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

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

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

11. 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?

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

13. 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?

14. 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.

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

16. 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?

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

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

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

20. How do you define "systemic racism?"

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

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

**Senator Josh Hawley**
**Questions for the Record**

**Shane Kato Crews**
**Nominee, U.S. District Court for the District of Colorado**

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

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

3. **Do you consider legislative history when interpreting legal texts?**
   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**
   b. **When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**a. If so, what are they?**

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

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

**a. Do you agree with Judge Learned Hand?**

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

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

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

**17. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?**
   **a. Do you believe that identical texts should be interpreted identically?**
   **b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?**

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

**19. Do federal courts have the legal authority to issue nationwide injunctions?**
   **a. If so, what is the source of that authority?**
   **b. In what circumstances, if any, is it appropriate for courts to exercise this authority?**

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

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

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

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

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

**25. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."**
   **a. What is your view of the scope of the First Amendment's right to free exercise of religion?**
   **b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?**
   **c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?**
   **d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?**

e. **Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?**
f. **Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.**

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

27. **The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).**
    a. **Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?**
    b. **In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?**
    c. **If you disagree with either of these statements, please explain why and provide examples.**

28. **U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.**
    a. **Do you believe it is appropriate for courts to issue "unpublished" decisions?**
    b. **If yes, please explain if and how you believe this practice is consistent with the rule of law.**
    c. **If confirmed, would you treat unpublished decisions as precedential?**
    d. **If not, how is this consistent with the rule of law?**
    e. **If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?**
    f. **Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.**
    g. **Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.**

**29. In your legal career:**
- **a. How many cases have you tried as first chair?**
- **b. How many have you tried as second chair?**
- **c. How many depositions have you taken?**
- **d. How many depositions have you defended?**
- **e. How many cases have you argued before a federal appellate court?**
- **f. How many cases have you argued before a state appellate court?**
- **g. How many times have you appeared before a federal agency, and in what capacity?**
- **h. How many dispositive motions have you argued before trial courts?**
- **i. How many evidentiary motions have you argued before trial courts?**

**30. If any of your previous jobs required you to track billable hours:**
- **a. What is the maximum number of hours that you billed in a single year?**
- **b. What portion of these were dedicated to pro bono work?**

**31. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."**
- **a. What do you understand this statement to mean?**

**32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."**
- **a. What do you understand this statement to mean?**
- **b. Do you agree or disagree with this statement?**

**33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."**
- **a. What do you think Justice Holmes meant by this?**
- **b. Do you agree or disagree with Justice Holmes? Please explain.**

**34. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?**
- **a. If yes, please provide appropriate citations.**

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

**36. What were the last three books you read?**

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

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

**39. Have you ever taken a position in litigation that conflicted with your personal views?**
- **a. How did you handle the situation?**

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

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

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

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

**43. Do you now or have you ever owned a firearm?**

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

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

**46. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**
- **a. *Roe v. Wade*, 410 U.S. 113 (1973)?**
- **b. The Supreme Court's substantive due process precedents?**
- **c. Systemic racism?**
- **d. Critical race theory?**

**47. Do you currently hold any shares in the following companies:**
- **a. Apple?**
- **b. Amazon?**
- **c. Google?**
- **d. Facebook?**
- **e. Twitter?**

**48. Have you ever authored or edited a brief that was filed in court without your name on the brief?**
- **a. If so, please identify those cases with appropriate citation.**

**49. Have you ever confessed error to a court?**
- **a. If so, please describe the circumstances.**

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

**Questions from Senator Thom Tillis**
**for Shane Kato Crews**
**Nominee to be United States District Judge for the District of Colorado**

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

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

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

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

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

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

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

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

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?

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?

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

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

13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

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

a. What experience do you have with copyright law?

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

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

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

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts

have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

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

c. Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such

material or activities, requiring remedial action?

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

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

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

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested

division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

c. Do you think it is ***ever*** appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire

whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Ms. Molly R. Silfen**
**Nominee to be Judge, United States Court of Federal Claims**

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

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

3. Please define the term "living constitution."

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

5. What is implicit bias?

6. Is the federal judiciary affected by implicit bias?

7. Do you have any implicit biases? If so, what are they?

8. How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?

9. Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?

10. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

11. Please identify a Federal Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

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

13. Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?

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

    a. Was *Brown v. Board of Education* correctly decided?
    b. Was *Loving v. Virginia* correctly decided?
    c. Was *Griswold v. Connecticut* correctly decided?
    d. Was *Roe v. Wade* correctly decided?
    e. Was *Planned Parenthood v. Casey* correctly decided?
    f. Was *Gonzales v. Carhart* correctly decided?
    g. Was *District of Columbia v. Heller* correctly decided?
    h. Was *McDonald v. City of Chicago* correctly decided?
    i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
    j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
    k. Was *Dobbs v. Jackson Women's Health* correctly decided?

15. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."
    a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?
    c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

16. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."
    a. Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?
    c. Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

17. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
b. Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.
c. Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.
d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

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

19. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."
    a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?
    b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?
    c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

20. Please describe the selection process that led to your nomination, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

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

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

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

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

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

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

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

QUESTIONS SUBMITTED TO MOLLY R. SILFEN
BY SENATOR HIRONO

**Written Questions for Molly Silfen**
**Nominee to the Court of Federal Claims**
**March 29, 2023**

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

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

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

**Senator Mike Lee**
**Questions for the Record**
**Molly Silfen, Nominee to the United States Court of Federal Claims**

1. What legal experience do you think is necessary for a person to make a good Court of Federal Claims judge, and what have you done to gain this experience?

2. How would you describe your judicial philosophy?

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

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

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

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

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

7. What are the requirements for standing in the Court of Federal Claims?

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

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

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

11. What rights are protected under substantive due process?

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?

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

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

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

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?

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

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

19. 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?

20. What role does precedent play in the opinions of a Court of Federal Claims judge?

21. 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.

22. 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?

23. 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?

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color;

members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

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

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

27. How do you define "systemic racism?"

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

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

30. The Court of Federal Claims has been called "the keeper of the Nation's conscience" and the "People's court." How do you see the court fulfilling such a role? How do you see yourself fulfilling this role if you are confirmed?

**Senator Josh Hawley**
**Questions for the Record**

**Molly Silfen**
**Nominee, U.S. Court of Federal Claims**

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

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

3. **Do you consider legislative history when interpreting legal texts?**
   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**
   b. **When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**a. If so, what are they?**

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

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

**a. Do you agree with Judge Learned Hand?**

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

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

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

**17. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?**
   **a. Do you believe that identical texts should be interpreted identically?**
   **b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?**

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

**19. Do federal courts have the legal authority to issue nationwide injunctions?**
   **a. If so, what is the source of that authority?**
   **b. In what circumstances, if any, is it appropriate for courts to exercise this authority?**

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

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

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

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

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

**25. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."**
   **a. What is your view of the scope of the First Amendment's right to free exercise of religion?**
   **b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?**
   **c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?**
   **d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**29. In your legal career:**
- **a. How many cases have you tried as first chair?**
- **b. How many have you tried as second chair?**
- **c. How many depositions have you taken?**
- **d. How many depositions have you defended?**
- **e. How many cases have you argued before a federal appellate court?**
- **f. How many cases have you argued before a state appellate court?**
- **g. How many times have you appeared before a federal agency, and in what capacity?**
- **h. How many dispositive motions have you argued before trial courts?**
- **i. How many evidentiary motions have you argued before trial courts?**

**30. If any of your previous jobs required you to track billable hours:**
- **a. What is the maximum number of hours that you billed in a single year?**
- **b. What portion of these were dedicated to pro bono work?**

**31. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."**
- **a. What do you understand this statement to mean?**

**32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."**
- **a. What do you understand this statement to mean?**
- **b. Do you agree or disagree with this statement?**

**33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."**
- **a. What do you think Justice Holmes meant by this?**
- **b. Do you agree or disagree with Justice Holmes? Please explain.**

**34. Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?**
- **a. If yes, please provide appropriate citations.**

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

**36. What were the last three books you read?**

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

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

**39. Have you ever taken a position in litigation that conflicted with your personal views?**
- **a. How did you handle the situation?**

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

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

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

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

**43. Do you now or have you ever owned a firearm?**

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

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

**46. In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**
- **a. *Roe v. Wade*, 410 U.S. 113 (1973)?**
- **b. The Supreme Court's substantive due process precedents?**
- **c. Systemic racism?**
- **d. Critical race theory?**

**47. Do you currently hold any shares in the following companies:**
- **a. Apple?**
- **b. Amazon?**
- **c. Google?**
- **d. Facebook?**
- **e. Twitter?**

**48. Have you ever authored or edited a brief that was filed in court without your name on the brief?**
- **a. If so, please identify those cases with appropriate citation.**

**49. Have you ever confessed error to a court?**
- **a. If so, please describe the circumstances.**

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

**Questions from Senator Thom Tillis**
**for Molly Rebecca Silfen**
**Nominee to the United States Court of Federal Claims**

1.Please describe your understanding of the workload of the Federal Claims Court. If confirmed, how do you intend to manage your caseload?

2. The Federal Claims jurisdiction is based upon subject matter rather than geographic location. How has your background prepared you to address the variety of issues, including appeals from administrative agencies, which you will hear?

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

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

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

6. Please share your understanding of how intellectual property related matters come before the U.S. Court of Federal Claims.

7. What are your thoughts regarding the importance of intellectual property rights, specifically related to patents?

8. What are your thoughts on the USPTO Patent Trial and Appeal Board (PTAB) and the role it currently plays in our intellectual property laws?

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

10. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

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

    a. What experience do you have with copyright law?

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

    c. What experience do you have addressing intermediary liability for online service

providers that host unlawful content posted by users?

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

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

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

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

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

13. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much

more slowly and there was a lot less infringing material online.

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

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

**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Judge Amanda Kathleen Brailsford**
**Nominee to be United States District Judge for the District of Idaho**

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

   Response: I am not familiar with this statement or the context in which it was made. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent. To the extent "independent value judgments" in the referenced statement means personal preferences, beliefs, or values, then I disagree with the statement. If confirmed, I would be duty bound to apply Supreme Court and Ninth Circuit precedent regardless of my personal preferences, beliefs, or values.

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

   Response: I am not familiar with Judge Reinhardt's statement or the context in which it was made. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent. To the extent the statement suggests it is appropriate for a judge not to follow mandatory precedents, that is not an approach I follow as an Idaho Court of Appeals judge, and I would not take that approach if confirmed.

3. **Please define the term "living constitution."**

   Response: According to Black's Law Dictionary (11th ed. 2019), a "living constitution" is "[a] constitution whose interpretation and application can vary overtime according to changing circumstances and changing social values."

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

Response: I am not familiar with what Justice Brown Jackson said in 2013 about a "living constitution" so I can neither agree nor disagree with her comments. The Supreme Court has stated that the Founders created the Constitution to "endure for ages," "to be adapted to various crises of human affairs," and to apply "to circumstances beyond those the Founders specifically anticipated," although its meaning is "fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assoc.*, *Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

5. **What is implicit bias?**

Response: I do not have a definition for this phrase.

6. **Is the federal judiciary affected by implicit bias?**

Response: I have not studied the effects of implicit bias on the federal judiciary and do not have a basis to conclude that it either affects or does not affect the judiciary. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow the Supreme Court and Ninth Circuit precedents, and impartially apply those authorities to the facts of the case to resolve the issues properly presented.

7. **Do you have any implicit biases? If so, what are they?**

Response: I am not aware that I have any implicit biases. As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow Supreme Court and Ninth Circuit precedent, and impartially apply those authorities to the facts of the case to resolve the issues properly presented.

8. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: I do not understand the meaning of the terms "attacks" and "mere criticism" in this context, which suggests a fact-specific scenario. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the merits of any matter that may come before any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). Generally, however, an individual has a constitutionally protected First Amendment rights to free speech and assembly but those rights do not extend to protect unlawful conduct. *See, e.g.*, 18 U.S.C. § 1507 (prohibiting certain activities); *Virginia v.*

*Black*, 538 U.S. 343, 359 (2003) (discussing limitations for fighting words, inciting or producing imminent lawless action, and true threats). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent to questions of constitutionally protected rights.

9. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: If confirmed, 18 U.S.C. § 3553(a)(1)-(7) and Supreme Court and Ninth Circuit precedent would guide my sentencing approach. I would weigh all factors, including those identified in § 3553(a)(2). Section 3553(a) does not assign one factor any more weight than another factor. In sentencing defendants, I would not consider my personal beliefs, if any.

10. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow Supreme Court and Ninth Circuit precedent, and impartially apply those authorities to the facts of the case to resolve the issues properly presented. I am not familiar with all the Supreme Court decisions issued in the last 50 years and do not know if any one Supreme Court decision is typical of my judicial philosophy.

11. **Please identify a Ninth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution and apply the laws fairly and impartially. If confirmed, I would approach each case with an open mind, research and understand the applicable laws, follow Supreme Court and Ninth Circuit precedent, and impartially apply those authorities to the facts of the case to resolve the issues properly presented. I am not familiar with all the Ninth Circuit decisions issued in the last 50 years and do not know if any one Ninth Circuit decision is typical of my judicial philosophy.

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

Response: Section 1507 of Title 18 of the United States Code generally prohibits: (1) picketing or parading in or near a building housing a court of the United States; (2) picketing or parading in or near a building or residence occupied or used by a judge, juror, witness, or court officer; and (3) using any sound-track or similar device or

demonstrating in or near such residence, if done with the intent to influence those persons or to interfere, obstruct, or impede the administration of justice.

13. **Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I am not aware that the Supreme Court has ruled on the constitutionality of 18 U.S.C. § 1507. The Court, however, in *Cox v. Louisiana*, 379 U.S. 559, 561, 564 (1965), held that a Louisiana statute "modeled after a bill pertaining to the federal judiciary" later enacted as 18 U.S.C. § 1507 was facially valid.

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

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

Response: Yes. As a sitting judge on the Idaho Court of Appeals and judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown v. Board of Education*, 349 U.S. 294 (1955), however, is one of a small number of well-established decisions holding a uniquely foundational position on constitutional law not likely to arise again in any court.

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

Response: Yes. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Loving v. Virginia*, 388 U.S. 1 (1967), however, is one of a small number of well-established decisions holding a uniquely foundational position on constitutional law not likely to arise again in any court.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply *Griswold v. Connecticut*, 381 U.S. 479 (1965), and all other Supreme Court and Ninth Circuit precedent.

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

Response: The United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), overruled *Roe v. Wade*, 410 U.S. 113 (1973). As a sitting judge and judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United

States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

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

Response: The United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), overruled *Planned Parenthood of Southeastern, Pa. v. Casey*, 505 U.S. 833 (1992). As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

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

Response: As sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply this precedent and all other Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

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

Response: *See* Response to Question 14f above.

15. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No.

16. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**

a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

Response: No.

19. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No.

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

Response: On January 14 and 18, 2022, Idaho Senator Mike Crapo's chief of staff contacted me about my interest in the position. On January 25, I spoke to Senator Crapo about that subject. On February 3, Idaho Senator Jim Risch's chief of staff interviewed me; on February 15, both Senators' chiefs of staff interviewed me; and then on February 22, Senators Crapo and Risch interviewed me. On March 17, Senators Crapo and Risch notified me they had submitted my name to the White House for consideration.

On April 22, 2022, I interviewed with attorneys from the White House Counsel's Office, and I have had contact with White House Counsel's Office officials since that date. On April 29, I was notified that my name was being submitted to the Office of Legal Policy at the Department of Justice for vetting. Since May 2, 2022, I have been in contact with officials from the Office of Legal Policy. On January 18, 2023, the President announced his intent to nominate me, and on January 31, the nomination was sent to the Senate.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: *See* Response to Question No. 20 above.

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

Response: In responding to these questions, I reviewed my prior submissions, including my answers to the Senate Judiciary Questionnaire and my calendars for the years 2022

and 2023. I personally conducted research and read authorities cited in these questions as necessary to refresh my memory, and I generally discussed my responses with and received feedback from the Office of Legal Policy at the Department of Justice.

RESPONSES OF HON. AMANDA K. BRAILSFORD TO QUESTIONS SUBMITTED BY SENATOR HIRONO

**Written Questions for Judge Amanda K. Brailsford**
**Nominee to the United States District Court for the District of Idaho**
**March 29, 2023**

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

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

      Response: No.

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

      Response: No.

**Senator Mike Lee**
**Questions for the Record**
**Amanda Brailsford, Nominee to the United States District Court for the District of Idaho**

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

Response: As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and then legislative history only if necessary. *See, e.g., N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating"); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (ruling that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material" and that "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"); *United States v. Craft*, 535 U.S. 274, 287 (2002) (noting "risk of relying" on certain legislative history and that "failed legislative proposals" are particularly dangerous ground).

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

Response: If confirmed, I would look to the Constitutional provision at issue and follow Supreme Court and Ninth Circuit precedent for interpreting that constitutional provision. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (noting "established method of substantive-due-process analysis" inquires whether rights are deeply rooted in Nation's history and tradition and implicit in concept of ordered liberty); *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022) ("The government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation."). In the rare instance of an interpretation question of first impression of a constitutional provision, I would look to Supreme Court and Ninth Circuit precedent for the analysis method and interpret the provision using that method. For example, the Supreme Court looked to the original public meaning of the Second Amendment in *District of*

*Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (noting analysis guided by principle that Constitution was written to be understood by voters and words and phrases were used in their normal, ordinary meaning). *See also Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (referring to "original public understanding of the Fifth Amendment").

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

Response: The Supreme Court has analyzed the original public meaning of the Constitution's text in interpreting the meaning of a constitutional provision including, for example, the Second and Fifth Amendments. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (referring to "original public understanding of the Fifth Amendment"); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (defining "original public meaning"). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 2 above. The plain meaning of the statute controls, if that language is unambiguous. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (ruling "the authoritative statement is the statutory text").

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

Response: The Supreme Court generally "interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). Similarly, the Court has stated that in interpreting the Constitution:

> [W]e are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

*District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (citations, quotations and brackets omitted).

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

Response: Article III standing requires that: (1) The plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. (2) There must be a causal connection between the injury and the conduct of which the plaintiff complains, i.e., the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court. (3) That the court will redress the injury by a favorable decision must be likely as opposed to merely speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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

Response: Article I, Section 8 of the Constitution enumerates Congress's powers, including to make all laws "necessary and proper" for carrying into execution the enumerated powers. The Supreme Court in *McCulloch v. Maryland*, 17 U.S. 316 (1819), initially defined this clause by explaining: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. The Court emphasized that the word "necessary" does not mean "absolutely necessary." *Id.* at 413–415; *see also Jinks v. Richland County,* 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power."). More recently, in *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (citations, quotations, and brackets omitted), the Court ruled:

> [T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal Government is acknowledged by all to be one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers. But, at the same time, a government, entrusted with such powers must also be entrusted with ample means for their execution. Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful or conducive to the authority's beneficial exercise.

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

Response: The Supreme Court in *National Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534-355 (2012) (citations, quotations, and brackets omitted), stated:

> The Federal Government is acknowledged by all to be one of enumerated powers. That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal

> Government's powers. . . . The enumeration of powers is also a limitation of powers, because the enumeration presupposes something not enumerated. The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it. . . . . If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

The Court in *Sebelius* also stated, however, that "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Id.* at 570 (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). If confirmed, I would follow Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendment protect certain fundamental rights that are so deeply rooted in our history and tradition that they are essential to the Nation's scheme of ordered liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022); *see also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (noting Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights that are deeply rooted in Nation's history and tradition and implicit in concept of ordered liberty). Fundamental rights that the Supreme Court has previously recognized include: (1) the right to marry a person of a different race; (2) the right to marry while in prison; (3) the right to obtain contraceptives; (4) the right to reside with relatives; (5) the right to make decisions about the education of one's children; (6) the right not to be sterilized without consent; (7) the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; (8) the right to engage in private, consensual sexual acts; and (9) the right to marry a person of the same sex. *Dobbs*, 142 S. Ct. at 2257-58.

**10. What rights are protected under substantive due process?**

Response: *See* Response to Question 9 above.

**11. 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: A judge has a duty to apply binding precedent. Because *Ferguson v. Skrupa*, 372 U.S. 726 (1963), overruled *Lochner v. New York*, 198 U.S. 45 (1905), *Lochner* is no longer binding precedent. Likewise, because *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022), overruled *Roe v. Wade*, 410 U.S. 113 (1973), *Roe* is no longer binding precedent. If confirmed, I would faithfully

apply the binding Supreme Court and Ninth Circuit precedent, regardless of my personal beliefs if any.

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

Response: The Supreme Court explained the limits on Congress's powers under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted):

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

In *United States v. Morrison*, 529 U.S. 598, 617 (2002), the Supreme Court ruled that Congress may not "regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."

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

Response: The Supreme Court explained that a group qualifies as a "suspect class" if it "possess[es] an immutable characteristic determined solely by the accident of birth" or if it is "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). The suspect classifications to which strict scrutiny applies include race, religion, nationality, and alienage. *See, e.g., Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1876-77 (2021) (applying strict scrutiny to religion where law was not neutral and generally applicable); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971) (applying strict scrutiny to alienage); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (applying strict scrutiny to race); *Oyama v. California*, 332 U.S. 633, 644-(1948) (applying strict scrutiny to nationality).

**14. 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 is a constitutional doctrine under which the Constitution grants separate, unique powers to each of the three branches of government under Article I, the Congress; Article II, the Executive; and Article III, the Judiciary. Because the Constitution grants different powers to these branches, each is given powers to check and balance the other two branches.

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

Response: If confirmed, I would look to Supreme Court and Ninth Circuit precedent to decide a case in which one branch assumed an authority the Constitution's text did not grant to it. For example, in *Youngstown v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the President lacked the power to seize steel mills in the absence of Congress's statutory authority conferring such power to him:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits hi functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States."

*Id.* at 587-588.

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

Response: A judge's obligation is to apply the legal binding precedents to the established facts of a case.

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

Response: Neither result is better nor worse. Both results are undesirable and should be avoided. If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent in determining the constitutionality of a law.

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

Response: I have not studied this trend and do not have a belief about why it occurred. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent in reviewing the actions of other branches or levels of government.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" to include a court's power to review the actions of other branches or levels of government; the courts' power to invalidate legislative and executive actions as being unconstitutional; the constitutional doctrine providing for this power; and a court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary defines "judiciary supremacy" to mean the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review are binding on the coordinate branches of the federal government and the states. The doctrine applies to judicial determinations that some legislation or other action is unconstitutional.

20. **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: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not counsel elected officials on their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions. Regardless, the Supreme Court has held elected officials have an obligation to obey federal court decisions in *Cooper v. Anderson*, 358 U.S. 1, 4 (1955) (rejecting argument state officials have no duty to obey federal court orders).

21. **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: A judge's role is limited to applying the rule of law to the established facts regardless of his personal beliefs or feelings. Complying with this limited role is essential to maintaining the judiciary's integrity and the public's confidence in the judiciary.

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

Response: A district judge must apply the Supreme Court and (in my case if confirmed) Ninth Circuit precedent. A judge has no authority to and should not question binding precedent but rather should apply existing precedent to the facts of the case at issue. The Supreme Court has made clear that only it has the prerogative to overrule its precedent. *Bosse v. Oklahoma*, 580 U.S. 1, 2 (2016) (per curiam); *see also Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019) (noting court is mindful of Supreme Court's prerogative to overrule Supreme Court precedent).

**23. 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: Section 3553(a)(1)-(7) of Title 18 of the United States Code governs sentencing. Any consideration of a defendant's group identities is not appropriate. Sentencing Guideline §5H1.10 provides that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence."

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

Response: I am not familiar with the Biden Administration's definition of "equity" or in what context the Administration used it. Black's Law Dictionary (11th ed. 2019) defines "equity" to include fairness, impartiality and evenhanded-ness." As a sitting judge for the Idaho Court of Appeals and a judicial nominee, I should not comment on an elected official's position. To do so may call into question my impartiality or be construed as prejudicing an issue that could come before me either if I am confirmed or as an Idaho Court of Appeals judge.

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

Response: As noted above, Black's Law Dictionary (11th ed. 2019) defines "equity" to include fairness, impartiality and evenhanded-ness. Meanwhile, Black's Law Dictionary defines "equality" as including the quality, state or condition of being equal especially in likeness in power or political status.

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

Response: The Fourteenth Amendment guarantees "the equal protection of the laws." If confirmed, I would faithfully follow the Supreme Court and Ninth Circuit precedent regarding the guarantees of the Equal Protection Clause.

**27. How do you define "systemic racism?"**

Response: I do not have a definition for this phrase.

**28. How do you define "critical race theory?"**

Response: Black's Law Dictionary (11th ed. 2019) defines "critical race theory" as:

> 1. A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism. 2. The body of work produced by adherents to this theory.

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

Response: *See* Responses to Questions 27 and 28 above.

**Senator Josh Hawley**
**Questions for the Record**

**Amanda Brailsford**
**Nominee, U.S. District Court for the District of Idaho**

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

   Response: No.

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

      Response: *See* Response to Question 1 above.

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

   Response: The Supreme Court has analyzed the Constitution's original public meaning in interpreting the Constitution in certain issues such as, for example, the Second Amendment and the Fifth Amendment. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (referring to "original public understanding of the Fifth Amendment"); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (defining "original public meaning"). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent in determining whether to rely on the Constitution's original public meaning in analyzing an issue.

3. **Do you consider legislative history when interpreting legal texts?**

   Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and then legislative history only if necessary.

   Regarding legislative history, the Supreme Court has explained in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), that:

   > Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is

> vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

*Id.* (citation omitted); *see also N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating").

**a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

Response: Certain legislative history may be less probative of legislative intent than other legislative history. For example, the Supreme Court in *United States v. Craft*, 535 U.S. 274, 287 (2002), noted the "risk of relying" on certain legislative history and that "failed legislative proposals" are particularly dangerous ground on which to interpret a statute. *See, e.g., N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating"); *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." (quotations and brackets omitted)).

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

Response: The Constitution is a domestic document and the laws of foreign nations generally have no relevance in interpreting the Constitution. The Supreme Court, however, has considered English common law in interpreting the Constitution's original public meaning. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144, 2153-54 (2018) (discussing English common law). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent to interpret the Constitution.

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

Response: To establish an execution protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment, a petitioner must "establish that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself" and "'identify an alternative method that is feasible, readily implemented, and in fact significantly reduces' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (brackets omitted) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). The Ninth Circuit has applied the standard in *Glossip* to resolve an Eighth Amendment claim. *Atwood v. Shinn*, 36 F.4th 901, 903-04 (9th Cir. 2022).

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

Response: *See* Response to Question 4 above. A petitioner is required to identify an alternative method that is feasible, readily implemented, and significantly reduces the risk of harm involved. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022).

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

Response: In *Osborne v. District Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005), the Ninth Circuit held that a habeas corpus petitioner has a right to DNA testing. The Supreme Court, however, overruled this decision in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73-74 (2009), ruling that there is no "freestanding right to access DNA evidence for testing" under the Due Process Clause of the Constitution. The Court noted, however, that a habeas corpus petitioner may allege a federal actual innocence claim, which if viable would permit discovery for good cause. *Id.* at 72.

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

Response: No.

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

Response: Laws incidentally burdening religion are ordinarily not subject to strict scrutiny as long as they are neutral and generally applicable. *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1876 (2021). If a law is neutral and generally

applicable, it is subject to rational basis review. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "Facial neutrality is not determinative," however. *Id.* at 534. A law is not neutral and generally applicable if, for example, it is specifically directed at a religious practice, *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2422 (2022); prohibits religious conduct while permitting secular conduct undermining the government's asserted interest in a similar way, *id.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam); or is hostile to religion or a religious viewpoint, *Masterpiece Cakestop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Lukumi*, 508 U.S. at 534. If a law is not neutral and generally applicable, it is subject to strict scrutiny. *See, e.g., Tandon*, 141 S. Ct. at 1296 (applying strict scrutiny to regulations treating comparable secular activities more favorably); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (applying "least-restrictive-means standard" where mandate required "severe" economic consequences).

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

Response: *See* Response to Question 8 above.

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

Response: The Ninth Circuit follows Supreme Court precedent. The Supreme Court has ruled that the Court's function is not to determine whether a plaintiff's religious belief is "mistaken or unreasonable." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 686 (2014). Rather, the Court's narrow function is to determine whether a plaintiff's asserted religious belief reflects "'an honest conviction.'" *Id.* (quoting *Thomas v. Review Bd. Of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981)).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595, 610, 628-29 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms unconnected to militia service, including to keep and use firearms for the protection of one's home and family. Further, the Court held that requiring firearms in a home to be rendered and kept inoperable at all times is unconstitutional. *Id.* at 630.

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

Response: No. The Idaho Court of Appeals did issue *Peterson v. Gunderson*, No. 48781, 516 P.3d 1095 (Ct. App. 2022), which I authored. In that case, the plaintiff, who had a prior felony conviction for sexual exploitation of a child, challenged the sheriff's denial of his application to carry a concealed weapon. *Id.* at 1097. The plaintiff in that case, however, did not assert a constitutional challenge to the statutory scheme at issue.

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

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

Response: Justice Holmes explained this statement by writing:

> [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

*Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). To the extent Justice Holmes' comments mean a judge's personal views are not a basis to conclude a statute is unconstitutional, I agree.

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

Response: In *Ferguson v. Skrupa*, 372 U.S. 726, (1963), the Supreme Court overruled *Lochner v. New York*, 198 U.S. 45 (1905). As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), held that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority," overruling *Korematsu v. United States*, 323 U.S. 214 (1944). In doing so, the Court stated that the dissent's reference to *Korematsu* "affords this Court the opportunity to express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in the law under the Constitution.'" *Trump*, 138 S. Ct. at 2423. I understand this statement to mean that *Korematsu* was wrongly decided.

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

Response: I am not aware of any Supreme Court opinions, which are no longer good law but which the Court has not yet formally overruled.

**a. If so, what are they?**

Response: *See* Response to Question 14 above.

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

Response: Without exception, I would faithfully apply the Supreme Court precedent.

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

**a. Do you agree with Judge Learned Hand?**

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court, including what constitutes a monopoly. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 15a above.

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

Response: The Ninth Circuit has ruled that "[a] market share of sixty-five percent or more usually establishes a prima facie case of monopoly power" in the context of 15 U.S.C. § 2. *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 484 (9th Cir. 2021). The Supreme Court, however, has stated that "[o]bviously no magic inheres in numbers," but rather "[t] he relative effect of percentage command of a market varies with the setting in which that factor is placed." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 (1953) (quotations omitted).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as:

> The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law. An example is the nonstatutory law applying to interstate streams of commerce.

The Supreme Court has explained in *Rodriguez v. Federal Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020), the federal courts' role in creating federal common law:

> Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the States. *See* Art. I, § 1; Amdt. 10. As this Court has put it, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S. Ct. 2739, 159 L.Ed.2d 718 (2004). These areas have included admiralty disputes and certain controversies between States. *See, e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23, 125 S. Ct. 385, 160 L.Ed.2d 283 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S. Ct. 803, 82 L.Ed. 1202 (1938). In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. The Sixth Circuit correctly identified one of the most basic: In the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'"

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

Response: If confirmed, I would apply state law to determine the scope of a state constitutional right. The Supreme Court has held that "the state courts are the ultimate

expositors of state law" and that federal courts are bound by the state's "constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

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

Response: *See* Response to Question 17 above.

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

Response: Yes. The Supreme Court in *Mills v. Rogers*, 457 U.S. 291, 300 (1982), held that "the substantive rights provided by the Federal Constitution define only a minimum"; state laws "may recognize liberty interests more extensive than those independently protected by the Federal Constitution"; and "broader state protections would define the actual substantive rights possessed by a person living within that State."

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

Response: Yes. As a sitting judge on the Idaho Court of Appeals and judicial nominee, I should not comment on the "correctness" of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). *Brown v. Board of Education*, 349 U.S. 294 (1955), however, is one of a small number of well-established decisions holding a uniquely foundational position on constitutional law not likely to arise again in any court.

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

Response: The Supreme Court has previously upheld nationwide injunctions. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). Federal Rule of Civil Procedure 65 provides the procedure by which a court may issue a preliminary injunction. A preliminary injunction is an extraordinary remedy never awarded as a matter of right but rather may only to be awarded upon a clear showing that the plaintiff is entitled to the requested relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; he is likely to suffer irreparable harm in the absence of preliminary relief; the balance of equities tip in his favor; and an injunction is in the public interest. *Id.* at 20.

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

Response: *See* Response to Question 19 above.

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

Response: *See* Response to Question 19 above.

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

Response: *See* Response to Question 19 above.

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

Response: The Supreme Court has articulated the role of federalism in our constitutional system in *Bond v. United States*, 564 U.S. 211, 220-22 (2011):

> The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine,* 527 U.S. 706, 758, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.
>
> Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.
>
> But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States,* 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting *Coleman v. Thompson,* 501 U.S. 722, 759, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991) (Blackmun, J., dissenting)).
>
> Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft,* 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a

remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *See ibid.* By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. *See New York, supra,* at 181, 112 S. Ct. 2408. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

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

Response: Various abstention doctrines require or allow a federal court to refuse to hear a case if doing so would intrude on the powers of another court. Examples of these doctrines include:

(1) The *Younger* abstention doctrine provides that when there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution. *Sprint Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). This doctrine has been extended to state civil proceedings that are akin to criminal prosecutions or that implicate a State's interest in enforcing the orders and judgments of its courts. *Id.* at 72-73.

(2) The *Pullman* abstention doctrine is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. Abstention is appropriate when: (a) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (b) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (c) the possibly determinative issue of state law is unclear. *The San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998).

(3) Under the *Colorado River* abstention doctrine, a federal court determines whether to abstain from resolving a case pending the resolution of a parallel state action. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017). The court evaluates eight factors in assessing the appropriateness of a *Colorado River* stay or dismissal, including (1) which court first assumed jurisdiction over any

property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Id.* at 841-42.

(4) The *Burford* abstention doctrine allows a federal court to dismiss a case only if it presents difficult questions of state law bearing on policy problems of substantial public import, the importance of which transcends the result in the case, or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996).

(5) The *Thibodaux* abstention doctrine allows a federal court to abstain in cases involving unresolved state law questions that are "intimately involved with the [state's] sovereign prerogative." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *see also City of Tucson v. U.S. West Comm'ns, Inc.*, 284 F.3d 1128, 1134 (9th Cir. 2002) ( "In *Thibodaux*, the Supreme Court approved a district court's decision to abstain from hearing an eminent domain case where state law apportioning power between the city and the state was uncertain, and any decision by the federal district court would affect state sovereignty.").

(6) Although not technically an abstention doctrine, the *Rooker-Feldman* doctrine is sometimes referred to as such a doctrine. "Under *Rooker–Feldman*, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court. The United States Supreme Court is the only federal court with jurisdiction to hear such an appeal." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003).

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

Response: An award of compensatory damages and injunctive relief have distinct purposes. An award of damages generally compensates a party for a proven loss or harm already sustained. *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 871 (9th Cir. 2017). In contrast, injunctive relief is intended to prevent irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The disadvantages and advantages of damages versus injunctive relief will depend on the specific facts of a particular case.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments

protect fundamental rights that are deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty. Fundamental rights that the Supreme Court has previously recognized include: (1) the right to marry a person of a different race; (2) the right to marry while in prison; (3) the right to obtain contraceptives; (4) the right to reside with relatives; (5) the right to make decisions about the education of one's children; (6) the right not to be sterilized without consent; (7) the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures; (8) the right to engage in private, consensual sexual acts; and (9) the right to marry a person of the same sex. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257-58 (2022).

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

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

Response: *See* Response to Question 8 above.

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

Response: In *Lee v. Weisman*, 505 U.S. 577, 591 (1992), the Supreme Court held that the Free Exercise Clause of the First Amendment protects both freedom of religion and freedom of conscience. Further, the Supreme Court in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022), ruled that:

> The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.

*Id.* at 2421 (quotations omitted).

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

Response: *See* Response to Question 8 above.

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

Response: *See* Response to Question 10 above.

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

Response: The Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ___, 140 S. Ct. 2367, 2383 (2020) (noting RFRA provides very broad protection and applies to all Federal law).

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

Response: No.

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

Response: The Supreme Court has held that the Constitution "does not require any particular form of words to be used in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). If confirmed, I would instruct the jury on the definition of reasonable doubt using the Ninth Circuit Model Jury Instruction 3.5.

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

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the merits of any matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 27a.

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

Response: *See* Response to Question 27a.

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

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

Response: Ninth Circuit Rule 36-3 provides that unpublished Ninth Circuit disposition and orders are not precedent except under the doctrine of the law of the case or under the rules of claim or issue preclusion; may be cited to Ninth Circuit courts on or after January 1, 2007; and may not be cited before January 1, 2007 unless under the doctrine of the law of the case, for purposes of issue or claim preclusion, to show double jeopardy, notice of sanctionable conduct, entitlement to attorney fees, or the existence of a related case. If confirmed, I would follow the Ninth Circuit local rules and precedent regarding unpublished opinions.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

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

Response: See Response to Question 28a.

**29. In your legal career:**

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

Response: I have tried three cases as first chair.

**b. How many have you tried as second chair?**

Response: I have tried three cases as second chair.

**c. How many depositions have you taken?**

Response: I have taken about 100 depositions.

**d. How many depositions have you defended?**

Response: I have defended about 100 depositions.

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

Response: I have not argued any cases before a federal appellate court but have briefed many which were submitted without argument.

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

Response: I have argued five cases before state appellate courts.

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

Response: I have appeared approximately five times before the Equal Employment Opportunity Commission as counsel.

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

Response: I have argued approximately 30 dispositive motions before trial courts.

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

Response: I have argued approximately 20 evidentiary motions before trial courts.

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

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

Response: While in private practice, I billed 2000 hours or more annually.

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

Response: On average, I dedicated at least 100 hours to pro bono activities annually.

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

**a. What do you understand this statement to mean?**

Response: I am not familiar with the statement or its context, but on its face, it appears to mean that a good judge who faithfully applies the law may have to reach a result inconsistent with his personal views.

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

**a. What do you understand this statement to mean?**

Response: I am not familiar with the statement or its context, but on its face, it appears to mean that judges fairly and impartially apply the rule of law.

**b. Do you agree or disagree with this statement?**

Response: I agree judges should fairly and impartially apply the law.

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

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

Response: I am not familiar with the statement or its context, but on its face, it appears to mean that judges should impartially apply the law.

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

Response: I agree judges should impartially apply the law.

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

Response: No.

**a. If yes, please provide appropriate citations.**

Response: *See* Response to Question 34.

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

Response: I have not deleted or attempted to delete any content from social media.

**36. What were the last three books you read?**

Response: *Against All Odds* by Alex Kershaw, *Where Men Win Glory* by Jon Krakauer, and *Dune* by Frank Herbert.

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

Response: I am unaware of a universally recognized definition of "systemic racism." If confirmed, I would faithfully apply the laws prohibiting racial discrimination.

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

Response: I am most proud of my representation of Idaho growers in various matters, including antitrust litigation and crop damage cases.

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

Response: Yes.

**a. How did you handle the situation?**

Response: I complied with my duty as an attorney to represent my clients zealously regardless of my personal beliefs, while at the same time complying with all other ethics rules, including my duty of candor to the court.

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

Response: Yes.

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

Response: I do not often read the works of law professors.

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

Response: No particular Federalist Paper has shaped my views of the law.

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

Response: In addressing legal issues, my understanding of the law may evolve as I read applicable authorities. I have no specific recollection, however, of any one opinion or article changing my mind.

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

Response: The Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022), declined to address this issue leaving it for the voters in the States. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent on this issue regardless of my personal beliefs, if any.

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

Response: In approximately 2013, I testified as a witness in a malpractice action against a law firm. The testimony is not available to me.

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

**a. *Roe v. Wade*, 410 U.S. 113 (1973)?**

Response: No.

**b. The Supreme Court's substantive due process precedents?**

Response: No.

**c. Systemic racism?**

Response: No.

**d. Critical race theory?**

Response: No.

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

**a. Apple?**

Response: Yes.

**b. Amazon?**

Response: No.

**c. Google?**

Response: No.

**d. Facebook?**

Response: No.

**e. Twitter?**

Response: No.

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

Response: While an attorney in private practice, colleagues would occasionally request me to review their briefs. I have no specific recollection, however, of making significant substantive changes or of the cases in which those briefs were filed.

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

Response: *See* Response to Question 47 above.

**48. Have you ever confessed error to a court?**

Response: I do not recall having ever confessed an error to a court.

**a. If so, please describe the circumstances.**

Response: *See* Response to Question 48 above.

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

Response: I swore an oath to be truthful when testifying to the Committee and complied with that oath.

**Senator John Kennedy**
**Questions for the Record**

**Judge Amanda Brailsford**

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

   Response: As an Idaho Court of Appeals judge, I support and defend both the United States Constitution and the Idaho Constitution. I approach each case with an open mind, research and understand the law, and fairly and impartially apply the binding precedent to the facts of the case to resolve the issues properly presented. If confirmed, I would follow the same approach and faithfully apply Supreme Court and Ninth Circuit precedent.

2. **Do you believe the meaning of the Constitution is immutable or does it evolve over time?**

   Response: The Supreme Court has stated that the Founders created the Constitution to "endure for ages," "to be adapted to various crises of human affairs," and to apply "to circumstances beyond those the Founders specifically anticipated," although its meaning is "fixed according to the understandings of those who ratified it." *New York State Rifle & Pistol Assoc. Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

3. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and then legislative history only if necessary.

   Regarding legislative history, the Supreme Court in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), has ruled that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." Further, the Supreme Court in that case explained:

   > Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history

> has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

*Id.* (citation omitted); *see also N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating").

**4. Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

Response: *See* Response to Question 3 above. While at least one Ninth Circuit panel has considered a President's signing statement as legislative history for purposes of interpreting an ambiguous statutory provision, another panel has rejected a President's statement as probative of a provision's meaning. *Compare U.S. Aviation Underwriter's, Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1099-1100 (9th Cir. 2012) (noting President Clinton's intent as reflected in signing statement) *with Estate of Reynolds v. Martin*, 985 F.2d 470, 477 n. 8 (9th Cir. 1993) ("We give little credence to President Bush's statement accompanying his signing of the bills . . . . It is not the President's place to write federal statutes."). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

**5. What First Amendment restrictions can the owner of a shopping center place on private property?**

Response: In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552 (1972), the Supreme Court considered whether under the Federal Constitution a privately owned shopping center may prohibit distribution of handbills on its property when adequate alternative avenues of communication are available. In addressing this issue, the Court held that "when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in the expression beyond those already existing under the applicable law." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (stating holding in *Lloyd*). The Court in *PruneYard* ruled, however, that "a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to taking without just compensation or contravene any other federal constitutional provision." *Id.* It held that "neither [the property owners'] federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of [individuals] to exercise state-protected rights of expression and petition on [the owners'] property." *Id.* at 88.

**6. Are non-citizens unlawfully present in the United States entitled to a right of privacy?**

Response: The Supreme Court has held that nonresident aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (listing cases and aliens' constitutional protections, including under Equal Protection Clause and First, Fifth, Sixth, and Fourteenth Amendments). Although the Court did not address what constitutes a "substantial connection" in that case, it ruled that the appellant "was a citizen and resident of Mexico with no voluntary attachment to the United States" at the time of the search; "the place searched was located in Mexico"; and under those circumstances the Fourth Amendment had no application. *Id.* at 274-75. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent to determine an alien's right to privacy if that issue arose.

7. **Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?**

   Response: *See* Response to Question 6 above.

8. **At what point is a human life entitled to equal protection of the law under the Constitution?**

   Response: The Supreme Court in *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022), held that the Fourteenth Amendment Due Process Clause did not protect the right to abortion. The Court did not address at what point human life is entitled to equal protection under the Constitution, but rather it "return[ed] the issue of abortion to the people's elected representatives." *Id.* at 2243. If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent bearing on any equal protection issue presented.

9. **A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.**

   a. **Do you agree?**

      Response: I am not familiar with any suggestion that the Thirteenth Amendment provides a basis for the right to abortion. If confirmed, I would faithfully apply *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022), and all other the Supreme Court and Ninth Circuit precedent.

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

Response: *See* Response to Question 9a. A judge has a duty to comply with existing mandatory precedent.

**10. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?**

Response: No.

**11. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?**

Response: In *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189–90 (2008), the Supreme Court held that under some circumstances states may require voter identification. It discussed restrictions on the right to vote, stating:

> [U]nder the standard applied in *Harper* [*v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)], even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983), however, we confirmed the general rule that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*. 460 U.S. at 788, n. 9, 103 S. Ct. 1564. Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands.

*Id.* As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court, including whether voter identification requirements are unlawful. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

**12. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.**

Response: The Supreme Court in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), held that:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a

> firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

If confirmed, I would apply the Supreme Court and Ninth Circuit precedent.

**13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.**

**a. How many factors are necessary to provide a special justification for overturning precedent?**

Response: The Supreme Court precedent identifies numerous factors for consideration in overturning precedent. *See Janus v. American Fed. of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018) (identifying case law and "most important" factors in that case to include quality of reasoning, workability of rule, consistency with other related decisions, developments since decisions handed down, and reliance on decision); *see also Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (overruling cases and noting important factors of "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance"). I am not aware of any Supreme Court or Ninth Circuit authority requiring a certain quantum of factors needed to overrule prior precedent.

**b. Is one factor alone ever sufficient?**

Response: *See* Response to 13a above.

**14. Please explain the difference between judicial review and judicial supremacy.**

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" to include a court's power to review the actions of other branches or levels of government; the courts' power to invalidate legislative and executive actions as being unconstitutional; the constitutional doctrine providing for this power; and a court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary defines "judiciary supremacy" to mean the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review are binding on the coordinate branches of the federal government and the states. The doctrine applies to judicial determinations that some legislation or other action is unconstitutional.

**15. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?**

Response: I am not aware of any Supreme Court or Ninth Circuit precedent providing that the Ninth Amendment protects individual rights or otherwise provides structural protection applicable to the people. Justice Thomas, however, wrote in his concurrence in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 851 (2010) (Thomas, J., concurring), that "certain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples. . . ." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding the Ninth Amendment.

**16. Under former U.S. Supreme Court Justice Stephen Breyer's view of 'active liberty', is the Ninth Amendment evolving?**

Response: I am not familiar with Justice Breyer's view of "active liberty." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding the Ninth Amendment.

**17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?**

Response: The Ninth Circuit has stated that "[t]he Ninth Amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir.1991); *see also San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) (citing authority noting "[t]he Ninth Amendment is not a source of rights as such; it is simply a rule about how to read the Constitution."). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent regarding the Ninth Amendment.

**18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?**

Response: In certain circumstances, the Supreme Court has considered founding-era history when interpreting constitutional protections. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (interpreting Establishment Clause); *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2131-32 (2022) (interpreting Second Amendment). I am not aware, however, of any binding precedent providing founding-era history is useful for interpreting the Ninth Amendment's meaning. If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

**19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."**

**a. Who is included within the meaning of *'the people'*?**

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Supreme Court held that nonresident aliens "receive constitutional protections

when they have come within the territory of the United States and developed substantial connections with this country." In that case, the Supreme Court discussed the meaning of "the people" in the Constitution:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const., Amdt. 1 ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. *See United States ex rel. Turner v. Williams,* 194 U.S. 279, 292, 24 S. Ct. 719, 723, 48 L.Ed. 979 (1904) (Excludable alien is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of these Amendments contrasts with the words "person" and " accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

*Verdugo-Urquidez*, 494 U.S. at 265-66; *see also District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (analyzing Constitution's use of phrase "the people" and noting "right" attributable to "the people" refers to "an individual right").

**b. Is the term's meaning consistent in each amendment?**

Response: *See* Response to Question 19a above.

**20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?**

Response: The Supreme Court has held in *Plyler v. Doe*, 457 U.S. 202, 210 (1982), that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

**21. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?**

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights that are deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty. The Court did not address whether the meaning of the Due Process Clauses change over time. It has held, however, in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), that the Founders created the Constitution to "endure for ages," "to be adapted to various crises of human affairs," and to apply "to circumstances beyond those the Founders specifically anticipated," although its meaning is "fixed according to the understandings of those who ratified it." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

**22. Could the Privileges or Immunities Clause within the Fourteenth Amendment a source of unenumerated rights?**

Response: In *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 n. 22 (2022), the Supreme Court noted that "[s]ome scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights." For example, Justice Thomas in *McDonald v. Chicago*, 561 U.S. 742, 813–850 (2010) (Thomas, J., concurring in part and concurring in judgment), noted the Court reserved the question of "whether the privileges and immunities of American citizenship include any rights besides those enumerated in the Constitution." If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

**23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?**

Response: The Supreme Court in *Dobbs v. Jackson Woman's Health Org.*, 142 S. Ct. 2228, 2248 (2022), held that the Fourteenth Amendment Due Process Clause did not protect the right to abortion. In reaching this conclusion, the Court also noted "[t]hat is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause." *Id.* at 2248 n. 22. If confirmed, I would faithfully apply *Dobbs* and all other Supreme Court and Ninth Circuit precedent.

**24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?**

Response: The Supreme Court held in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnotes omitted), that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Recently, however, the Supreme Court in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022) (citation omitted), relied on the major questions doctrine and ruled:

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

**25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?**

Response: *See* Response to Question 24 above.

**26. How does the Constitution limit the powers of Congress? Please provide examples.**

Response: Article I of the United States Constitution enumerates Congress's powers and provides specific limitation on those powers in Article I, Section 9. The Constitution also limits Congress's powers by granting enumerated powers to the executive and judicial

branch in Articles II and III, respectively. Further, the Tenth Amendment reserves for the States powers that the Constitution neither delegates to the United States nor prohibits.

**27. Please describe the modern understanding and limits of the Commerce Clause.**

Response: The Supreme Court explained Congress's powers and its limits under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted):

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

**28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.**

Response: In *United States v. Morrison*, 529 U.S. 598, 617 (2000), the Supreme Court ruled that Congress may not "regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."

**29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.**

Response: The Supreme Court has stated that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995) (noting general rule that "obligations imposed by the Fifth and the Fourteenth Amendments are undisguisable").

**30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?**

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

**31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.**

Response: *See* Response to Question 24.

**32. Please describe your understanding and limits of the anti-commandeering doctrine.**

Response: In *Murphy v. National Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1475-76 (2018), the Supreme Court explained the anti-commandeering doctrine is "the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." I am not aware of any binding precedent discussing the limitations of the anti-commandeering doctrine. If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

**33. Does the meaning of 'cruel and unusual change over time? Why or why not?**

Response: In *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (citations, quotations, brackets omitted), the Supreme Court explained:

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense. Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

**34. Is the death penalty constitutional?**

Response: Yes. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

**35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?**

Response: Article II of the Constitution states the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. The Supreme Court has stated "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also*

*Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct of United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

**36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.**

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

**37. What restrictions on First Amendment activities can owners of a private shopping center put on their property?**

Response: *See* Response to Question 5 above.

**38. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?**

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent.

**39. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?**

Response: The Supreme Court in described the adequate and independent state grounds doctrine in *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citation omitted), stating:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

In contrast, the Supreme Court has stated that the Supremacy Clause "creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance

thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015).

**40. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.**

Response: The Ninth Circuit has held in *Kashem v. Barr*, 941 F.3d 358, 380 (9th Cir. 2019), that due process requires the Government to inform an individual when placed on a no-fly list, stating that "individuals challenging their No Fly List designation are presumptively entitled to a full statement of the reasons for their inclusion on the list and to disclosure of the original evidence—inculpatory and exculpatory—upon which the government relied in making the designation."

**41. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?**

Response: To the best of my knowledge, the Supreme Court has not explicitly identified a textual source for the different standards of review for determining whether state laws or regulations violate constitutional rights. The Supreme Court, however, has identified three standards of review for determining a constitutional violation. They include:

(1) Strict scrutiny, which applies to suspect classes including race, religion, national origin, and alienage and provides that a law can only survive if it advances interests of the highest order and is narrowly tailored to achieve those interests. *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1881 (2021); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (referring to standard as "least-restrict-means standard").

(2) Intermediate scrutiny, which applies to quasi-suspect classes including gender and sex and requires the law be substantially related to achieving a sufficiently important government interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

(3) Rational basis review, which applies to all other classes and requires only that the law be rationally related to a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

**42. Please describe the legal basis that allows federal courts to issue universal injunctions.**

Response: Federal Rule of Civil Procedure 65 provides the procedure by which a court may issue a preliminary injunction, including a universal or nationwide injunction. A preliminary injunction is an extraordinary remedy never awarded as a matter of right but rather may only to be awarded upon a clear showing that the plaintiff is entitled to the requested relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). A

plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; he is likely to suffer irreparable harm in the absence of preliminary relief; the balance of equities tip in his favor; and an injunction is in the public interest. *Id.* at 20; *see California v. Azar*, 911 F.3d 558, 575, 582 (9th Cir. 2018) (noting required showing and that "broad relief" of nationwide injunction "must be *necessary*").

Questions from Senator Thom Tillis
for Amanda Kathleen Brailsford
Nominee to be United States District Judge for the District of Idaho

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: Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as:

   > A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents.

   Judicial activism is inappropriate.

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

   Response: Impartiality is an expectation and an obligation for a judge. *See, e.g.*, 28 U.S.C. § 453 (requiring affirmation of impartiality); *see generally* Code of Conduct for United States Judges, Canon 3.

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

   Response: No.

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

   Response: If confirmed, I would interpret the law pursuant to the Supreme Court and Ninth Circuit precedents regardless of any belief I may have about whether the outcome is undesirable.

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: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 595, 628-29 (2008), held that the Second Amendment confers an individual right to keep and bear arms, including for protection of one's home and family. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010), the Court held the Fourteenth Amendment's Due Process Clause incorporates this Second Amendment right. In *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022), the Court held that the government must justify that any law regulating the possession of firearms must be "consistent with the Nation's historical tradition of firearm regulation." If confirmed, I would faithfully apply these and other Supreme Court and Ninth Circuit precedent regarding the Second Amendment.

**8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?**

Response: If confirmed, I would evaluate such a lawsuit by faithfully applying the Supreme Court and Ninth Circuit precedent to the facts of the case, including *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022) ("The government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation.").

**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: The Supreme Court in *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), stated that the doctrine of qualified immunity protects government officials from liability for civil damages for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known and that the protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. In determining whether qualified immunity protects a government official, the court must make two inquiries: (1) whether the plaintiff has alleged a violation of a constitutional right; and (2) whether that right was clearly established at the time of defendant's alleged misconduct. *Id.* at 232. The Court held that, while the sequence of these inquiries is often appropriate, it is not mandatory, and the district court has discretion to determine which of the two prongs it should address first. *Id.* at 236; *see also Rodis v. City, County of San Fransisco*, 558 F.3d 964, 968 (9th Cir. 2009) (citing and applying *Pearson*). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

**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: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the sufficiency of a law or the correctness of a Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would

faithfully apply the Supreme Court and Ninth Circuit precedent regardless of my personal beliefs, if any.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on a law's "proper scope" based on my personal belief. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent regardless of my personal beliefs, if any.

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

Response: During my more than 20 years as an attorney handling matters involving complex civil litigation, including a two-year clerkship for the Ninth Circuit, and my more than 4 years as a judge on the Idaho Court of Appeals, I have not handled any matters involving patent eligibility. If confirmed, I would diligently work to understand thoroughly any legal topic presented to me and would faithfully apply Supreme Court, Ninth Circuit and Federal Circuit precedent to issues of patent eligibility. As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment on the Supreme Court's patent eligibility jurisprudence or prejudge how I would apply the law. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

**13. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: *See* Response to Question 12 above.

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

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

Response: During my more than 20 years as an attorney handling matters involving complex civil litigation, including a two-year clerkship for the Ninth Circuit, and my more than 4 years as a judge on the Idaho Court of Appeals, I have not handled any matters involving copyright law. If confirmed, I would diligently work to understand thoroughly any legal topic presented to me and

would faithfully apply Supreme Court, Ninth Circuit and Federal Circuit precedent to issues of copyright law.

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

Response: *See* Response to Question 14a above.

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

Response: *See* Response to Question 14a above.

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

Response: *See* Response to Question 14a above.

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

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

Response: If confirmed, I would interpret a statutory provision by first looking to any Supreme Court or Ninth Circuit precedent previously interpreting the specific provision at issue. If none, I would begin with the statute's plain language. If the plain language were unambiguous, the analysis ends. If the language were ambiguous, I would look to the applicable rules of statutory construction. If necessary, I would consider persuasive authorities from other Circuit Courts of Appeal and legislative history only if necessary and authorized by precedent. *See, e.g., N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (noting example of legislative history which is not "illuminating").

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

Response: Whether a court must defer to an agency's interpretation of a statute depends on the statutory provision at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is clear on its face, then the court will defer to the agency's interpretation of the text if the interpretation is reasonable and "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Recently, however, the Supreme Court in *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587 (2022), relied on the major questions doctrine and ruled:

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

*Id.* at 2609 (citations omitted). If confirmed, I would faithfully apply Supreme Court and Ninth Circuit precedent.

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

Response: As a sitting judge on the Idaho Court of Appeals and a judicial nominee, I should not comment a matter pending or impending in any court. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I would faithfully apply the Supreme Court and Ninth Circuit precedent regardless of my personal beliefs, if any.

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

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

Response: *See* Response to Question 15a above.

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

Response: *See* Response to Question 15a above.

**17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.**

**a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?**

Response: I have been nominated for the District of Idaho. There is one "active" judge and one "senior" judge in that District. (If confirmed, I would be the second "active" judge.) As the assignment process has been explained to me, a computer-generated program makes case assignments, which are entirely random by both subject matter and location (Boise, Pocatello, and Coeur d'Alene). For this reason, I am not aware that "judge shopping" or "forum shopping" in Idaho is a problem or even a possibility.

**b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?**

Response: *See* Response to Question 17a.

**c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?**

Response: No.

**d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?**

Response: Yes, I commit not to engage in such conduct.

**18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?**

Response: *See* Response to Question 17a above.

**19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?**

Response: *See* Response to Question 17a above.

**Senator Dick Durbin**
**Chair, Senate Judiciary Committee**
**Written Questions for Judge S. Kato Crews**
**Nominee to be United States District Judge for the District of Colorado**
**March 29, 2023**

1. **You have served as a federal magistrate judge since 2018. During your confirmation hearing, you noted that you have issued over 1,500 recommendations and orders while in this role.**

   a. **Please give a general overview of your role as a federal magistrate judge. What types of cases do you routinely handle?**

   Response: The United States District Court for the District of Colorado is a court of limited jurisdiction, with jurisdiction over cases involving the United States government, the United States Constitution or federal laws, or controversies between states or between the United States government and foreign governments. The court also has diversity jurisdiction over cases between citizens of different states where the amount in controversy exceeds $75,000. The jurisdiction or authority of magistrate judges is further limited by 28 U.S.C. § 636. In criminal cases, magistrate judges: consider petitions for issuance of search warrants; conduct preliminary proceedings; and preside over the trial and final disposition of misdemeanor cases. In the District of Colorado, civil cases are randomly drawn directly to both magistrate judges and district judges. In those cases where the parties do not consent to the magistrate judge handling all matters, both a district and magistrate judge are assigned to the case. In those cases, magistrate judges conduct pretrial matters, evidentiary proceedings, and post-trial matters on referral from the district judge. In civil cases where the parties consent to the magistrate judge handling all matters, the magistrate judge presides over the entirety of the case.

   b. **In how many cases have your decisions been reversed by a reviewing court or affirmed with significant criticism of your substantive or procedural rulings?**

   Response: Since my confirmation hearing, I have gone back to determine the number of recommendations and orders I have issued to provide a more precise number. I have issued at least 1,727 recommendations and orders.

   Concerning recommendations I have issued, a recommendation (known as a Report and Recommendation) goes to the presiding district judge and recommends—based on an analysis of the prevailing law applied to the particular facts and circumstances of the case—what should happen with a motion. The parties then have an opportunity to file written objections to the recommendation, which the district judge reviews *de novo*, and either adopts, modifies, or rejects some or all of the recommendation. Unlike a reversal by an appellate court,

> the magistrate judge shall file his proposed findings and recommendations . . . with the court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations[.] A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b)(1)(C). I have had recommendations partially rejected 13 times and rejected four times. None of these rejections included significant criticism of my substantive or procedural analyses. I have been partially reversed by the Tenth Circuit one time.

**c. How many of those cases involved a partial reversal or were the result of new legal developments in the Tenth Circuit?**

Response: I have had recommendations partially rejected 13 times and rejected four times. Three of these rejections were the result of either new legal developments in the Tenth Circuit or changed circumstances in the specific case.

**2. Federal district court judges are trial court judges. District court judges must be familiar with trial court practice and procedure.**

**a. While in private practice, how many cases did you try to verdict, judgment, or final decision?**

Response: I tried approximately 18 cases to verdict, judgment, or final decision.

**b. While serving as a federal magistrate judge, how many cases have you presided over that have gone to verdict or judgment?**

Response: I have presided over six cases to verdict or judgment. Five of those cases were multi-day jury trials, and one was a bench trial. All were civil matters.

**3. All judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a range of legal issues they have not confronted beforehand in their professional practice or judicial service.**

**What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your professional practice or judicial service?**

Response: I would conduct my own legal research into Supreme Court and Tenth Circuit precedent, and persuasive authority within my district and from other circuit courts, to familiarize myself with legal issues I have not previously encountered. This could include requesting briefing, or additional briefing, from counsel where appropriate. I would also utilize training materials and educational resources made available to me by the Administrative Office of the U.S. Courts and the Federal Judicial Center, as well as respected legal treatises on the subject. Where appropriate, I might also consult other judicial colleagues with experience facing those issues—the collegiality among the judges in the District of Colorado has included these types of consultations.

4. **During your confirmation hearing, you were asked several questions pertaining to *Brady v. Maryland*, 373 U.S. 83 (1963) that you said you had not had occasion to address during your time as a magistrate judge. Please provide answers in writing to these questions.**

Response: In my confirmation hearing, I was asked about *Brady* motions. In my 22-plus years in the legal profession, including my four-plus years as a United States Magistrate Judge, I have not dealt with *Brady* motions. I do not recall any party filing a *Brady* motion in a misdemeanor criminal matter I have presided over as a magistrate judge, nor do I recall any district judge referring a *Brady* motion to me in a felony criminal matter.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held the government's withholding of favorable evidence that is material to the determination of the guilt or punishment of a criminal defendant violates the defendant's Fourteenth Amendment right to due process. A defendant may file a *Brady* motion in a criminal case to compel the prosecution to turn over any favorable exculpatory evidence. In *Giglio v. United States*, 405 U.S. 150, 153 (1972), the Supreme Court extended the government's disclosure obligation in criminal cases to include evidence that is useful to the defendant to impeach government witnesses even if the evidence is not inherently exculpatory.

In October 2020, Congress passed the Due Process Protections Act, which amended Federal Rule of Criminal Procedure 5. *See* PL 116-182, October 21, 2020, 134 Stat 894. The Act reaffirms the government's disclosure obligations in criminal cases. It requires, at a defendant's first court appearance, that the judge issue an oral and written order that "confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law." Fed. R. Crim. P. 5(f). I am familiar with these requirements and, during my criminal duty rotation, regularly provide the oral order at the initial appearance of a defendant charged with a criminal offense. In the District of Colorado, the required written order has been incorporated into the form Discovery Conference Memorandum and Order utilized in our district. I regularly sign and issue these form orders during my criminal duty rotation.

**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Judge Shane Kato Crews**
**Nominee to be United States District Judge for the District of Colorado**

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

   Response: As a sitting United States Magistrate Judge, the referenced statement is not how I approach cases. Judges are duty-bound to apply, and adhere to, precedent faithfully and impartially and without consideration of their "independent value judgments."

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

   Response: As a sitting United States Magistrate Judge, the referenced statement is not how I approach cases. Judges are duty-bound to apply Supreme Court precedent, and the precedent of their circuit court, faithfully and impartially and without consideration of their personal views or agendas.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary defines "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019).

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

   Response: I am not familiar with this statement from now Associate Supreme Court Justice Ketanji Brown Jackson, or the context in which she made it. As a sitting federal judge, I faithfully and impartially apply Supreme Court and Tenth Circuit precedent to matters involving the interpretation of constitutional provisions. Further, the Constitution may be formally amended only in accordance with its Article V.

5. **What is implicit bias?**

   Response: The Oxford English Dictionary defines "implicit bias" as "[a]ny unconscious or unacknowledged preference that affects a person's outlook or behaviour; (now esp.) an unconscious favouritism towards or prejudice against people of a particular race, gender, or group that influences one's actions or perceptions."

6. **Is the federal judiciary affected by implicit bias?**

Response: I have not conducted research on whether the federal judiciary is affected by implicit bias. In my 22-plus years in the legal profession, first practicing in the District of Colorado and now sitting on that court, that has not been my experience in the court in which I have practiced or sit.

7. **Do you have any implicit biases? If so, what are they?**

Response: As a sitting United States Magistrate Judge, I take seriously my oath under 28 U.S.C. § 453 to "administer justice without respect to persons," meaning I approach every case with an open mind and impartiality recognizing that the parties in front of me stand equal before the law, and I apply Supreme Court and Tenth Circuit precedent faithfully and impartially to every case.

8. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: Black's Law Dictionary defines "attack" as "[t]he act of assailing either with physical violence or with sharp words." Black's Law Dictionary (11th ed. 2019). The Oxford English Dictionary defines "criticism" as "[t]he art or practice of analysing, evaluating, and commenting on the qualities and character of something[.]"

9. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: A judge's sentencing decisions are guided by 18 U.S.C. § 3553(a). That statute does not provide that any one sentencing purpose or sentencing factor may be prioritized over another. If confirmed, the mandates of Section 3553(a) will guide my sentencing decisions.

10. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: My judicial philosophy is that, as a United States Magistrate Judge, I take seriously my oath under 28 U.S.C. § 453 to "administer justice without respect to persons," meaning I approach every case with an open mind and impartiality recognizing that the parties in front of me stand equal before the law. I am a steward of the litigation process following and enforcing the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the District of Colorado's Local Rules of Practice, and applying Supreme Court and Tenth Circuit precedent faithfully and impartially to the issues before me. I am not aware of any Supreme Court decisions that typify my judicial philosophy.

11. **Please identify a Tenth Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: Please see my answer to Question 10. I am not aware of any Tenth Circuit judicial opinions that typify my judicial philosophy.

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

Response: 18 U.S.C. § 1507 provides:

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

13. **Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: In *Cox v. Louisiana*, the Supreme Court held that a Louisiana statute modeled on 18 U.S.C. § 1507 was constitutional on its face.

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

a. **Was *Brown v. Board of Education* correctly decided?**
b. **Was *Loving v. Virginia* correctly decided?**
c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting United States Magistrate Judge, the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of any United States Supreme Court decision. However, because the issues in *Brown v. Board*

*of Education* and *Loving v. Virginia* are unlikely to be relitigated, I am able to state that those two cases were correctly decided. I am unable, however, to state whether the other listed cases were correctly decided; but it is a judge's role to apply binding precedent faithfully and impartially to the facts and issues presented regardless of whether the judge believes that precedent was correctly decided.

15. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No; not to my knowledge.

16. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**

    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

Response: No; not to my knowledge.

17. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: Not applicable.

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

Response: No.

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

Response: No; not to my knowledge.

18. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No; not to my knowledge.

19. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: No.

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

Response: No; not to my knowledge.

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

Response: On March 28, 2022, I submitted an application to the Advisory Committee established by Senators Michael Bennet and John Hickenlooper for a vacancy on the United States District Court for the District of Colorado. On April 18, 2022, I interviewed with the Advisory Committee. On April 22, 2022, I interviewed with Senators Bennet and Hickenlooper and two members of their staff. On May 18, 2022, I interviewed with attorneys from the White House Counsel's Office. On August 3, 2022, an attorney from the White House Counsel's Office informed me that I would be vetted for a judgeship. Since August 3, 2022, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On February 22, 2023,

the President announced his intent to nominate me. The President nominated me on February 27, 2023.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: Please see my response to Question 20.

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

Response: I answered these questions based on my 17-plus years of experience as a civil litigator and trial lawyer, my four-plus years of experience as a federal magistrate judge, and my personal knowledge. Where necessary, I conducted my own legal research on

Westlaw, and consulted Black's Law Dictionary and the Oxford English Dictionary. I also consulted the Code of Conduct for United States Judges. I submitted a draft of my answers to the Office of Legal Policy for review and received minor feedback. I then finalized my answers for submission to the Senate.

RESPONSES OF HON. S. KATO CREWS TO QUESTIONS
SUBMITTED BY SENATOR HIRONO

**Senator Mazie Hirono**
**Written Questions for Judge S. Kato Crews**
**Nominee to the United States District Court for the District of Colorado**
**March 29, 2023**

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

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

      Response: No.

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

      Response: No.

**Senator Mike Lee**
**Questions for the Record**
**S. Kato Crews, Nominee to the United States District Court for the District of Colorado**

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

Response: As a sitting United States Magistrate Judge, I take seriously my oath under 28 U.S.C. § 453 to "administer justice without respect to persons," meaning I approach every case with an open mind and impartiality recognizing that the parties in front of me stand equal before the law. I am a steward of the litigation process following and enforcing the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the District of Colorado's Local Rules of Practice, and applying Supreme Court and Tenth Circuit precedent faithfully and impartially to the issues before me.

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

Response: The first source I would consult when deciding a case that turned on the interpretation of a federal statute is Supreme Court and Tenth Circuit precedent. If either court previously interpreted that statute my inquiry would end there and I would apply the precedent to the case before me. In the event neither court has interpreted that statute, I would next consult the text of the statute itself. If the text of the statute is plain and unambiguous, my inquiry would end there and I would apply the statute as written. If, on the other hand, the text of the statute is vague or ambiguous, I would then consult Supreme Court and Tenth Circuit precedent for any applicable canons of construction, and I would apply those canons of construction to interpret the statute.

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

Response: I would consult Supreme Court and Tenth Circuit precedent to determine whether either court previously interpreted that constitutional provision. If either court previously interpreted the constitutional provision my inquiry would end there and I would apply the precedent to the case before me. In the event neither court has interpreted that provision, I would consult the text of the constitutional provision and determine the appropriate method of interpretation mandated by either the Supreme Court or the Tenth Circuit. I would also consider persuasive authority from other federal jurisdictions.

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

Response: As a general rule, any interpretation of the Constitution starts with consideration of the text. *See Utah v. Evans*, 536 U.S. 452, 474 (2002) (beginning with a review of the text of the Census Clause before considering its historical

application). Where the Supreme Court or Tenth Circuit has determined the original meaning is the appropriate method of interpretation, I would follow that precedent.

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

Response: Please see my answer to Question 2.

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

Response: I would follow Supreme Court and Tenth Circuit precedent regarding how to assess the plain meaning of a statute or constitutional provision. For example, in *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020), the Supreme Court instructed that to interpret a statutory term "[w]ithout a statutory definition, we turn to the phrase's plain meaning at the time of enactment."

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

Response: Yes. The Supreme Court has held that Congress has implied powers beyond those enumerated in the Constitution. For example, in *McCulloch v. State of Maryland*, 17 U.S. 316 (1819), the Supreme Court determined the Necessary and Proper Clause of Article I of the Constitution gave Congress the implied power to establish a national bank. The Court wrote:

> A power without the means to use it, is a nullity. But we are not driven to seek for this power in implication: because the constitution, after enumerating certain specific powers, expressly gives to 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 or (sic) in any department or officer thereof.' If, therefore, the act of congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to congress by the constitution.

*Id.* at 353. *See also United States v. Comstock*, 560 U.S. 126 (2010) (discussing the Necessary and Proper Clause affords Congress the ability to carry-out other acts in the implementation of its explicit powers).

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

Response: The Supreme Court has stated "the 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (citing *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). But it is critical that Congress's exercise of power derive from one or more enumerated powers. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). I would listen to and assess the parties' legal arguments, research relevant Supreme Court and Tenth Circuit precedent on the constitutionality of a law where Congress has not referenced a specific constitutional enumerated power, and I would faithfully and impartially apply the law and precedent to the facts before me.

8. **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 listen to and assess the parties' legal arguments, research Supreme Court and Tenth Circuit precedent for guidance or authority on how to evaluate the issue of one branch assuming authority not granted it by the text of the Constitution, and I would faithfully and impartially apply that precedent to the facts before me.

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

Response: A judge should base their decisions solely on the law and applicable precedent.

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

Response: It would be improper for a federal court to invalidate a law that is, in fact, constitutional. It would be equally improper for a federal court to uphold a law that is, in fact, unconstitutional.

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

Response: I am not familiar with how common or uncommon it is for the Supreme Court to strike down federal statutes as unconstitutional and I have not studied any academic theories on this issue. As a sitting federal judge my role is to set aside any personal views I may hold and apply Supreme Court precedent, and the applicable circuit court precedent, faithfully and impartially to the matters before me.

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

Response: The principle of judicial review was established by the Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803), and derives from Article III of the Constitution. *Id.* at 173. Black's Law Dictionary defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id.*

**13. 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: *Marbury v. Madison*, 5 U.S. 137, 177 (1803), established that it is "emphatically the province and duty of the judicial department to say what the law is." The Supreme Court has held that elected officials must follow court decisions even if they disagree with them. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958). The precise way that elected officials should balance their obligations is an issue for policymakers and elected officials to determine.

**14. 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: I have not studied Federalist 78. As I understand the provided excerpt, it is expressing how judges are limited in their decision making to applying precedent, and they lack the ability to apply or impose their own will or personal views in their decision making. This is important to keep in mind because the role of the judge does not include advancing a personal agenda.

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

**the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: It is the duty of a lower court judge to apply applicable Supreme Court and Tenth Circuit precedent regardless of whether the judge believes the "constitutional underpinnings" of that precedent are questionable. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.") If applicable precedent does not speak directly to the issue at hand, the judge should look to precedent for applicable methods of interpretation bearing on that issue (such as originalism, for example) while exercising judicial restraint. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (discussing the "fundamental principle of judicial restraint").

16. **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: Judges' sentencing decisions are guided by 18 U.S.C. § 3553(a). Section 3553(a)(5) requires a judge to consider "any pertinent policy statement" issued by the Sentencing Commission. One of these policy statements informs that factors such as race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." United States Sentencing Commission, Guideline Manual, §5H1.10 (Nov. 2021).

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

Response: Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). I do not have a personal definition for "equity."

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

Response: Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "equality" as "[t]he quality, state, or condition of being equal." *Id.*

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

Response: The Fourteenth Amendment's equal protection clause guarantees no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not familiar with any Supreme Court or Tenth Circuit precedent addressing whether the Fourteenth Amendment's equal protection clause guarantees "equity."

**20. How do you define "systemic racism?"**

Response: I do not have a personal definition of "systemic racism." Black's Law Dictionary defines "racism" as "[t]he belief that some races are inherently superior to other races." Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary defines "systemic discrimination" as "[a]n ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location." *Id.*

**21. How do you define "critical race theory?"**

Response: I do not have a personal definition of "critical race theory." Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: Please see my answers to Questions 20 and 21.

**Senator Josh Hawley**
**Questions for the Record**

**Shane Kato Crews**
**Nominee, U.S. District Court for the District of Colorado**

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

   Response: No.

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

      Response: Not applicable.

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

   Response: As a general rule, any interpretation of the Constitution starts with consideration of the text. *See Utah v. Evans*, 536 U.S. 452, 474 (2002) (beginning with a review of the text of the Census Clause before considering its historical application). Where the Supreme Court or Tenth Circuit has determined the original public meaning is the appropriate method of interpretation, I would follow that precedent.

3. **Do you consider legislative history when interpreting legal texts?**

   Response: The first source I consult when deciding a case that turns on the interpretation of legal texts is Supreme Court and Tenth Circuit precedent to determine whether either court previously interpreted that text, and if so, I follow that precedent. In the event neither court has interpreted that text, I consult the text of the document itself. If that text is plain and unambiguous, my inquiry ends there and I apply the text. If, on the other hand, the text is vague or ambiguous, I then consult Supreme Court and Tenth Circuit precedent for applicable canons of construction, and possibly case law from other jurisdictions in consideration of persuasive authority. I would rarely and cautiously consider legislative history only as a last resort and only if necessary, still applying Supreme Court and Tenth Circuit precedent to the analysis of legislative history. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("legislative history is not the law"); *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("ambiguous legislative history [may not be used to] muddy clear statutory language"); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020) ("Once we exhaust the traditional tools of statutory interpretation, we may (cautiously) turn to the legislative history.") (parenthetical in original).

**a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

Response: Please see my answer to Question 3. In addition, the Supreme Court has distinguished between pre-enactment and post-enactment legislative history. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011); *see also Tax & Acct. Software Corp. v. United States*, 301 F.3d 1254, 1266 (10th Cir. 2002).

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

Response: I am not aware that it is ever appropriate for a judge to consult the laws of a foreign nation when interpreting the U.S. Constitution.

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

Response: In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court held that to prevail on an Eighth Amendment claim challenging an execution protocol "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id*. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, and n. 9 (1994)). The Supreme Court applied this standard in *Glossip v. Gross*, 576 U.S. 863 (2015), including its explanation that the controlling opinion in *Baze* also requires a showing of a "known and available alternative method of execution that entails a lesser risk of pain."

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

Response: Yes. Please see my answer to Question 4.

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

Response: The Supreme Court has held that a habeas corpus petitioner does not have a substantive due process right to DNA analysis to prove innocence. *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009). The Tenth Circuit applied *Osborne* in *McDaniel v. Suthers*, 335 F. App'x 734 (10th Cir. 2009).

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

Response: No.

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

Response: The First Amendment's Free Exercise Clause bars governmental action that suppresses the exercise of religion or religious practices. State action which burdens the free exercise of religion that is not neutral and generally applicable is subject to strict scrutiny. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). State action that treats any comparable secular activity more favorably than religious exercise is not neutral or generally applicable. *See id.*; *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018).

In addition, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, prohibits federal governmental action that substantially burdens the exercise of religion even if the burden results from a rule of general applicability. In that instance, the government must demonstrate that application of the burden on the person, to include for-profit corporations and religious organizations, furthers a compelling governmental interest by the least restrictive means. *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 705 (2014); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: Please see my answer to Question 8. Any such governmental action would be subject to strict scrutiny review. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court stated the courts' "narrow function" in this context is to determine whether the claimed religious belief "reflects an honest conviction."

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

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

Response: In *Heller,* the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms within the home for self-defense.

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

Response: To the best of my recollection I have not issued any decisions adjudicating a claim under the Second Amendment or an analogous state law.

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

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

Response: In *Lochner*, Justice Holmes, writing in dissent, stated the majority's opinion was "decided upon an economic theory which a large part of the country does not entertain." *Id.* He went on to express that his "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." *Id.* His comments in dissent express his view that the majority's opinion was not supported by the Fourteenth Amendment but was instead based on the majority's personal opinions on economic or social matters. If confirmed, I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent on matters involving the Fourteenth Amendment.

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

Response: The Supreme Court effectively overruled *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See also Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952). If confirmed, I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent.

**13. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50**

**years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?**

Response: In *Trump v. Hawaii*, Chief Justice Roberts wrote: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. . . . *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Id.* (citation omitted). The phrase can be understood as expressing the view that history has rejected the result in *Korematsu*, which allowed the forcible relocation of U.S. citizens to concentration camps based solely and explicitly on their race.

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

Response: Unless specifically overruled or abrogated by the Supreme Court, all Supreme Court opinions remain good law.

**a. If so, what are they?**

Response: Please see my answer to Question 14.

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

Response: I commit to faithfully applying all Supreme Court precedent.

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

**a. Do you agree with Judge Learned Hand?**

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

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

Response to all subsections: I am not familiar with this excerpt from Judge Learned Hand or this decision from the Second Circuit. The Supreme Court has held that an antitrust claim under Section 2 of the Sherman Act against monopolization requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

*Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571 (1966)); *see also Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 968 (10th Cir. 1990) ("We prefer the view that market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.").

Because this is an issue that could come before me, whether as a sitting United States Magistrate Judge or if confirmed, the Code of Conduct for United States Judges precludes me from offering any commentary that could be perceived as prejudging this issue. But I will continue to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to the facts of each case before me.

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

Response: Black's Law Dictionary defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." Black's Law Dictionary (11th ed 2019). But the Supreme Court has held there is no federal general common law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: As a general rule, the interpretation of state constitutions and state laws is a matter to be left to the state courts. *Hebert v. State of La.*, 272 U.S. 312, 316-17 (1926). The federal courts must accept state court interpretations of state constitutional provisions unless they are inconsistent with the fundamental principles of liberty and justice. *Bute v. People of State of Ill.*, 333 U.S. 640, 649 (1948); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts.").

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

Response: Please see my answer to Question 17. The U.S. Constitution should be interpreted in accordance with Supreme Court and Tenth Circuit precedent, including those precedents' articulations of applicable canons of construction.

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

Response: A state may provide greater protections than what is provided under federal law. *See California v. Ramos*, 463 U.S. 992, 1013–14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.")

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

Response: As a sitting United States Magistrate Judge, the Code of Conduct for United States Judges generally precludes me from commenting on the correctness of any United States Supreme Court decision. However, because the issues in *Brown v. Board of Education* are unlikely to be relitigated, I am able to state that this case was correctly decided.

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

Response: I am not aware of any Supreme Court or Tenth Circuit precedent, or other applicable law, as the explicit source of judicial authority to issue nationwide injunctions. Courts are authorized under Federal Rule of Civil Procedure 65 to issue injunctions. Supreme Court and Tenth Circuit precedent offer further guidance on the elements a party must establish to obtain an injunction. If confirmed, I would apply this precedent faithfully and impartially to requests for injunctive relief that come before me.

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

Response: Please see my answer to Question 19.

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

Response: Please see my answer to Question 19.

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

Response: Please see my answer to Question 19.

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

Response: The Supreme Court has stated "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Principles of federalism provide a constitutional structure for limiting the scope of the federal government's authority with respect to the states. *See id.* at 159. It serves as a check on abuses of government power, balances power between the federal government and state governments, and

ensures the protection of fundamental liberties. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: The *Younger* abstention doctrine requires federal courts to abstain from hearing cases seeking injunctive or declaratory relief and that involve ongoing parallel state court proceedings. The doctrine is based on the principle that federal courts should not interfere with the ability of state courts to resolve issues within the state court's jurisdiction. *Younger v. Harris*, 401 U.S. 37 (1971). For *Younger* to apply, there must be an ongoing state judicial proceeding, the presence of an important state interest, and an adequate opportunity to raise federal claims in the state proceedings. *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989). Absent extraordinary circumstances, abstention is non-discretionary once these conditions are met. *Id.* The Supreme Court has held *Younger* applies in three categories of state cases: (1) state criminal prosecutions, (2) civil enforcement proceedings, and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013).

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

Response: Generally, a court may award injunctive relief when there is no adequate remedy at law and a party would suffer irreparable injury in the absence of injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). A court may award damages to remedy a past wrong and make the injured party whole. *Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 604 (1983) (referring to damage awards for past wrongs). The advantages and disadvantages of each depend on the circumstances of each individual case.

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

Response: The Supreme Court has held the Fifth Amendment Due Process Clause protects certain fundamental rights and liberty interests from infringement by the federal government. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). It has held the same under the Fourteenth Amendment Due Process Clause with regard to state governments. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998). There are two primary features to the Supreme Court's substantive-due-process analysis. First, the Due Process Clause protects those fundamental rights and liberty interests that are deeply rooted in this Nation's history and traditions and implicit in the concept of ordered liberty. *Glucksberg*, 521 U.S. at 719. Second, a "careful description" of the asserted liberty interest must be provided. *Id.* Governmental action which infringes on a fundamental liberty interest is subject to strict scrutiny.

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

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

Response: Please see my answers to Questions 8 and 9.

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

Response: The Supreme Court has referred to the Free Exercise Clause as protecting the freedom to worship and the free exercise of religion (or put differently, religious practices). *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021-22 (2017) (free exercise of religion); *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (freedom to worship).

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

Response: Please see my answer to Question 8.

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

Response: Please see my answer to Question 10.

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

Response: The Supreme Court has determined the Religious Freedom Restoration Act (RFRA) provides "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). By its terms, RFRA expressly applies to "all Federal law, and the implementation of that law, whether statutory or otherwise[,]" with certain limited exceptions. 42 U.S.C. § 2000bb-(3)(a).

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

Response: Yes: *Ralston v. Cannon*, 2019 WL 8223559, at *2 (D. Colo. Mar. 12, 2019), *aff'd*, 2021 WL 3478634 (10th Cir. 2021); and, *Hale v. Marques*, 2020 WL 2309619, at *2 (D. Colo. Feb. 3, 2020), *report and recommendation adopted as modified*, 2020 WL 1593339 (D. Colo. Mar. 30, 2020).

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

Response: The Supreme Court has held proof beyond a reasonable doubt does not mean the elements of the offense must be proven "to a mathematical certainty." *Holland v. United States*, 348 U.S. 121, 138 (1954).

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

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

Response: Not necessarily. The Supreme Court has acknowledged that "all, or virtually all, [ ] judges occasionally commit error; they make decisions that in retrospect may be characterized as 'unreasonable.' . . . Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another." *Williams v. Taylor*, 529 U.S. 362, 378 (2000).

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

Response: Please see my answers to Questions 17, 21, and 27(a).

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

Response: Please see my answers to Questions 17, 21, and 27(a).

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

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

Response: As a sitting United States Magistrate Judge, I am duty-bound to follow Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1. If confirmed, I would continue to follow these rules when citing and considering Tenth Circuit precedent.

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

Response: Please see my answer to Question 28(a).

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

Response: Please see my answer to Question 28(a).

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

Response: Please see my answer to Question 28(a).

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

Response: Yes. Consistent with Tenth Circuit Rule 32.1, I would consider unpublished decisions cited by litigants "for their persuasive value" or "under the doctrines of law of the case, claim preclusion, and issue preclusion."

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

Response: No. Rule 32.1(a) for the Tenth Circuit, which encompasses the District of Colorado, permits the citation of unpublished opinions. Also, the 2006 committee notes to Federal Rule of Appellate Procedure 32.1 state: "[U]nder Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue."

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

Response: Please see my answer to 28(f).

**29. In your legal career:**

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

Response: In my 17-plus years of prior practice as a civil litigator, I tried approximately 15 cases to verdict as first chair.

**b. How many have you tried as second chair?**

Response: In my 17-plus years of prior practice as a civil litigator, I tried approximately three cases to verdict as second chair.

**c. How many depositions have you taken?**

Response: During my 17-plus years of prior practice as a civil litigator, I tried approximately 18 cases to verdict. While I did not track the number of depositions I took during my time in practice, I estimate I took hundreds of depositions.

**d. How many depositions have you defended?**

Response: During my 17-plus years of prior practice as a civil litigator, I tried approximately 18 cases to verdict. While I did not track the number of depositions I defended during my time in practice, I estimate I defended hundreds of depositions.

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

Response: While I have filed a brief with the Tenth Circuit, I have never argued before a federal appellate court.

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

Response: I have argued two cases before the Colorado Court of Appeals.

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

Response: I have appeared before the National Labor Relations Board in two or three hearings involving issues related to petitions for a union representation election.

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

Response: While I have filed hundreds of dispositive motions in the trial courts during my 17-plus years of practice, I have not tracked the number of times the court allowed or requested oral argument on those motions.

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

Response: While I have filed numerous evidentiary motions in the trial courts during my 17-plus years of practice, I have not tracked the number of times the court allowed or requested oral argument on those motions.

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

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

Response: To the best of my recollection, the maximum number of hours I billed in a single year was between 1900 and 2000 hours.

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

Response: I do not have a record of how many of those hours were dedicated to pro bono work.

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

**a. What do you understand this statement to mean?**

Response: I am unfamiliar with this statement and its context. I understand it to highlight that a good judge understands that the role of a judicial officer includes having to issue decisions with which you may personally disagree.

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

**a. What do you understand this statement to mean?**

Response: I am unfamiliar with the context of this statement. I understand it to highlight that the judge's role is to apply the law and precedent faithfully and impartially to the facts before them.

**b. Do you agree or disagree with this statement?**

Response: I agree with this statement based on my understanding of it, as described above.

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

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

Response: I am unfamiliar with this statement and its context. I understand it to highlight that it is improper for a judge to make decisions based on a personal agenda or personal views. Instead, judges are to follow and apply precedent faithfully and impartially to the matters before them.

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

Response: I agree with this statement based on my understanding of it, as described above.

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

Response: No.

**a. If yes, please provide appropriate citations.**

Response: Not applicable.

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

Response: No.

**36. What were the last three books you read?**

Response: Kings of the Wyld, by Nicholas Eames; The Count of Monte Cristo, by Alexandre Dumas; and Interior Chinatown, by Charles Yu.

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

Response: I have not studied the issue of whether America is a "systemically racist" country. I understand the terminology, "systemic racism," is subject to differing interpretations. In my personal experience, I have had the honor to become a United States Magistrate Judge—the issue of "systemic racism," therefore, is not something I am aware I have experienced in my career.

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

Response: I am most proud of my development of the Federal Limited Appearance Program (FLAP) in the District of Colorado. Within my first two years as a magistrate judge, I founded FLAP in conjunction with the Colorado Bar Association (CBA) Young Lawyers Division. This is a volunteer-driven program developed by the U.S. District Court for the District of Colorado and the CBA YLD, in coordination with the existing Federal Pro Bono Panel and the Faculty of Federal Advocates. It provides *pro se* litigants with legal representation during certain non-dispositive court hearings.

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

Response: From my 17-plus years of prior experience practicing law as a civil litigator, I do not specifically recall whether I took a position in litigation that conflicted with a personal view. When I litigated cases, I represented my clients' interests to the best of my ability and within the bounds of the Colorado Rules of Professional Conduct, and without allowing my personal views to affect my representation.

**a. How did you handle the situation?**

Response: Please see my answer to Question 39.

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

Response: Yes. If confirmed, I commit to applying Supreme Court and Tenth Circuit precedent faithfully and impartially (as I do now as a United States Magistrate Judge) to the matters before me, and without regard to my personal beliefs.

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

Response: I do not regularly read any specific law professors' work.

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

Response: No specific Federalist Paper has shaped my views of the law.

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

Response: In my 22-plus years in the legal profession, first as a lawyer and most recently as a federal judge, I cannot think of a specific judicial opinion, law review article, or other legal opinion that made me change my mind. As a sitting United States Magistrate Judge, I apply Supreme Court and Tenth Circuit precedent regardless of any other materials I might find to be persuasive.

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

Response: As a sitting United States Magistrate Judge, the Code of Conduct for United States Judges precludes me from prejudging an issue that could come before me in future litigation. But if this issue came before me, I would apply Supreme Court and Tenth Circuit precedent, including *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), faithfully and impartially to the facts of that case.

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

Response: Yes. My SJQ lists *Bernal v. Diamond Elite et al.*, No. 2017-cv-31075, Adams County District Court, in which I represented the individual defendant, Ms. Waterhouse, as sole trial counsel. This was a civil action involving a dispute between former business partners. In the bench trial, my client prevailed on a motion for judgment as a matter of law made after the close of plaintiff's case-in-chief. The court awarded my client her reasonable attorney's fees. I then withdrew from the case based on my appointment as a United States Magistrate Judge and was later called to testify in the attorney's-fee hearing about the work I had performed. I do not have a record of this testimony and am not aware that it is available online.

In addition, just prior to my appointment as a Trustee of the University of Northern Colorado in 2015, I appeared before a state legislative committee to offer testimony about my appointment. I do not have a record of this testimony and am not aware of whether it is available online.

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

**a. *Roe v. Wade,* 410 U.S. 113 (1973)?**

Response: No.

**b. The Supreme Court's substantive due process precedents?**

Response: No.

**c. Systemic racism?**

Response: No.

**d. Critical race theory?**

Response: No.

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

**a. Apple?**

**b. Amazon?**

**c. Google?**

**d. Facebook?**

**e. Twitter?**

Response: No to all subparts.

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

Response: No.

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

Response: Not applicable.

**48. Have you ever confessed error to a court?**

Response: I do not recall whether I have ever confessed error to a court.

**a. If so, please describe the circumstances.**

Response: Not applicable.

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

Response: I understand nominees are sworn before testifying before the Committee and that they have a duty to be candid when testifying. I also understand, as a sitting United States Magistrate Judge, and as a nominee, the Code of Conduct for United States Judges informs, under Canon 2, a judge should avoid impropriety and the appearance of impropriety in all activities—this includes avoiding circumstances which may cause the judge's impartiality to be questioned. And under Canon 3A(6), a judge should not make public comment on the merits of a matter pending or impending in any court.

**Questions from Senator Thom Tillis**
**for Shane Kato Crews**
**Nominee to be United States District Judge for the District of Colorado**

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

   Response: Yes.

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

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions[.]" Black's Law Dictionary (11th ed. 2019). I do not consider "judicial activism" to be appropriate to judicial decision making.

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

   Response: As a sitting United States Magistrate Judge, I took an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and *impartially* discharge and perform all the duties incumbent upon me as a magistrate judge under the Constitution and laws of the United States." 28 U.S.C. § 453 (emphasis added). Impartiality is an expectation.

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: Faithful application of the law may result in outcomes that some find undesirable. But it is a judge's role to faithfully apply binding precedent to the facts and issues presented regardless of whether I or others view the outcome as undesirable.

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: If confirmed, I would faithfully and impartially apply Supreme Court and Tenth Circuit precedent to Second Amendment cases that come before me, including the decisions

in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

**8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?**

Response: I would listen to and assess the parties' legal arguments; research the applicable statutory law or constitutional provisions bearing on the facts, to include Supreme Court and Tenth Circuit precedent; and I would faithfully and impartially apply the law and precedent to the facts before me.

**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: Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Callahan v. Unified Gov't of Wyandotte Cnty.*, 806 F.3d 1022, 1026 (10th Cir. 2015). When considering qualified immunity, I listen to and assess the parties' legal arguments and research and analyze Supreme Court and Tenth Circuit precedent, and I apply that precedent to determine whether a statutory or constitutional right has been violated, and if so, whether that right was clearly established.

**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: As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to any questions of qualified immunity that come before me. As with all issues that come before me, if faced with a case implicating qualified immunity I would listen to and assess the parties' legal arguments without prejudging any issues; research the applicable law, to include Supreme Court and Tenth Circuit precedent; and I would faithfully and impartially apply the law and the precedent to the facts.

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

Response: Please see my response to Question 10.

**12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in**

**abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?**

Response: As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold, and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to any questions of patent eligibility that come before me.

13. **Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: Please see my response to Question 12.

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

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

    Response: In my 17-plus years of practice as a lawyer, I did not practice copyright law. In my four-plus years as a United States Magistrate Judge, I have been the referral magistrate judge on 18 cases alleging copyright infringement, and the presiding judge (on consent of the parties) in 13 cases alleging copyright infringement. For example, in *RE/MAX, LLC v. Argus & Kronos, LLC*, No. 1:17-cv-02006-MSK-SKC, 2019 WL 1437768 (D. Colo. Jan. 29, 2019), *report and recommendation adopted*, 2019 WL 967815 (D. Colo. Feb. 27, 2019), I issued a report and recommendation recommending to the district judge that the plaintiff's motion for default judgment alleging claims for trademark counterfeiting, trademark infringement and unfair competition, and copyright infringement, be granted after finding, in relevant part, that the plaintiff stated plausible claims for relief. The district judge adopted my recommendation.

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

    Response: I was the referral magistrate judge in at least one case involving the Digital Millennium Copyright Act (DMCA). *See Millennium Funding, Inc. v. Private Internet Access, Inc.*, Civil Action No. 1:21-cv-01261-NYW-SKC (D. Colo.). In that case, the plaintiff alleged the defendant, through its virtual private network, either directly engaged in or induced or contributed to third parties' infringement of the plaintiff's copyrights, and alleged the defendant should be

held secondarily liable for the DMCA violations of its end users. I handled all pretrial matters on referral from the district judge.

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

Response: In my 22-plus years in the legal profession (first as a lawyer and then as a judicial officer), I have not handled or adjudicated any cases addressing intermediary liability for online service providers for content posted by users.

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

Response: As a lawyer, I defended a charter school against allegations that it violated a teacher's First Amendment free speech rights after it declined to renew her contract. My client prevailed in that case after a five-day jury trial. As a federal magistrate judge, I have randomly drawn cases involving the First Amendment and free speech issues. For example, in *Hale v. Marques*, Civil Action No. 1:19-cv-00752-WJM-SKC, 2020 WL 2309619, at *9-11 (D. Colo. Feb. 3, 2020), *report and recommendation adopted as modified sub nom.* 2020 WL 1593339 (D. Colo. Mar. 30, 2020), the plaintiff, a *pro se* incarcerated person, alleged (in relevant part) the defendant Bureau of Prison's (BOP) personnel violated his free speech rights because of restrictions they placed on his speech related to his white supremacist organization that was deemed a security threat group by the BOP. I issued a report and recommendation recommending finding the plaintiff's free speech claims were barred by issue preclusion based on a prior decision involving this plaintiff issued by the Tenth Circuit. The presiding district judge adopted my recommendation.

Concerning intellectual property issues, on referral from the presiding district judge, I issued an order granting the plaintiff's motion to amend its initial patent infringement contentions to assert an additional claim for infringement. The presiding district judge overruled the defendants' objections to my order and affirmed my order. *See Cocona, Inc. v. VF Outdoor, LLC*, Civil Action No. 1:16-CV-02703-CMA-SKC, 2023 WL 2743270 (D. Colo. Mar. 30, 2023).

I approach each of these cases with an open mind by listening to and assessing the parties' legal arguments, and by researching, analyzing, and faithfully and impartially applying Supreme Court and Tenth Circuit precedent.

**15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the**

**Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.**

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

Response: Supreme Court and Tenth Circuit precedent have guided that legislative history should be considered rarely and cautiously, and only as a last resort. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("legislative history is not the law"); *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("ambiguous legislative history [may not be used to] muddy clear statutory language"); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020) ("Once we exhaust the traditional tools of statutory interpretation, we may (cautiously) turn to the legislative history.") (parenthetical in original). As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent, including any methods of interpretation dictated by that precedent, faithfully and impartially when considering how to apply the law to the facts in a particular case.

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

Response: The Supreme Court has developed a series of doctrines which afford deference to certain agency decisions. For example, in *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022), the Supreme Court announced the "major questions" doctrine, which provides that in extraordinary cases involving statutes that confer authority upon an administrative agency, the agency must point to clear congressional authorization for the authority the agency claims. In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that when a court reviews an agency's construction of a statute the agency administers, if the statue is silent or ambiguous with respect to the specific issue, the court should defer to the agency's interpretation so long as it is based on a permissible construction of the statute. Additional deference doctrines include *Auer* deference and *Skidmore* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997) (affording deference to an agency's reasonable readings of genuinely ambiguous regulations); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (affording deference to agency decisions which lack the force of law and based on the degree of the agency's care, its consistency, formality, relative expertise, and the persuasiveness of the agency's position).

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

Response: Supreme Court and Tenth Circuit precedent have guided that legislative history should be considered rarely and cautiously, and only as a last resort. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("legislative history is not the law"); *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("ambiguous legislative history [may not be used to] muddy clear statutory language"); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1237 (10th Cir. 2020) ("Once we exhaust the traditional tools of statutory interpretation, we may (cautiously) turn to the legislative history.") (parenthetical in original). As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent, including any methods of interpretation dictated by that precedent, faithfully and impartially when considering how to apply the law to the facts in a particular case.

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

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

Response: When deciding a case that turns on the interpretation of a federal statute like the DMCA, I start with examining the text of the statute. If the text of the statute is plain and unambiguous, my inquiry ends there and I apply the statute as written to the facts before me. If, on the other hand, the text of the statute is vague or ambiguous, I consult Supreme Court and Tenth Circuit precedent for any applicable canons of construction, and I apply those canons of construction to interpret the statute.

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

Response: Federal trial courts are duty-bound to apply Supreme Court precedent, as well as the precedent of their circuit court, faithfully and impartially to the facts before them. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.")

**17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.**

**a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?**

Response: In the District of Colorado, new cases are randomly drawn to both district and magistrate judges, which prevents the problem of judge shopping. In any event, regardless of how cases are assigned, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to the matters before me.

**b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?**

Response: Please see my answer to Question 17(a).

**c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?**

Response: No.

**d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?**

Response: Please see my answers to 17(a) and 17(c). As a sitting United States Magistrate Judge, I have never engaged in forum selling. If I were confirmed to be a United States District Judge I would continue to preside over the matters assigned to me through the District of Colorado's procedures for assigning cases.

**18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?**

Response: As a sitting United States Magistrate Judge, my role is to set aside any personal views I may hold and to apply Supreme Court and Tenth Circuit precedent faithfully and impartially to the matters before me. If faced with a question about whether procedures or rules adopted in a judicial district have biased the administration of justice and encouraged forum shopping, I would listen to and assess the parties' legal arguments and evaluate the lawfulness of the circumstances by researching and applying Supreme Court and Tenth Circuit precedent and faithfully and impartially applying that precedent.

**19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?**

Response: Please see my answers to Questions 17(a) and 18.

**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Ms. Molly R. Silfen**
**Nominee to be Judge, United States Court of Federal Claims**

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

   Response: I do not agree that the role of a judge is to exercise value judgments. Rather, the role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

   Response: I am not familiar with that quote by Judge Reinhardt. If confirmed as a judge on the Court of Federal Claims, I would take the approach that each case should be decided based on following the law and the precedent of the Supreme Court and the Federal Circuit and applying that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

3. **Please define the term "living constitution."**

   Response: Black's Law Dictionary (11th ed. 2019) defines "living constitution" as "A constitution whose interpretation and application can vary over time according to changing circumstances and changing social values."

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

   Response: I am not familiar with that quote by Justice Jackson. If confirmed as a judge on the Court of Federal Claims, I would treat the Constitution as an enduring document and interpret it based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provisions. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions.

5. **What is implicit bias?**

Response: The Merriam-Webster dictionary defines "implicit bias" as "a bias or prejudice that is present but not consciously held or recognized." "Implicit bias." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/implicit%20bias.

6. **Is the federal judiciary affected by implicit bias?**

Response: I am not aware of studies addressing the federal judiciary's implicit biases, and I have not conducted any research into this question.

7. **Do you have any implicit biases? If so, what are they?**

Response: Should I be fortunate enough to be confirmed as a judge on the Court of Federal Claims, I would be bound by the oath that federal judges take, namely to "administer justice without respect to persons." Accordingly, I promise to treat all parties in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

8. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: Black's Law Dictionary (11th ed. 2019) defines "attack" as, "The act of assailing either with physical violence or with sharp words." It defines "ad hominem attack" as, "A personal dig or affront; specif., the criticism of an adversary's character as opposed to the substance of the adversary's arguments." The Supreme Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964), has distinguished between criticism of an opinion and criticism of a judge, explaining that both are protected speech: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains half-truths and misinformation. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. … Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Id.* (citations and quotation marks omitted).

9. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which sentencing a criminal defendant would arise. Nevertheless, in the unlikely event that it became relevant to apply criminal sentencing law, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent

that the Federal Circuit had relevant precedent) in a fair and impartial way. It is my understanding in reviewing the federal sentencing statute, 18 U.S.C. § 3553(a), that Congress has not directed one purpose of sentencing to be favored or prioritized over any other.

10. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: I have never been a judge and thus have not had occasion to employ a particular judicial philosophy. The philosophy that would guide my decisionmaking, if fortunate enough to be confirmed as a judge on the Court of Federal Claims, would be to take each case with an open mind, on its own terms and its own merits. I would study the pleadings and the facts of the case. I would study the parties' arguments and the law and precedent of the Supreme Court and the Federal Circuit, and I would apply that law and those precedents in a fair and impartial way. I would treat each case as the most important case, because it is the most important case to the parties. I would ensure that every party understands that it has been heard and its arguments have been addressed, but I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me. I have not studied whether there is one decision that best represents this philosophy but am confident that many judges take a similar approach.

11. **Please identify a Federal Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: Please see my response to Question 10.

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

Response: Section 1507 of Title 18 of the United States Code imposes a fine, imprisonment for up to one year, or both, against "[w]hoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence."

13. **Under Supreme Court precedent, including *Cox v. Louisiana*, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: In *Cox v. Louisiana*, 379 U.S. 559, 561-64 (1965), the Supreme Court upheld a state statute modeled on 18 U.S.C. § 1507 against a facial constitutional challenge.

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

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Because the legal issues presented in *Brown v. Board of Education of Topeka* are unlikely to become the subject of litigation, I am comfortable expressing my view that *Brown* was correctly decided.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Because the legal issues presented in *Loving v. Virginia* are unlikely to become the subject of litigation, I am comfortable expressing my view that *Loving* was correctly decided.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Griswold v. Connecticut* is binding precedent of the Supreme Court. If confirmed, I would follow *Griswold* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade*, returning the authority to regulate abortion to the people and their elected representatives. *Dobbs* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Planned Parenthood v. Casey*, returning the authority to regulate abortion to the

people and their elected representatives. *Dobbs* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Gonzales v. Carhart* is binding precedent of the Supreme Court. If confirmed, I would follow *Gonzales v. Carhart* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *District of Columbia v. Heller* is binding precedent of the Supreme Court. If confirmed, I would follow *Heller* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *McDonald v. City of Chicago* is binding precedent of the Supreme Court. If confirmed, I would follow *McDonald* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding precedent of the Supreme Court. If confirmed, I would follow *Hosanna-Tabor* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *New*

*York State Rifle & Pistol Association v. Bruen* is binding precedent of the Supreme Court. If confirmed, I would follow *Bruen* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. *Dobbs v. Jackson Women's Health Organization* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

Response: No.

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

Response: No.

17. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**

a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

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

Response: Please see my response to Question 17.a.

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

Response: No.

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

Response: I recently had a conversation at a party with a friend of a friend who, I learned during our conversation, works in human resources for Arabella Advisors. This was in February 2023, before my nomination was announced, and we did not discuss anything substantive about the work of Arabella Advisors or anything about the courts or about my potential nomination to the Court of Federal Claims. I do not remember her full name.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

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

       Response: No.

20. **Please describe the selection process that led to your nomination, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

    Response: In March 2022, Senator Patrick Leahy sent a letter to the White House recommending me for a position on the United States Court of Federal Claims. I am

aware that in September 2022 Senator Thom Tillis also sent a letter recommending me for a position on the United States Court of Federal Claims. On November 22, 2022, I was contacted by an attorney in the White House Counsel's Office regarding my interest in being considered for a seat on the United States Court of Federal Claims. After that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On February 22, 2023, the President announced his intent to nominate me.

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

Response: No.

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

Response: No.

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

Response: I recently had a conversation at a party with a friend of a friend who, I learned during our conversation, works in human resources for Arabella Advisors. This was in February 2023, before my nomination was announced, and we did not discuss anything substantive about the work of Arabella Advisors or anything about the courts or about my potential nomination to the Court of Federal Claims. I do not remember her full name.

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

Response: No.

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

Response: No.

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

Response: In March 2022, Senator Patrick Leahy sent a letter to the White House recommending me for a position on the United States Court of Federal Claims. I am aware that in September 2022 Senator Thom Tillis also sent a letter recommending me for a position on the United States Court of Federal Claims. On November 22, 2022, I was contacted by an attorney in the White House Counsel's Office regarding my interest in being considered for a seat on the United States Court of Federal Claims. After that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On February 22, 2023, the President announced his intent to nominate me.

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

Response: I reviewed the questions and drafted my answers, conducting legal research where necessary. I submitted my draft answers to the Office of Legal Policy at the Department of Justice, who provided feedback. I revised and finalized my answers after receiving that feedback.

RESPONSES OF MOLLY R. SILFEN TO QUESTIONS
SUBMITTED BY SENATOR HIRONO

**Written Questions for Molly Silfen**
**Nominee to the Court of Federal Claims**
**March 29, 2023**

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

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

   Response: No.

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

   Response: No.

**Senator Mike Lee**
**Questions for the Record**
**Molly Silfen, Nominee to the United States Court of Federal Claims**

**1. What legal experience do you think is necessary for a person to make a good Court of Federal Claims judge, and what have you done to gain this experience?**

Response: Starting at the beginning of my career, for two years I was a law clerk for Judge Lourie on the Federal Circuit, where I worked on cases arising from the Court of Federal Claims, including all of the various areas of the court's jurisdiction. In my practice since then, I have focused on intellectual property cases, which represent one important area of the court's jurisdiction. My practice has involved cross-cutting issues that the Court of Federal Claims addresses, issues like administrative law, statutory interpretation, and constitutional questions. Those types of issues arise in all different areas of the court's jurisdiction. And my experience practicing in front of the Federal Circuit and understanding the records of highly technical complex cases—I have argued 20 Federal Circuit appeals and been involved in many dozens more—will serve me well on the court if I am fortunate enough to be confirmed.

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

Response: I have never been a judge and thus have not had occasion to employ a particular judicial philosophy. The philosophy that would guide my decisionmaking, if fortunate enough to be confirmed as a judge on the Court of Federal Claims, would be to take each case with an open mind, on its own terms and its own merits. I would study the pleadings and the facts of the case. I would study the parties' arguments and the law and precedent of the Supreme Court and the Federal Circuit, and I would apply that law and those precedents in a fair and impartial way. I would treat each case as the most important case, because it is the most important case to the parties. I would ensure that every party understands that it has been heard and its arguments have been addressed, but I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: I would interpret a federal statute based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions.

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

Response: I would interpret a constitutional provision based on the Constitution's text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. For example, the Supreme Court in certain types of constitutional questions puts a heavy emphasis on the Nation's history and tradition. *See New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2127-30 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Response: Please see my response to Question 4. In addition, the Supreme Court has looked to the original public meaning in evaluating the text of particular constitutional provisions including, for example, the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Please see my response to Question 3.

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

Response: I understand the "plain meaning" of a constitutional provision to refer to the public understanding of the relevant language at the time of enactment. For a statute, the relevant time is also the time of enactment. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020). If confirmed as a judge on the Court of Federal Claims, I would follow the precedent of the Supreme Court and the Federal Circuit to determine the plain meaning of a statute or constitutional provision and the time at which that meaning is assessed.

**7. What are the requirements for standing in the Court of Federal Claims?**

Response: While the Court of Federal Claims is an Article I, not an Article III, court, it has adopted the standing requirements of Article III courts based at least on the reference to a "case or controversy" in the statute empowering it to enter final judgments. 28 U.S.C. § 2519; *see Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1351 n.7 (Fed. Cir. 2015) ("Although the Court of Federal Claims is an Article I tribunal, it generally adheres to traditional justiciability standards applicable to courts established under Article III."); *see also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 889 (1991) (Non-Article III tribunals can "exercise the judicial power of the United States."). One exception is that private relief bills can

be referred to the Court of Federal Claims by Congress, and in those instances there is no independent standing requirement. *See* 28 U.S.C. § 1492. In most cases, however, where there is a standing requirement, the plaintiff must show that it has an injury in fact that is fairly traceable to the conduct of the United States and that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Figueroa v. United States*, 466 F.3d 1023, 1029 (Fed. Cir. 2006).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316, 323-24 (1819), the Supreme Court held that Congress has certain unenumerated powers that are implicit in its authority to carry out its enumerated powers, under the Necessary and Proper Clause of Article I. In general, though, the Constitution sets out enumerated, not plenary, powers of Congress.

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

Response: Under binding precedents of the Supreme Court, Congress need not reference a specific enumerated power in enacting a law. *See, e.g.*, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." (quotation marks and citations omitted)). If a party has raised a question about the constitutionality of a statute, I would research the law and precedent of the Supreme Court and the Federal Circuit on the question and apply that precedent to the case before me, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: The Supreme Court has held that certain unenumerated rights are protected under the Constitution, including the right to privacy in the home, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and the right to travel interstate, *Saenz v. Roe*, 526 U.S. 489, 498 (1999). The test for determining whether an unenumerated right is fundamental under the Constitution asks whether the right is deeply rooted in the Nation's history and tradition; is implicit in the concept of ordered liberty; and contains a careful description of the asserted liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *see also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022).

**11. What rights are protected under substantive due process?**

Response: The Supreme Court has held that substantive due process protects individuals against laws that exceed the limits of government authority, namely, certain unenumerated rights. Those unenumerated rights include the right to privacy in the home, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and the right to travel interstate, *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

**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: The Supreme Court has distinguished unenumerated rights that are protected, as discussed in my answers to Questions 10 and 11, from economic rights addressed in *Lochner v. New York*, and has overruled *Lochner*. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The Supreme Court has also overruled the cases—*Roe v. Wade* and *Planned Parenthood v. Casey*—that protected a substantive due process right to abortion, returning the authority to regulate abortion to the people and their elected representatives. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Should I be confirmed to the Court of Federal Claims, I would apply all binding precedents of the Supreme Court and the Federal Circuit.

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

Response: The Supreme Court has explained that, under the Commerce Clause, Congress may regulate (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even if the threat comes only from intrastate activities; and (3) activities that substantially affect interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000). In *Morrison* and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court set out limits of Congress's powers under the Commerce Clause.

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

Response: The suspect classes are race, religion, national origin, and alienage. In determining whether a group qualifies as a suspect class, the Supreme Court looks at whether the group is a "discrete and insular minority." *United States v. Carolene Products Co.*, 304 U. S. 144, 152-53 n.4 (1938). The Supreme Court has further explained that the "underlying rationale" of suspect classes "is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades

because traditional political processes may have broken down." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

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

Response: The Supreme Court has recognized the centrality of checks and balances, and separation of powers, to our system of government, describing the separation of powers as "at the heart of our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119 (1976). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122. In that spirit, the Supreme Court "has held that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution. The Court has held that the President may not execute and exercise legislative authority belonging only to Congress." *Id.* at 123 (citations omitted). Separation of powers is also why the judicial branch's powers are limited to deciding cases and controversies. *Clapper v. Amnesty International U.S.A.*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

**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: In reviewing a separation-of-powers question, I would follow the text and structure of the Constitution and the precedent of the Supreme Court and the Federal Circuit, all of which bind the Court of Federal Claims.

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

Response: As a judge on the Court of Federal Claims, my job would be to apply the law and precedent of the Supreme Court and the Federal Circuit, and to apply that law and those precedents in a fair and impartial way. I would take each case with an open mind, on its own terms and its own merits. I would ensure that every party understands that it has been heard and its arguments have been addressed, but I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" as, "A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." It defines "judicial supremacy" as, "The doctrine that

interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

**19. 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: I am not familiar with this quotation from President Lincoln. Every branch of government has the foremost obligation to follow the Constitution; all elected officials and judicial officers take an oath to uphold the Constitution. An important part of that obligation is respecting the Constitution's separation of powers, which provides the judicial branch with the power to decide cases and controversies. Moreover, the Supreme Court has made clear that elected officials must respect the decisions of the judicial branch. *See, e.g.*, *Cooper v. Aaron*, 358 US 1, 18 (1958).

**20. What role does precedent play in the opinions of a Court of Federal Claims judge?**

Response: A judge on the Court of Federal Claims is bound by the precedent of the Supreme Court and the Federal Circuit. If I were fortunate enough to be confirmed, I would follow that precedent.

**21. 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: The courts play a narrow role in our constitutional system, limited to deciding cases and controversies. *Clapper v. Amnesty International U.S.A.*, 568 U.S. 398, 408-09 (2013). Courts maintain their role and the limits on their power by applying the law and precedent of the Supreme Court and—in the case of the Court of Federal Claims—the Federal Circuit, and applying that law and those precedents in a fair and impartial way. Courts also maintain those limits by addressing each case narrowly, keeping in mind the judges' role of adjudicating only the case that is before them. And courts maintain those limits by explaining their decisions clearly.

**22. 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 judge on the Court of Federal Claims has the duty to apply the law and precedent of the Supreme Court and the Federal Circuit, and to apply that law and those precedents in a fair and impartial way. I would apply any precedent that squarely addresses the issue in the case. In the absence of precedent squarely addressing the issue in the case, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. In all cases, I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

23. **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: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which sentencing a criminal defendant would arise. Nevertheless, in the unlikely event that it became relevant to apply criminal sentencing law, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way. *See* 18 U.S.C. § 3553(a); United States Sentencing Guideline § 5H1.10.

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

Response: I am not familiar with this quotation or its context. In the legal context, Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing."

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing." It defines "equality" as "[t]he quality, state, or condition of being equal; esp., likeness in power or political status."

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

Response: The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." If confirmed, I would apply all Supreme Court and Federal Circuit precedents regarding the scope and contours of the Equal Protection Clause.

**27. How do you define "systemic racism?"**

Response: I do not have a personal definition of "systemic racism." If I were fortunate enough to be confirmed as a judge on the Court of Federal Claims, I promise to treat all parties in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

**28. How do you define "critical race theory?"**

Response: Black's Law Dictionary (11th ed. 2019) defines "critical race theory" as, "A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

Response: The terms "critical race theory" and "systemic racism" are different terms, but I have not studied either one and do not have a personal definition of either one. Please also see my responses to Questions 27 and 28.

**30. The Court of Federal Claims has been called "the keeper of the Nation's conscience" and the "People's court." How do you see the court fulfilling such a role? How do you see yourself fulfilling this role if you are confirmed?**

Response: The Court of Federal Claims originated in 1855 to waive the sovereign immunity of the United States in a number of circumstances and hold the government accountable for its actions. In 1861, President Lincoln successfully urged Congress to give the court authority to render binding judgments, arguing, "It is as much the duty of the Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." In that important tradition, I would view my role as requiring both prompt attention to all cases and taking each case with an open mind, on its own terms and its own merits, in a fair and impartial way. On promptness, I had the honor of serving for two years as a law clerk for Judge Lourie on the Federal Circuit, and he routinely emphasized the importance of prompt decisionmaking as critical to rendering justice. I would work to emulate that approach. On taking each case with an open mind, I have litigated both for and against the United States government, zealously representing clients on both sides, and as a law clerk I learned from an impartial adjudicator addressing cases between the government and private individuals. I would work to emulate Judge Lourie's openminded, fair, and impartial approach to each case.

**Senator Josh Hawley**
**Questions for the Record**

**Molly Silfen**
**Nominee, U.S. Court of Federal Claims**

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

   Response: No.

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

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

   Response: I would interpret a constitutional provision based on the Constitution's text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. For example, the Supreme Court in certain types of constitutional questions puts a heavy emphasis on the Nation's history and tradition. *See New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2127-30 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

3. **Do you consider legislative history when interpreting legal texts?**

   Response: I would interpret a legal text based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. The Supreme Court "permit[s] resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004). The Supreme Court has also explained that some types of legislative history are more probative than others; for example, the Supreme Court has explained that full committee reports have greater probative value than statements of individual members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

**a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

Response: The Supreme Court has directed that not all legislative history should be treated the same. If the circumstance called for looking to legislative history based on Supreme Court and Federal Circuit precedent, I would follow the precedent of the Supreme Court and Federal Circuit in the emphasis they place on legislative history. For example, the Supreme Court has explained that full committee reports have greater probative value than statements of individual members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: I would follow the precedent of the Supreme Court and Federal Circuit in determining whether it is appropriate to consult the laws of foreign nations when interpreting provisions of the U.S. Constitution. I am not aware of a circumstance in which either court consults the laws of foreign nations for interpreting the U.S. Constitution.

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

Response: The Federal Circuit does not have a criminal docket, and I am not aware of a Federal Circuit case that applies the Eighth Amendment's prohibition on cruel and unusual punishment. Further, the "Court of Federal Claims does not have jurisdiction over claims arising under the Eighth Amendment, as the Eighth Amendment is not a money-mandating provision." *Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (quotation marks omitted). Nevertheless, the Supreme Court applies a test that asks whether the protocol presents "a substantial risk of serious harm" and whether there is "an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (marks omitted).

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

Response: "The Court of Federal Claims does not have jurisdiction over claims arising under the Eighth Amendment, as the Eighth Amendment is not a money-mandating provision." *Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) (quotation marks omitted). Nevertheless, the answer is yes. *Glossip v. Gross*, 576 U.S. 863, 878 (2015).

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

Response: The Federal Circuit does not have a criminal docket, and I am not aware of a Federal Circuit case that addresses DNA analysis for habeas corpus petitioners. Further, "the habeas statute does not list the Court of Federal Claims among those courts empowered to grant a writ of habeas corpus, and the trial court therefore is without power to entertain [a party's] petition." *Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002). Nevertheless, the Supreme Court does not recognize such a right. *District Attorney's Office for Third Judicial District. v. Osborne*, 557 U.S. 52, 72 (2009).

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

Response: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which these death-penalty issues would arise. Nevertheless, in the unlikely event that it became relevant to apply these laws, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way.

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

Response: It is unlikely that the Court of Federal Claims would be addressing a state governmental action, as its jurisdiction is limited to federal money-mandating statutes. Nevertheless, in the unlikely event that it became relevant to apply these laws, under the Free Exercise Clause in particular, the Supreme Court has held that, if a law is facially neutral and generally applicable, in general, it "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993). But if the law is not neutral, or not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* A law is not neutral if its "object or purpose … is the suppression of religion or religious conduct," *id.* at 533, or if its enforcement was motivated by hostility to religion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729-31 (2018); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 n.1 (2022). A law is not generally applicable if it provides individual exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), or if it treats religious conduct less favorably than comparable secular conduct, comparing

the governmental interests at issue, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021).

The Supreme Court has addressed religious freedom claims against federal laws under the Free Exercise Clause of the Constitution, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In cases where RFRA or RLUIPA applies, the Supreme Court applies strict scrutiny, even if the law is facially neutral and generally applicable, if it substantially burdens the free exercise of religion. *Burwell v. Hobby Lobby*, 573 U.S. 682, 694-96, 705 (2014). The Supreme Court requires the government to show a compelling government interest and to use the least restrictive available means to achieve that interest. *Id.*

If faced with a free exercise question, I would apply the law and precedent of the Supreme Court and the Federal Circuit in a fair and impartial way.

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

Response: Please see my response to Question 8.

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

Response: I am not aware of any precedent from the Federal Circuit on evaluating the sincerity of a person's religious belief, as the Federal Circuit is a court of limited jurisdiction. The Supreme Court asks whether the belief is not pretextual, *Burwell v. Hobby Lobby*, 573 U.S. 682, 717 n.28 (2014), and "whether [it is], in [the person's] own scheme of things, religious," *United States v. Seeger*, 380 U.S. 163, 185 (1965). A belief is "religious" if it is a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by ... God." *Id.* at 176.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects the individual right to keep and bear arms, and that includes the right of an ordinary, law-abiding citizen to keep a firearm in his house. The Supreme Court has since held that the right to bear arms is a fundamental right, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and that it is rooted in the Nation's history and tradition and also applies outside the

house, *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: No.

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

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

Response: I understand that statement, in context, to mean that Congress has the authority under the Constitution, particularly under the Fourteenth Amendment, to make laws and enact policies that affect the right to contract, as shown in the Nation's history of enacting policies that affect the right to contract, and that the courts' policy preferences should not interfere with that authority vested in Congress.

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. The Supreme Court has overruled *Lochner v. New York*, 198 U.S. 45 (1905). *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would faithfully apply the law of the Supreme Court and the Federal Circuit to any question involving contracts and the Fourteenth Amendment.

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

Response: The Supreme Court had not explicitly overruled *Korematsu v. United States*, 323 U.S. 214 (1944), until 2018. But the Court explained that *Korematsu* was wrong the day it was written and had been shown in the many decades since to be wrong.

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

Response: No. Two particular cases, *Lochner* and *Korematsu*, have been overruled, as discussed in my responses to Questions 12 and 13.

**a. If so, what are they?**

Please see my response to Question 14 above.

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

Response: Yes.

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

**a. Do you agree with Judge Learned Hand?**
**b. If not, please explain why you disagree with Judge Learned Hand.**
**c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.**

Response to 15.a-c: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Any personal opinion I may have about the market share that might lead to an antitrust violation has not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Moreover, it is unlikely that the Court of Federal Claims would be addressing a claim under, for example, the Sherman Act, as its jurisdiction is limited to federal money-mandating statutes. If the issue were to arise, I would faithfully apply the law of the Supreme Court and the Federal Circuit to any question involving antitrust law or monopolistic market share. The Supreme Court has explained that there is no particular minimum market share that constitutes a monopoly. *Times-Picayune Publishing Corp. v. United States*, 345 U.S. 594, 612 (1953).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as, "The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law."

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

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

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

Response to 17.a-b: I would interpret a legal text based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. The Supreme Court has explained that, for a state constitution, courts should follow the interpretation of that state's highest court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Sometimes, but not always, that process would result in identical provisions being interpreted identically. The Supreme Court has explained that "[w]ithin our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Thus, a state's highest court may "impose, based on the State's Constitution, any additional protections … it deems appropriate." *Florida v. Powell*, 559 U.S. 50, 59 (2010).

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

Response: Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Because the legal issues presented in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), are unlikely to become the subject of litigation, I am comfortable expressing my view that *Brown* was correctly decided.

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

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

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

Response to 19.a-b: The Court of Federal Claims is a court of limited jurisdiction, and its jurisdiction is limited to suits for money damages. It is therefore rare that the Court of Federal Claims will issue injunctions at all. Where the Court of Federal Claims issues injunctions is generally in the context of issuing preliminary injunctions in bid protest cases, where the government is enjoined from undertaking a particular course of action until the court has had a chance to rule. In general, injunctions are addressed in Federal Rule of Civil Procedure 65. My past experience with injunctions is in the context of patent infringement cases, where 35 U.S.C. § 283 permits a court to issue an injunction to prevent patent infringement. Those injunctions by their nature must have nationwide effect, as the patent right is a nationwide right. In any case, I would apply the law and precedent of the Supreme Court and the Federal Circuit on any injunction

issue. I would also work hard to address each case narrowly, keeping in mind the judge's role of adjudicating only the case that is before me.

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

Response: Please see my response to Question 19.

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

Response: The Founders envisioned a federalist system, in which certain powers are delegated to the federal government, and any powers not delegated to the federal government are reserved to the individual states. Like the separation of powers among the three branches of government, that distribution of power ensures that no single government has too much power over the people it represents. That is why, for example, the Supreme Court has developed a significant body of law deferring to state court decisions on substantive questions of state law, when a federal court is sitting in diversity. *E.g.*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: Several Supreme Court cases address federal courts abstaining in deference to state court adjudication. Under *Younger v. Harris*, 401 U.S. 37, 43-44, 53-54 (1971), when there are concurrent federal and state court proceedings, the federal court should not call into question the state court proceedings by deciding a federal constitutional question because "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against goodfaith attempts to enforce it."

Under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498-501 (1941), a federal court should avoid deciding a federal constitutional question when the case can be decided by interpreting the state law in a way that would avoid the federal constitutional question. In the case where "a definitive ruling on the state issue would terminate the controversy," the courts can and should avoid constitutional adjudication. *Id.* at 498.

Under the *Rooker-Feldman* doctrine, a federal court should avoid sitting in review of a state court unless explicitly authorized by Congress. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) ("If the [state court's] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. … Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." (citations omitted)); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) ("[T]he United States District Court is without authority to review final determinations of the District of Columbia Court of

Appeals in judicial proceedings. Review of such determinations can be obtained only in" the Supreme Court).

Under *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943), a federal court should abstain when its consideration of a state regulatory scheme "so clearly involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." In some circumstances, such as where there is a dispute over the meaning of a state statute governing an issue with particular interest to that state like eminent domain, a federal court should seek the state courts' interpretation before proceeding. *See Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29 (1959) ("The special nature of eminent domain justifies a district judge … to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast.").

Under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), a federal court should abstain from deciding a question, in favor of a concurrent state court proceeding, based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* (marks omitted).

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

Response: The Court of Federal Claims is a court of limited jurisdiction, and its jurisdiction is limited to suits for money damages. It is therefore rare that the Court of Federal Claims will issue injunctions at all. Where the Court of Federal Claims issues injunctions is generally in the context of issuing preliminary injunctions in bid protest cases, where the government is enjoined from undertaking a particular course of action until the court has had a chance to rule. The Supreme Court has explained that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). I would apply the law and precedent of the Supreme Court and the Federal Circuit on any injunction issue.

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

Response: The Supreme Court has held that substantive due process protects individuals against laws that exceed the limits of government authority, such as certain unenumerated rights. Those unenumerated rights include the right to privacy in the home, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and the right to travel interstate, *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

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

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

Response: Please see my response to Question 8.

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

Response: No, the right to free exercise of religion is broader than the freedom of worship. The Supreme Court has explained that free exercise "protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022).

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

Response: Please see my response to Question 8.

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

Response: Please see my response to Question 10.

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

Response: Please see my response to Question 8. In addition, RFRA applies to all federal laws. *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 695 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). RFRA thus applies to federal laws governing areas like employment and education and prohibits the government from "substantially burdening 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." *Hobby Lobby*, 573 U.S. at 705 (marks and emphasis omitted).

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

Response: No.

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

Response: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which the issue of the threshold for conviction of a criminal defendant would arise. Nevertheless, in the unlikely event that it became relevant to apply this law, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way.

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

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

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

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

Response to 27.a-c: The Court of Federal Claims does not have a criminal docket, and it is hard to imagine a situation in which these issues would arise. "[T]he habeas statute does not list the Court of Federal Claims among those courts empowered to grant a writ of habeas corpus, and the trial court therefore is without power to entertain [a party's] petition." *Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002). Nevertheless, in the unlikely event that it became relevant to apply the law of habeas corpus, I would apply the law and precedent of the Supreme Court and the Federal Circuit (to the extent that the Federal Circuit had relevant precedent) in a fair and impartial way.

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

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

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

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

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

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

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

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

Response to 28.a-g: The Federal Circuit issues nonprecedential opinions when "a precedential opinion would not add significantly to the body of law," and when the decision is not addressing an issue of first impression, establishing a new rule of law, or otherwise addressing a significant legal issue. Federal Circuit Internal Operating Procedures, ¶¶ 3, 4; *see* Fed. Cir. R. 32.1(b). Nevertheless, the Federal Rules of Appellate Procedure and the Federal Circuit's rules allow parties to cite nonprecedential decisions. Fed. R. App. P. 32.1; Fed. Cir. R. 32.1(c). I would consider nonprecedential opinions of the Federal Circuit to be relevant authority, consistent with the Federal Rules of Appellate Procedure, and I would not prohibit litigants from citing nonprecedential opinions.

**29. In your legal career:**

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

Response: I have taken one case to trial as first chair, and I have been first chair in two other district court cases, one of which was decided on summary judgment and the other of which was voluntarily dismissed by the plaintiff without prejudice. In the case I took to a weeklong trial, I was in charge of trial preparation, pretrial motions, the opening statement, direct and cross-examination of witnesses, moving for judgment as a matter of law, closing argument, and all post-trial briefing, among other things.

**b. How many have you tried as second chair?**

Response: I have been second chair in nine district court cases from the beginning to judgment. Those ended in summary judgment or judgment on the administrative record. I have also been second chair in an additional five cases that involved significant discovery and briefing but ended in other ways, such as settlement, or when I left the law firm before the case ended.

**c. How many depositions have you taken?**

Response: I have taken one deposition of the key expert witness in a district court litigation. I have been significantly involved in preparation for a few other depositions, preparing outlines and questions.

**d. How many depositions have you defended?**

Response: I have been significantly involved in the defense of depositions, where I helped prepare the witnesses for the process, but I have not defended any depositions.

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

Response: I have presented oral argument in twenty-three appeals before federal courts of appeals. (Twenty of those were before the Federal Circuit, and the other three were before the D.C. and Eighth Circuits.) I have additionally been counsel on at least sixty more briefs in the federal courts of appeals, including the Supreme Court.

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

Response: I have not argued any appeals before a state appellate court.

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

Response: I was first chair in a pro bono case at the Social Security Administration. I was also first chair in a pro bono case at the Department of Veterans Affairs. I was second chair in a patent case at the International Trade Commission, where I participated in briefing and in a claim construction hearing. I have also appeared before the U.S. Patent and Trademark Office in at least one inter partes reexamination. I have appeared dozens of times before the U.S. Patent and Trademark Office, in connection with prosecution of patent applications.

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

Response: I have been counsel on dispositive motions in approximately eleven district court cases.

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

Response: I was counsel on motions in limine and motions to exclude evidence, and responses to motions to exclude evidence and motions for late-stage depositions, in the case I tried as first chair. I also was counsel on motions to

compel and responses to motions to compel production of evidence in several other cases, and I presented oral argument on one of those motions to compel.

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

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

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

Response: I spent five years at a law firm tracking billable hours. I do not have access to those records, but as I recall, I billed about 2050 hours per year, and I spent about 60 hours per year on legal work for pro bono clients. I also volunteered as an adjunct professor at George Mason Law School (now the Antonin Scalia Law School) and volunteered regularly for committees of bar associations such as the Federal Circuit Bar Association and the American Intellectual Property Law Association.

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

**a. What do you understand this statement to mean?**

Response: I am not familiar with this quotation from Justice Scalia. Faithfully interpreting the law sometimes results in an undesirable outcome. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Upholding the rule of law is a crucial and systemic good in itself, important for maintaining the legitimacy of the courts and our whole system of government. That eclipses any personal opinions I may have in any particular case. Assuming this is what Justice Scalia also meant by this statement, I agree with it.

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

**a. What do you understand this statement to mean?**

**b. Do you agree or disagree with this statement?**

Response to 32.a-b: I am generally familiar with this quotation from Chief Justice Roberts. I believe that the role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Assuming this is what Chief Justice Roberts also meant by this statement, I agree with it.

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

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

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

Response to 33.a-b: I am not familiar with this quotation from Justice Holmes. I believe that the role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits. Assuming this is what Justice Holmes also meant by this statement, I agree with it.

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

Response: No.

**a. If yes, please provide appropriate citations.**

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

Response: No.

**36. What were the last three books you read?**

Response: *The Foundling*, by Ann Leary; *The Weekend*, by Charlotte Wood; and *The Road Taken*, by Senator Patrick Leahy.

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

Response: I do not have a personal definition of "systemic racism." If I were fortunate enough to be confirmed as a judge on the Court of Federal Claims, I promise to treat all parties in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

Response: Since I began working for the federal government in 2013, it has consistently been an honor to stand up in court and represent the United States. Public service has been integral to my career, and I would be honored to continue my public service as a judge on the Court of Federal Claims.

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

**a. How did you handle the situation?**

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

Response to 39.a-b: Yes, I have taken positions in litigation that conflicted with my personal views. I have addressed them the way I address every case—I zealously represented the interests of my client. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims.

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

Response: I frequently read the work of Professors Dennis Crouch, Jonas Anderson, and Jorge Contreras, all of whom write about intellectual property law issues.

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

Response: There is no individual Federalist Paper that has most shaped my view of the law.

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

Response: I recently argued an appeal for the government, *Hyatt v. Hirshfeld*, 16 F.4th 855 (Fed. Cir. 2021), which the government lost. The Federal Circuit's opinion not only addressed the parties' arguments, but it did so while acknowledging that it was a close case and that there was merit to both sides' arguments. I would hope to emulate that kind of humility in decisionmaking, acknowledging the merits of both sides' arguments (where both sides had in fact advanced meritorious arguments) while still making the hard decisions. In general, I have learned the most and rethought my positions the most in cases in which the arguments I advanced were not adopted by the court.

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

Response: This question implicates issues that are currently pending in litigation. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. Recently, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court returned the authority to regulate abortion to the people and their elected representatives. Litigation over abortion remains pending. *E.g.*, *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*, No. 2:22-cv-223 (N.D. Tex.). *Dobbs* is binding precedent of the Supreme Court. If confirmed, I would follow *Dobbs* and all other binding precedents of the Supreme Court and Federal Circuit.

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

Response: No.

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

**a. *Roe v. Wade,* 410 U.S. 113 (1973)?**

Response: No.

**b. The Supreme Court's substantive due process precedents?**

Response: No.

**c. Systemic racism?**

Response: No.

**d. Critical race theory?**

Response: No.

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

**a. Apple?**
**b. Amazon?**
**c. Google?**
**d. Facebook?**
**e. Twitter?**

Response to 46.a-e: I do not hold any shares in any of these companies outside of large diversified index funds. My assets are listed in my Financial Disclosure Report and Net Worth Statement submitted to the Committee.

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

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

Response: I have never authored a brief that was filed without my name on it. I have occasionally worked on briefs that were filed in court without my name on them. Those were briefs for the United States in *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853 (2019), *reversing* 860 F.3d 1350 (Fed. Cir. 2017); an amicus brief for Senator Patrick Leahy in *Apple Inc. v. Qualcomm Inc.*, 142 S. Ct. 2868 (2022); an amicus brief for the United States in *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016); and briefs for the United States in *Hyatt v. Office of Management and Budget*, 998 F.3d 423 (9th Cir. 2021), *affirming* 611 F. Supp. 3d 1051 (D. Nev. 2020), *on remand from* 908 F.3d 1165 (9th Cir. 2018), *reversing* 2017 WL 3974996 (D. Nev. Sept. 8, 2017). I have at times reviewed other briefs of colleagues and offered suggestions, where my name has not appeared on those briefs.

**48. Have you ever confessed error to a court?**

Response: No.

**a. If so, please describe the circumstances.**

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

Response: In testifying under oath, I have a duty of candor, and I take that duty very seriously. I have provided candid and truthful answers to these questions and all of the Committee's questions, to the best of my ability, consistent with Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees.

**Questions from Senator Thom Tillis**
**for Molly Rebecca Silfen**
**Nominee to the United States Court of Federal Claims**

1. **Please describe your understanding of the workload of the Federal Claims Court. If confirmed, how do you intend to manage your caseload?**

Response: During the fiscal year ending September 30, 2022, the Court of Federal Claims disposed of 627 complaints and 1,231 vaccine petitions. The total amount of money claimed was over $14 billion. U.S. Court of Federal Claims Statistical Report for the Fiscal Year Oct. 1, 2021 – Sept. 30, 2022. The cases include subject areas such as intellectual property, government contracts, bid protests, takings, military and civilian pay, tax, and Vaccine Act cases. The cases are assigned to the judges at random. Rule of the Court of Federal Claims 40.1(a). While this is a significant workload, I am accustomed to handling a heavy docket of multiple technical, complex cases at once. Starting at the beginning of my career, for two years I was a law clerk for Judge Lourie on the Federal Circuit, where I worked on cases arising from the Court of Federal Claims, including all of the various areas of the court's jurisdiction. In my practice since then, I have focused on intellectual property cases, which represent one important area of the court's jurisdiction. My practice has involved cross-cutting issues that the Court of Federal Claims addresses, issues like administrative law, statutory interpretation, and constitutional questions. Those types of issues arise in all different areas of the court's jurisdiction. And my experience practicing in front of the Federal Circuit and understanding the records of highly technical complex cases—I have argued 20 Federal Circuit appeals and been involved in many dozens more—will serve me well on the court if I am fortunate enough to be confirmed.

2. **The Federal Claims jurisdiction is based upon subject matter rather than geographic location. How has your background prepared you to address the variety of issues, including appeals from administrative agencies, which you will hear?**

Response: Please see my answer to Question 1. Additionally, I have spent more than seven years representing administrative agencies, primarily the United States Patent and Trademark Office, in court and, before that, represented private clients against the federal government. My cases have been in trial courts around the country, at the Federal Circuit, and in the Supreme Court, and they have addressed numerous issues of administrative law such as agency rulemaking and adjudication, the Appointments Clause and Federal Vacancies Reform Act, the Paperwork Reduction Act, the Freedom of Information Act, agency interpretation of statutory terms, collateral attacks on agency decisionmaking, reviewability of agency decisions, statutes of limitations, and many more.

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

Response: Yes. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge

on the Court of Federal Claims. The role of a judge on the Court of Federal Claims is to follow the law and the precedent of the Supreme Court and the Federal Circuit and to apply that law and those precedents in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.

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

Response: Yes, it does sometimes result in an undesirable outcome. Any personal opinions I may have have not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims. Upholding the rule of law is a crucial and systemic good in itself, important for maintaining the legitimacy of the courts and our whole system of government. That eclipses any personal opinions I may have in any particular case.

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

Response: No.

**6. Please share your understanding of how intellectual property related matters come before the U.S. Court of Federal Claims.**

Response: When a private party believes the United States is practicing technology that would infringe a patent or copyright he owns, that party cannot sue the United States in district court for patent infringement. Instead, his remedy is in the Court of Federal Claims, where the United States has waived sovereign immunity, and he can sue for damages under 28 U.S.C. § 1498. Intellectual property cases are an important and growing area of the Court of Federal Claims' jurisdiction. *See* https://www.law360.com/articles/1441884/record-award-shows-claims-court-s-rising-role-in-ip-matters. I have worked on patent cases involving the Court of Federal Claims, including *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019), where the dispute between the parties originated in the Court of Federal Claims, and have worked on Court of Federal Claims appeals when I was clerking on the Federal Circuit.

**7. What are your thoughts regarding the importance of intellectual property rights, specifically related to patents?**

Response: Intellectual property was so important to our Nation's Founders that they wrote it directly into the Constitution: Congress has the explicit power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." I have spent my career working on intellectual property issues, from helping patent applicants apply for patents to licensing and litigating patents and trademarks to working on intellectual property issues on the Senate Intellectual Property Subcommittee.

**8. What are your thoughts on the USPTO Patent Trial and Appeal Board (PTAB) and the role it currently plays in our intellectual property laws?**

Response: I have spent seven years litigating on behalf of the federal government, most of them on behalf of the United States Patent and Trademark Office. I have also, before that, litigated against the United States Patent and Trademark Office. The agency has a heavy workload—more than 8,000 patent examiners issue more than 6,000 patents per week. Since at least 1836, there has been a process for patent applicants to challenge initial decisions, in a body that eventually became the Patent Trial and Appeal Board. There has also always been a process for the public to challenge patentability decisions, initially in court and, since 1981, also in the body that eventually became the Patent Trial and Appeal Board. The Supreme Court has held that this ability for the government to reconsider its decisions on granting patents does not violate Article III or the Seventh Amendment of the Constitution. *Oil States Energy v. Greene's Energy Group*, 138 S. Ct. 1365, 1373, 1379 (2018).

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

Response: As with any area of law, if faced with a question of patent eligibility, I would apply the law and the precedent of the Supreme Court and the Federal Circuit. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation. The issue of patent eligibility is currently pending before the Supreme Court on certiorari, *Interactive Wearables, LLC, v. Polar Electro Oy*, S. Ct. No. 21-1281; *Tropp v. Travel Sentry, Inc.*, S. Ct. No. 22-22. I cannot comment on how I would interpret and apply 35 U.S.C. § 101. I'll note, though, that any personal opinion I may have on the state of eligibility jurisprudence has not factored into any position I have taken in litigation and would not factor into any decision I would make as a judge on the Court of Federal Claims.

**10. Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: Please see my response to Question 9.

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

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

Response: When I was working for the Senate Intellectual Property Subcommittee, I worked closely with several Senate offices on copyright legislation that focused on revisions to the Digital Millennium Copyright Act that would address online copyright infringement and liability for online service providers. On behalf of Senator Leahy, for whom I worked at the time, I worked with stakeholders from all different parts of the copyright community and developed legislation to try to address concerns from across the board. That work gave me a firsthand view of the current state of copyright law and how it is working in practice. That experience also solidified my view of the distinction between a judge and a policymaker; if confirmed as a judge on the Court of Federal Claims, I would follow the law and the precedent of the Supreme Court and the Federal Circuit on any issue involving the application and interpretation of copyright law.

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

Response: Please see my response to Question 11.a.

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

Response: Please see my response to Question 11.a.

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

Response: As an Associate Solicitor at the United States Patent and Trademark Office, I was a principal agency attorney on multiple cases involving the interaction between the Free Speech Clause of the First Amendment and intellectual property. I represented the agency in *In re Tam*, 785 F.3d 567 (Fed. Cir. 2015), *rev'd by* 808 F.3d 1321 (Fed. Cir. 2015) (en banc), *aff'd sub nom. Matal v. Tam*, 137 S. Ct. 1744 (2017), and *In re Brunetti*, 877 F.3d 1330 (Fed. Cir. 2017), *aff'd sub nom. Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

**12. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it**

**from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.**

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

Response: I would interpret a legal text based on its text and structure, applying the precedent of the Supreme Court and the Federal Circuit interpreting the relevant provision. If faced with a provision that has not been interpreted by the Supreme Court or the Federal Circuit, where the text and structure do not resolve the question, I would use canons of construction prescribed by the Supreme Court and the Federal Circuit in interpreting similar or analogous provisions. The Supreme Court "permit[s] resort to legislative history only when necessary to interpret ambiguous statutory text." *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 187 n.8 (2004). The Supreme Court has also explained that some types of legislative history are more probative than others; for example, the Supreme Court has explained that full committee reports have greater probative value than statements of individual members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: Please see my response to Question 12.a. In addition, there are instances where the Supreme Court and Federal Circuit defer to an agency interpretation of a federal statute. That deference is limited to circumstances in which Congress intended for the agency to have authority to define or interpret a term, where the term is ambiguous, and where the agency's definition or interpretation is reasonable or, in some circumstances, persuasive. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). While the U.S. Copyright Office is not an executive-branch agency but is instead an agency of the legislative branch, the above test nevertheless applies. *See Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 477-80 (6th Cir. 2015) (collecting cases from other circuits), *aff'd* 580 U.S. 405 (2017); *Capitol Records, LLC v. Vimeo*, 826 F.3d 78, 93 (2d Cir. 2016).

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

Response: If confirmed as a judge on the Court of Federal Claims, I would follow the law and the precedent of the Supreme Court and the Federal Circuit on any issue involving the application and interpretation of the copyright laws, including the level of notice that is required for online service providers. Canon 3 of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits judges and judicial nominees from commenting on legal issues that are or could become the subject of litigation; accordingly, I cannot comment on how I would address this particular situation.

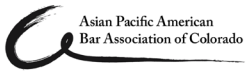
**13. The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.**

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

Response: Please see my responses to Questions 11.a and 12.a.

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

Response: If I am fortunate enough to be confirmed as a judge on the Court of Federal Claims, I will be bound by the precedent of the Supreme Court and the Federal Circuit, and I will faithfully apply that precedent in a fair and impartial way, taking each case with an open mind, on its own terms and its own merits.




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www.apaba-colorado.org

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March 17, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Brendan_Chestnut@judiciary-rep.senate.gov

**Re: Endorsement of Magistrate S. Kato Crews for United States District Court Judge for the District of Colorado**

Dear Chairman Durbin and Ranking Member Graham:

We submit this letter on behalf of the Asian Pacific American Bar Association of Colorado ("APABA") in support of **Magistrate Judge S. Kato Crews** for the United States District Court for the District of Colorado.

As a Federal Magistrate Judge in the United States District Court for the District of Colorado, Magistrate Crews has proven he has the intellect, time management skills, and judicial temperament necessary to be an effective judge. He deftly handles a full docket and is well respected by his colleagues and the parties that appear before him. When parties consent under 28 U.S.C. § 636(c), he presides over full trials as he would as an Article III judge, which demonstrates his ability to "hit the ground running" and make an immediate impact. Those who encounter Magistrate Crews, ranging from a judicial officer of Colorado's highest court to a juror in a week-long trial he presided over, rave about his incredible work ethic, judicial temperament, and impeccable character.

As the first African American Federal Magistrate Judge for the District of Colorado, Magistrate Crews impressed upon our committee members his "obligation" to be seen as a positive role model for all community members. Having been born and raised in Colorado, Magistrate Crews demonstrates a deep connection to the community, and his influence is extensive. He founded the Federal Limited Appearance Program to connect volunteer attorneys with

Asian Pacific American
Bar Association of Colorado

*An affiliate of the National Asian Pacific American Bar Association*
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*pro se* litigants thus ensuring all community members, regardless of their background, have an equal voice in the courts. He has partnered with local universities and law schools to increase access and opportunity to students from historically marginalized backgrounds and underrepresented groups in the legal profession. He also started a quarterly program connecting diverse law students to local diverse legal professionals with the intent towards welcoming the students into the legal profession.

APABA is pleased to endorse Magistrate Judge S. Kato Crews for the United States District Court Judge position. He has demonstrated he has the experience, writing skills, temperament, and character for this position, and his background provides him with well-rounded experience to serve as an asset to the District of Colorado.

Sincerely,

Judicial & Political Appointments Committee, APABA Colorado
Kevin Chen, J.D.
Andrew Ho, J.D.
Christine Lyman, J.D.
Christine Yun Sauer, J.D.

March 16, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Brendan_Chestnut@judiciary-rep.senate.gov

RE: **Support of Magistrate Judge S. Kato Crews to US District Court (CO) opening**

Dear Chairman Durbin and Ranking Member Graham:

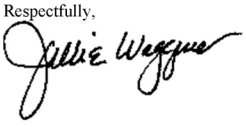
I write to you on my own behalf (and have been authorized by each of the Colorado attorneys named below) to state that I speak for them as well, in supporting the nomination of Honorable S. Kato Crews, U.S. Magistrate Judge for the District of Colorado, to fill a current vacancy as an Article III U.S. District Court Judge for the District of Colorado.

Judge Crews is eminently qualified to fill this position. Admitted to the Colorado Bar in 2000, Judge Crews is a graduate of the University of Arizona Law (2000), JD, and University of Northern Colorado (Greeley) (1993-1997) BA. He first worked for the US National Labor Relations Board (1 year), then spent 9 years at Rothgerber Johnson & Lyons LLP (now Lewis Roca Rothgerber Christie, LLP), including as partner. Following several years of other small firm experience, he became partner at Hoffman Crews Nies Waggener & Foster LLP (now Hoffman Nies Dave & Meyer) for five years until July 2018, when he was appointed US District Court Magistrate Judge, his current post.

Judge Crews has served on the Boards of University of Northern Colorado (Board of Trustees); CLE of Colorado; and COLTAF (including as Chair). He was selected as a member of the first class of the prestigious COBALT (Colorado Bar Association Leadership Training Program) in 2007. He also has served on various other non-profit boards including Colorado Humanities and Urban League of Pikes Peak (including as President). He was selected as a Rising Star and then a Super Lawyer (Employment & Labor Law and Business Litigation) by Colorado Super Lawyers Magazine from 2009 through his appointment to the bench in 2018.

Judge Crews' professional accomplishments including his nearly five years of service as a United States Magistrate speak loudly of his qualifications, to which those of us who both have known and worked with Judge Crews during his legal career can add our view of him as a very careful, thoughtful, humble, fair, dedicated, even-tempered and committed lawyer, community leader, public servant and citizen. And at the heart of it all he a good human being. Judge Crews also brings more racial diversity to the bench, as the only African American Federal Magistrate judge in Colorado. If appointed, he would be the second sitting African American on the Federal District Court Bench. We all request that you give Judge Crews your favorable consideration for this position.

Respectfully,



Julia T. Waggener, Esq. Ret.
303/880-6630; julie@fw379.com , Denver Colorado

(for myself and on behalf of all of the attorneys named below, see page 2)

Chairman Richard Durbin and Ranking Member Lindsey Graham
March 16, 2023

**We Colorado attorneys named below enthusiastically endorse and support nomination of Honorable S. Kato Crews, U.S. Magistrate Judge, as a United States District Court Judge for the District of Colorado:**

Kristin Bronson, Immediate Past Denver City Attorney
Hon. John Leopold, Ret.
Michael Feeley, Esq.
Frederick Baumann, Esq.
James Lyons, Esq.
Douglas Tumminello, Esq.
Michael Nosler, Esq. Ret.
Ben M. Ochoa, Esq.
Brian J. Spano, Esq.
Hilary D. Wells, Esq.
Nicole K. Kunnemann, Esq.
William D. Nelson, Esq.
Jan A. Steinhour, Esq.
H. William Mahaffey, Esq.
Chuong Le, Esq.
William E. Walters, Esq, Ret., (former Denver Bar and Colorado Bar Association President)
Qusair Mohamedbhai- (Rathod Mohamedbhai LLC)
Siddartha Rathod –(Rathod Mohamedbhai LLC )
Byeongsook Seo, Esq.
Denise Hoffman, Esq.
Nicole Nies, Esq.
Emily Coleman, Esq.
Jessamyn Jones, Esq.
Craig D. Joyce, Esq.
Margrit Parker, Esq.
Mychael Dave, Esq.
Gary Blum, Esq.
James (Jim) Fogg, Esq.
Paul Hurcomb, Esq.
Brent Cohen, Esq,
Jessica Fuller, Esq.
Kris Kostolansky, Esq.
Danae Woody, Esq.
Alan Schindler, Esq.
Greg Kanan, Esq, Ret.
Richard M. Foster, Esq, Ret.
Julia T. Waggener, Esq., Ret.

March 16, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

Dear Senator Durbin:

We, the undersigned, are a group of Colorado attorneys who have represented plaintiffs in employment and/or civil rights matters and write to offer our support for and recommendation that Magistrate Judge S. Kato Crews be appointed to the U.S. District Court for the District of Colorado to fill a seat created by the move to senior status by the Hon. Raymond Moore.

Each of the undersigned attorneys is dedicated to protecting the rights of Colorado workers by advocating for fairness, justice, and equality in application of the law to employment-related matters. None of us is a stranger to the U.S. District Court for the District of Colorado; combined, we have represented hundreds of employees in Colorado and collectively we have developed a unique understanding of, and appreciation for, the influence an Article III judge has on the lives and rights of clients, particularly ours.

Every signor to this letter has either practiced with Magistrate Judge Crews before he took the bench or appeared as a party in his courtroom. Some have done both. Regardless, all offer support not only on their behalf but, we reasonably believe, on behalf of clients involved, and whose lives Magistrate Judge Crews has meaningfully touched. We provide such support recognizing Magistrate Judge Crews has served as an adversary, defending employers, and has rendered judgments we might not have wanted. Notwithstanding that reality, not one of us questions Magistrate Judge Crews' intellect, integrity, respect for the rule of law, and the profession we share. We similarly have never seen him exhibit bias or disrespect toward a party or counsel and have witnessed him handle challenging situations with calm and grace. Put simply, when he was an attorney, we observed Magistrate Judge Crews treat employee plaintiffs with the utmost respect and professionalism while still zealously advocating for his clients. As a Magistrate Judge, he has embodied what all hope to see in a judicial officer —fairness and impartiality. Above all, we have observed Magistrate Judge Crews treat our clients with dignity and kindness while also evidencing a degree of empathy and understanding for the stress and challenge plaintiffs, in particular, experience in pursuit of their employment-related claims. That alone has left a positive impact on our clients and the judicial system, regardless of the outcome of their cases.

With Judge Moore's transition to senior status, we think it also important to note the District of Colorado is losing its only Article III Black Judge. Magistrate Judge Crews is the District's first Black Magistrate Judge and we believe it fitting he be appointed to fill a seat vacated by a Judge of color. It is also worth noting, Magistrate Judge Crews' selection would also meet the Biden Administration's stated goal of promoting diversity among members of the federal

bench, a value and goal the undersigned share and believe is critical if justice is to be experienced by all.

In closing, we, the undersigned members of the Colorado Bar, cannot more fully express our support and recommendation that Magistrate Judge Crews be appointed to the U.S. District Court for the District of Colorado. If you have any questions, please feel free to contact any of the undersigned attorneys.

Sincerely,

Ian D. Kalmanowitz
Cornish & Dell'Olio, P.C.

Siddartha Rathod
Rathod Mohamedbhai, LLC

Bradley J. Sherman
Cornish & Dell'Olio, P.C.

Qusair Mohamedbhai
Rathod Mohamedbhai, LLC

Ben Lebsack
Lowery Parady Lebsack

Laura Wolf
Spark Justice Law, LLC

Ariel DeFazio
Lowrey Parady Lebsack

Gary Kramer
Gary Kramer Law, LLC

Deborah Yim
Primera Law Group

Christopher Lujan
Empower Law, PC

Victoria T. Aguilar
The AR Group, LLC

Michael Waters
Waters, Kubik & Cassens, LLC




*Serving Colorado, Promoting Justice*

March 17, 2023

**VIA E-MAIL**

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Brendan_Chestnut@judiciary-rep.senate.gov

**RE: CHBA Endorsement of Magistrate Judge Kato Crews for the United States District Court for the District of Colorado**

Dear Senator Durbin and Senator Graham:

I write you as Co-Chair of the Colorado Hispanic Bar Association ("CHBA") Nominations and Endorsements Committee to announce CHBA's endorsement of Magistrate Judge Kato Crews for the United States District Court vacancy.

The CHBA Nominations and Endorsements Committee voted to endorse Magistrate Judge Kato Crews after carefully vetting his candidacy and conducting due diligence. When conducting due diligence, the Committee endeavors to solicit comments about the nominee from our membership and references, and investigates the following attributes of the nominee:

- The nominee's commitment to social justice and equality under the law, equal opportunity, community service, access to justice, and diversity in the legal profession;

- The extent to which a nominee has been involved in, supportive of, and responsive to the needs and concerns of the Latino/a community. Specifically, the Committee examines the candidate's community service activities, participation in mentorship programs, pro bono legal activities, and programmatic efforts within the legal community to expand access to justice; and

- The nominee's legal scholarship. The CHBA values the role of legal scholarship and education of the public about the American legal system. The Committee examines the quality of the candidate's legal writing, legal and non-legal publications, and provision of legal education in the lay community.

In addition to his excellence as a lawyer and a judge, Magistrate Judge Crews has demonstrated he is a champion of diversity and inclusion in the legal community. His involvement benefits many underserved groups. For example, he is a mentor for Senior Judge Christine Arguello's Yes We Can Program, currently mentoring two Hispanic law students. He also has a Hispanic mentee through the Colorado Attorney Mentoring program. In addition, Magistrate Judge Crews has initiated his own program called Crews' Crew Chit Chats. His quarterly program invites diverse law students from the University of Denver Sturm College of Law and the University of Colorado Law School to the courthouse for a cookie and casual conversation with Magistrate Judge Crews and a diverse, local legal professional. His commitment is evident and powerful.

Our members reported that their experience with him as a practitioner and now as a magistrate judge is nothing short of exceptional. In private practice he had the reputation of a strong trial and litigation attorney with skills that transferred to the bench. Our members report that his judicial demeanor is excellent. As a magistrate judge, the parties have the right to consent to him as the judge having full authority over a case, and this happens for him more often than for most, an indication of his skill as a jurist and fairness.

We have every reason to believe Magistrate Judge Kato Crews will continue to be an excellent jurist and a champion for justice in all cases. For the foregoing reasons, the CHBA endorses Magistrate Judge Kato Crews and fully supports his nomination. Please do not hesitate to contact me with any questions.

Sincerely,

/s/ Ryan Morgan

Ryan Morgan
Co-Chair, Nominations & Endorsements Committee
CHBA
rmorgan@polsinelli.com

SAM CARY BAR ASSOCIATION

March 21, 2023

President Joseph R. Biden Jr.
1600 Pennsylvania Avenue NW
Washington, DC 20500

*Re: Official Endorsement of Kato Crews for the United States District Court for the District of Colorado*

Dear President Biden:

The Colorado Sam Cary Bar Association ("SCBA") is excited to endorse judicial candidate Kato Crews for the U. S. District Court for the District of Colorado Judgeship. The Sam Cary Bar Association consists of attorneys who have sworn to support the Constitutions of the United States and Colorado, and to use our knowledge of the law for the improvement of society and the legal system. As Black attorneys, we understand how the systemic inequities in our legal system disproportionately and negatively impact Black lives and communities throughout the United States. Based on Mr. Crews' exemplary career, dedication to the people of the State of Colorado, enthusiasm for the law, and commitment to historically disadvantaged communities, we believe he is the best candidate for the position of U. S. District Court for the District of Colorado Judge.

Our SCBA Judiciary Committee undertakes a careful review of candidates we seek to endorse to ensure that individuals have impeccable credentials, proper temperament and character, commitment to maintaining the highest standards of the legal profession and most importantly, a history of ensuring equal access to justice, are promoted to these trusted positions. We also ensure that the candidates for endorsement meet the spirit of our organizational goals and values, which include a number of criteria such as professional qualifications and a demonstrated commitment to the advancement of minority communities. The seven criteria at the forefront were:

1. Diversity of legal professional experiences;
2. Knowledge of the District's demographics;
3. Diversity and degree of community service experiences;
4. Awareness of minority groups' perception of judicial district's court systems;
5. Knowledge and level of cultural competence;
6. Understanding the impact of implicit bias on underrepresented and minority communities; and,
7. Commitment to ensuring litigants are respected and heard.

Mr. Crews has an extensive commitment to under-represented and historically disadvantaged groups. Service to his community, to the less fortunate, and to anyone who needs help are the people to whom Mr. Crews is drawn. He is dedicated to assist from the disenfranchised to Big Business without differentiation of race, color, or social class. As a Colorado Native, Mr. Crews has spent much of his time volunteering on Community Boards, mentoring students, and young lawyers, publishing articles and presenting in Colorado Legal Education and community events developed to educate and assist disadvantaged groups. He has dedicated the majority of his legal career to improving the community through educating the public and service, in his attempt to make justice equal for all. Part of what distinguishes Mr. Crews is that he is dedicated to righting injustice associated with anyone, especially with diverse and underrepresented groups. In support of Mr. Crews' service, he has received numerous awards including University of Northern Colorado Service Award, named a Rising Star in Colorado Springs Business Journal and Super Lawyers Magazine and Fellow Emeritus from Colorado Bar Foundation, which not only speaks to his involvement but to the lives he has changed.

Mr. Crews is keenly aware of the professionalism, decorum and work ethic required to be an U. S. District Court Judge. Mr. Crews has been a Magistrate Judge on the U.S. District Court, Adjunct Professor of Law, Partner in a Law Firm, and on the Board of Trustees for the Colorado Lawyer Trust Account Foundation. He has been a licensed attorney for over twenty years and a named Partner in two Law Firms. Mr. Crews' work in the U. S. District Court as a Magistrate Judge, his 20+ years of legal experience, coupled with his many years of work as a Partner in a Law Firm, speaks volumes to his commitment, knowledge, and professionalism.

In making the decision to endorse Mr. Crews, SCBA considered his ability to identify and comprehend the impact of implicit bias on African Americans and minorities in the state of Colorado. Mr. Crews' appreciation of social justice issues and his deep commitment to access to justice have been consistent and steady throughout his distinguished career. He is committed to educating everyone about implicit bias, the need for diversity and the positive effects of inclusiveness, and fairness within the legal system, as well as speaking and publishing to provide legal knowledge to everyone who wants to learn. Mr. Crews is a member of the Sam Cary Bar Association, member of the Federal Magistrate Judges Association and its Diversity Committee, Faculty of Federal Advocates, United States District Court, Colorado Pro se Working Group Chair, and a member of several Boards of Directors, which supports our position that he is the best candidate for the U. S. District Court for the District of Colorado Judgeship.

It is the considered opinion of the SCBA that Kato Crews possesses the professional qualifications, skills, experience, and temperament for this position, and that he would be a remarkable addition and asset to the U. S. District Court bench. As a judge, Mr. Crews will proudly serve the state of Colorado and be dedicated, fair, informed, an ally to his coworkers and a champion for justice. For these reasons, the SCBA is proud to endorse Kato Crews for the position of Judicial Officer for the U. S. District Court for the District of Colorado.

Respectfully,



A, Tyrone Glover, President
Sam Cary Bar Association




March 18, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Brendan_Chestnut@judiciary-rep.senate.gov

**Re: Letter in Support of Nomination of Magistrate Judge Kato Crews for U.S. District Court for the District of Colorado**

*Sent via email to:* Sarah_Bauer@judiciary-dem.senate.gov; Brendan_Chestnut@judiciary-rep.senate.gov

Dear Senators Durbin and Graham:

The Colorado Women's Bar Association (CWBA) is one of the largest and most respected women's bar associations in the country. It is the only bar association in Colorado that conducts confidential due diligence on publicly announced judicial candidates before endorsing or otherwise supporting a candidate.

The CWBA's mission is to advance women as leaders in the law and to promote gender equity. We work to promote the highest standards of the legal profession and to advance justice. For these reasons, we are contacting you regarding President Biden's nomination of Magistrate Judge Kato Crews for a vacancy in the United States District Court for the District of Colorado. After reviewing the due diligence, the CWBA's Executive Committee voted to endorse Magistrate Judge Crews earlier in the appointment process. We now strongly support his nomination.

The due diligence demonstrates that Judge Crews will excel as an Article III judge. Attorneys, judges, and mediators praised Judge Crews for his legal acumen, diligence, preparedness, fairness, integrity, and calm, respectful demeanor. Commenters noted the many ways Judge Crews has contributed to the legal community and to the pursuit of justice. Most recently, Judge Crews founded the District of Colorado's Federal Limited Appearance Program with the Colorado Bar Association. Additionally, Judge Crews mentors law students and young attorneys and advises attorneys—particularly women and persons of color—who want to become judges. As an example, Judge Crews was a panelist for the CWBA's "Storming the Bench" program to encourage more women to apply for judgeships in Colorado.

All commenters ranked Magistrate Judge Crews extremely high in the areas of thoughtfulness, judicial temperament, legal ability, experience, and commitment to service. They noted the importance of community to Judge Crews. If appointed, Magistrate Judge Crews would be only

CWBA
COLORADO WOMEN'S BAR ASSOCIATION

the third African American to serve as an Article III Judge in the 147-year-old District of Colorado, after Hon. Wiley Y. Daniel (appointed in 1995) and Hon. Raymond P. Moore (appointed in 2013). Judge Moore is currently the only African American judge on the District of Colorado bench. A court that lacks diversity cannot instill confidence in all those who appear before it that they will be heard and that justice will be served.

For these reasons, the CWBA strongly supports the nomination of Magistrate Judge Kato Crews and requests that he be appointed to the U.S. District Court for the District of Colorado. Thank you for your consideration and for allowing the CWBA to participate in this important process.

Sincerely,

*Kathryn Starnella*

Kathryn Starnella
2022-23 CWBA President

cc: Senator John Hickenlooper, Senator Michael Bennet

La Kischa J. Cook, Esq.
Arvada, CO
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The Hon. Lindsey Graham
Ranking Member
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United States Senate
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Brendan_Chestnut@judiciary-rep.senate.gov

Re: Support for the Nomination of S. Kato Crews as U.S. District Judge

Dear Chairman Durbin and Ranking Member Graham:

I write in support of Magistrate Judge Crews and his appointment to the United States District Court bench. I had the great pleasure and honor of clerking with Judge Crews for two years and I believe he has the proper demeanor, temperament, and innate sense of fairness necessary to being a District Court Judge.

Judge Crews and I first met just before the pandemic in January 2020 at a time when I was seeking to change the trajectory of my legal career. Over coffee we discussed that although I'd spent most of my professional life in the federal sector, I was seeking to take my talents to "big law." But I needed to know whether my experience working for the federal government was transferrable to the private sector, and I wrestled with the notion that I even belonged there. First, Judge Crews assured me I did, in fact, belong. Second, he offered to serve as my mentor, which included joining him at various legal events and introducing me to other accomplished attorneys. In addition, he offered me a two-year clerkship in his chambers. I jumped at the opportunity and served as his 2020-2022 Term Law Clerk.

Throughout my clerkship, Judge Crews continued to convey that same sense of care for my future professional endeavors. We spoke frequently about the type of lawyer I wanted to be once my clerkship ended. The answer to that question evolved over time, in large part due to my interactions with Judge Crews. He is deeply devoted to his family and his community and strives to do the right thing in all aspects of his life. Judge Crews is disciplined and has high expectations for himself and those around him. His goal is always to get the correct answer, which does not always mean it is the easy one. He is a thoughtful and thorough jurist who works

hard to ensure that the rule of law is followed, and justice is preserved. To be sure, these traits are why he is so well-regarded by both the plaintiff and defense bars as well as the wider legal community.

Because of his guidance and mentorship, at the end of my clerkship, I had a variety of opportunities available to me, including offers in the public and private sectors. In discussing my options, Judge Crews noted his observation of my enthusiasm for plaintiffs' rights and their need for justice in all facets of life, particularly in their employment. He encouraged me to base my decision on not only what was right for me and my family economically, but also on these ever-growing passions, which ultimately catalyzed my decision to join the Equal Employment Opportunity Commission as a trial attorney vindicating workers' federal rights.

Judge Crews is already an exemplary jurist and will undoubtably prove to be a superb District Court Judge. I urge you to support his nomination.

Sincerely,

/s/

La Kischa J. Cook

March 21, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

The Honorable Linsdey Graham
Ranking Member
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United States Senate
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Brendan_Chestnut@judiciary-rep.senate.gov

Re: Magistrate Judge S. Kato Crews Nomination to the U.S. District Court for the District of Colorado

Dear Chair Durbin and Ranking Member Graham:

Statute requires that all United States Judges take an oath of office. *See* 28 U.S.C. § 435 (West 2022). As part of that oath, each new judge states: "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me[.]" 28 U.S.C § 435. Kato Crews' career as a U.S. Magistrate Judge, community leader, and mentor is a sterling example of the judicial oath in action. It is our collective belief that he will continue to set the standard for judicial excellence as a District Court Judge.

Magistrate Judge Crews would make a remarkable District Court Judge because of his organized and measured approach to each matter before him. Through his leadership and mentorship, he continues to instill in each of us a dedication to the rule of law and to the people interacting with it, such as litigants, attorneys, and judges. He encourages us to approach each new issue with an unmatched vigor, thoroughness, and, importantly, our individual lived experiences. As a Magistrate Judge, he often remarks on his role as the first, and perhaps only, face litigants encounter during the emotional, and sometimes traumatic, experience of seeking recourse or defending oneself through the legal system. His meticulous attention to the factual details and legal nuances of every case reminds us that, as officers of the court, we owe it to the communities we serve to set aside bias and to dedicate ample time to providing everyone an equal opportunity before the law.

When he applied for his current role, Judge Crews did so not out of ambition, but out of a sense of duty to the legal profession and a desire to have a meaningful impact on the state of Colorado – the community that helped raise him. Choosing community over oneself, is what the late Justice Ginsburg said defines a "true professional" and a "meaningful life." To be sure, one need not look beyond the District of Colorado's courthouse to find an example of Judge Crews' community stewardship. In October 2019, barely a year into his judicial tenure, Judge Crews began developing an initiative that provides limited scope representation to pro se litigants in the District of Colorado. The Federal Limited Appearance Program launched in November 2020 and, since then, has provided myriad litigants with valuable legal assistance in the U.S. District Court for the District of Colorado. Furthermore, the impact of Judge Crews' guidance and mentorship is evident from the careers of those he has supported, including numerous first-generation attorneys who have become civil rights advocates, judicial law clerks, non-profit board members, and community leaders in their own rights.

"None of us got where we are solely by pulling ourselves up by our bootstraps." Justice Thurgood Marshall's words ring true for each of the undersigned former law clerks, employees, staff, and mentees, of Magistrate Judge S. Kato Crews. We can all attest to his abiding devotion to seeing each of us find our confidence as individuals and as legal advocates. He has taken a special interest in each of our lives and goals, and has given countless hours of his time and resources in service of aiding our development. For us, it was not "an Ivy League crony or a few nuns" that helped pull us up by our bootstraps, but instead the untold hours U.S. Magistrate Judge S. Kato Crews spent listening, counseling, and guiding us, as we honed our crafts.

It is with immense gratitude and distinct honor that we now take hold of S. Kato Crews' bootstraps in support of his nomination for the position of District Judge on the United States District Court for the District of Colorado.

Sincerely,



Philip D. Nickerson, Esq, *signing on behalf and with the consent of:*.

| | |
|---|---|
| Marquiel Cade, Esq. | Cara Groseth, Esq. |
| Jessamyn Jones, Esq. | Claudia Shadler, Esq. |
| Crist Whitney, Esq. | Rose Zetzman, Esq. |
| Daphne Barrera, Student | Michelle Medrano, Student |
| Camille Moore, Student | Andre Milton, Student |
| Yasmine Lawson, Student | Joanna Mendy, Student |
| Connor Moore, Student | |

# Supreme Court of Colorado

2 East 14th Avenue
Denver, CO 80203
monica.marquez@judicial.state.co.us

MONICA M. MÁRQUEZ
JUSTICE

TELEPHONE: (720) 625-5450
FACSIMILE: (720) 625-5455

March 16, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510
Brendan_Chestnut@judiciary-rep.senate.gov

**Re: Letter of Recommendation for Magistrate Judge S. Kato Crews**

Dear Senator Durbin and Senator Graham:

It is again my great pleasure to recommend Magistrate Judge S. Kato Crews for the upcoming vacancy on the U.S. District Court for the District of Colorado. Magistrate Judge Crews's background and experience make him an excellent candidate for the position. Colorado would be extraordinarily lucky to have him as a district court judge on our federal bench.

I have known Kato for more than a decade. We have crossed paths in multiple contexts in the legal community in Denver, often through community projects serving our diverse attorneys and law students. Kato was a member of the inaugural class of the Colorado Bar Association Leadership Training (COBALT) Program — a program that has produced a number of outstanding community leaders and judges, including two of my current colleagues on the Colorado Supreme Court (Justices William Hood and Melissa Hart). I have come to know and admire many COBALT graduates, and Kato is one of COBALT's superstars. He has remained deeply committed to the community throughout his career, devoting time from his busy schedule to mentor younger attorneys, serving on bar association and community boards, and sharing his wisdom through a host of continuing legal education programs, articles, and

countless speaking engagements over the years. In that vein, he is launching a new, informal mentoring program for diverse law students called Crews' Crew Chit Chats – quarterly conversations in chambers with Magistrate Judge Crews and a guest diverse judicial officer or attorney, accompanied by cookies, of course (or some comparable, deliberately unhealthy snack).

Over the past two years, I have had the pleasure of working directly with Kato through the Colorado Supreme Court's Judicial Well-Being (JWB) Committee. I serve as the chair of that Committee, which is an outgrowth of the Colorado Supreme Court's Task Force on Lawyer Well-Being. Our judicial well-being website provides a host of resources for judicial officers not only in Colorado, but across the country.

The JWB Committee reached out across the state to recruit representatives from all of Colorado's judicial districts as well as our federal district court. Kato volunteered to serve on the Committee and has been involved with a Diversity, Equity, and Inclusion (DEI) working group that is exploring the interplay between DEI and well-being. Without question, judicial officer well-being continues to be impacted by the challenges brought on by the COVID-19 pandemic. In addition, the social and civil unrest sparked by the events of the summer of 2020 have highlighted the intersectionality between DEI and well-being for our diverse judicial officers. Kato has been a committed member of the JWB Committee, sharing ideas from the federal courts with those of us in the state court system, and partnering in our efforts to support a significant number of new, diverse judicial officers on our state bench. I am grateful for his insight, support, and commitment.

Kato's devotion to his community is surpassed only by his incredible work ethic. His discipline and efficiency consistently amaze me. By all accounts, he is doing an outstanding job in his current role. In my own encounters with him, he is always thoroughly prepared for every meeting, every panel, every presentation. Importantly, Kato is a man of impeccable character. He exudes judicial temperament – in spades. He is thoughtful, calm, measured, and professional, even under challenging or frustrating circumstances.

In the decade or so that I have known Kato, I have been impressed by his poise and the humility with which he approaches his work for the public and for the legal profession. He is a true public servant and an ideal judicial officer. Kato would be an outstanding federal district court judge and would hit the ground running. Please feel free to contact me if I can provide any additional information.

Sincerely,

Monica M. Márquez

Justice Monica M. Márquez

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
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Washington, D.C. 20510
Sarah_Bauer@judiciary-dem.senate.gov

September 4, 2023

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
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Washington, D.C. 20510
Brendan_Chestnut@judiciary-rep.senate.gov

Re: Support for the Nominations of S.Kato Crews as U.S. District Judge

Dear Chairman Durbin and Ranking Member Graham:

My name is Vince Shaw, former Union Representative and current Consultant to Teamsters local #455 in Denver, CO. I served as a Representative for 25 years. This short note will speak to my dealings, interactions with Kato Crews. In my time as a Union Representative, I've sat across the table from many Corporate Management, Officers and legal counsel, many of which were closed minded and contentious in the handling of Employee matters. This was not the case with Mr. Crews

Over the past 10 years, I have worked though many weighted Employee issues with Mr. Crews and client sitting across the table, be it grievance meetings or arbitration hearings. Appearing on opposing sides of most issues, what I respected in Mr. Crews was his professionalism, his willingness to get to the bottom of an issue expeditiously and yet, not in a dismissive fashion. Employees received his full attention, their day in court, so to speak.
Not once over the span ten years in which we worked together did I witness Mr. Crews raise his voice or treat myself or any Union associate in a demeaning way. I feel that he understood my/our positions just as we tried to understand where he and clients stood on positions. At times we had to agree to disagree and in so

doing, his decisions on a matter never came across as being anything other than thoughtful consideration of positions of both parties.

I hope this provides for some insight into Mr. Crews.

Sincerely,
Vince Shaw

March 20, 2023

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

***Re: Molly R. Silfen, Judicial Nominee to the United States Court of Federal Claims***

Dear Chairman Durbin and Ranking Member Graham,

We write to express our strong support for the confirmation of Molly R. Silfen to serve on the United States Court of Federal Claims. We have all had the opportunity to work with Molly as coworkers and colleagues in the fields of intellectual property and appellate law. We come from across the political spectrum, but all appreciate the importance of judges who are thoughtful, impartial, and dedicated. Molly embodies these characteristics and many others that make her exceptionally qualified to serve on the Court of Federal Claims.

In our work with Molly, we have witnessed first-hand her exceptional intellect. She spots issues that others miss, thoroughly analyzes arguments, and explains herself in clear, understandable terms. She knows the law and our legal system as few others do and has demonstrated a passion for public service. Molly's impeccable educational credentials almost pale in comparison with her extraordinary experience in public service. Most of her legal career has been spent in government service, including at the U.S. Patent and Trademark Office, the Appellate Section of the U.S. Department of Justice, the Intellectual Property Subcommittee of the Senate Committee on the Judiciary, and the U.S. Court of Appeals for the Federal Circuit. We know that Molly's intelligence, work ethic, and rich and varied experience will position her well to succeed as an excellent jurist.

Molly's intelligence and background are impressive, but even more impressive is that is she a delight to work with. She is collegial, respectful, warm, and interested in others. She seeks and readily receives input from team members, invites differing viewpoints, and welcomes collaboration. She is well respected and active in the IP community. Many of us have worked with Molly on bar association committees or other professional activities, and she is quick to volunteer her time and energy, support initiatives, and follow through on her commitments. She is a great colleague and a loyal friend. We have been fortunate to know and work with Molly and are confident that her collegiality, loyalty, and temperament will enable her to serve honorably and with distinction as a federal judge.

We enthusiastically support Molly's nomination and urge the Senate to confirm her to the U.S. Court of Federal Claims without delay.

Respectfully submitted,

Erika Arner, Finnegan, Henderson, Farabow, Garrett & Dunner
Elizabeth D. Ferrill, Finnegan, Henderson, Farabow, Garrett & Dunner
Susan Tull, Latham & Watkins

Susan Allen
Srikala P. Atluri
James Barney
Les Bookoff, Bookoff McAndrews
Smith R. Brittingham IV
William Burgess, Kirkland & Ellis LLP
Barbara Butterworth, Finnegan, Henderson, Farabow, Garrett & Dunner
Kakoli Caprihan
Paromita Chatterjee, Hologic, Inc.
Jorge L. Contreras, University of Utah S.J. Quinney College of Law and London School of Economics and Political Science
Sarah E. Craven
Mai-Trang D. Dang
Elizabeth L. Dougherty, U.S. Patent and Trademark Office
Jonathan Y. Ellis, McGuireWoods LLP
Rama G. Elluru, Special Competitive Studies Project (former USPTO)
Mark C. Fleming, Wilmer Cutler Pickering Hale and Dorr LLP
Michael Flibbert
Jenae Gureff, Cantor Colburn
Jeremiah Helm, Knobbe Martens
Benjamin T. Hickman
Alyssa Holtslander, Senior Patent Counsel at Unified Patents, LLC.
Panyin Hughes
Benjamin H. Huh, Crowdstrike, Inc.
Sharon Israel, Shook, Hardy & Bacon
D. Brian Kacedon
Daniel Kazhdan, USPTO Solicitor
Nathan K. Kelley, Perkins Coie LLP
Mary L. Kelly, Office of the Solicitor for the USPTO
Monica B. Lateef
William Lee
Jessica Marks, Senior Patent Counsel at Unified Patents, LLC.
Roland McAndrews, Bookoff McAndrews
J. Derek McCorquindale
Barbara McCurdy
Robert McManus
Jason Melvin, USPTO
Dinesh N. Melwani, Bookoff McAndrews
Professor Lateef Mtima, Howard University School of Law
Amy Nelson, U.S. Patent and Trademark Office
Elizabeth A. Niemeyer
Michael V. O'Shaughnessy, General Counsel, CaaMTech, Inc.
Antigone Peyton, Ridgeline International, Inc.
Maureen D. Queler

Megan Raymond, Groombridge, Wu, Baughman & Stone LLP
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Sarah J. Sladic, Office of Unfair Import Investigations, U.S. International Trade Commission
Allen Sokal, Insigne PC
Philip Warrick, Irell & Manella
Scott Weidenfeller, Covington & Burling
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Ariana Woods, Coinbase
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References to law firms, corporations, government agencies, or other institutions are for identification purposes only and do not indicate endorsements by those entities.

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March 17, 2023

The Honorable Dick Durbin
Chair
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Molly Silfen to the U.S. Court of Federal Claims

We write to express our enthusiastic support for the nomination of Ms. Silfen to the United States Court of Federal Claims.

Ms. Silfen has taught as an adjunct professor at the Antonin Scalia Law School at George Mason University for more than a decade. Ms. Silfen has co-taught two law school courses each academic year: a seminar focused on practicing before the U.S. Court of Appeals for the Federal Circuit, and a seminar that helps students prepare to compete in the American Intellectual Property Law Association's annual Giles Sutherland Rich Memorial Moot Court competition. In teaching these courses, Ms. Silfen has worked closely with dozens of law students. Those of us who have taught with Ms. Silfen know her to be an exceedingly smart, diligent, and fair-minded attorney. All of us have sincere respect for Ms. Silfen and are confident that she would be an outstanding judge on the Court of Federal Claims.

Ms. Silfen's service as an adjunct law professor has showcased her exceptional qualifications and talents. She has shared her deep knowledge of intellectual property law and the complexities of appellate litigation with her students. Ms. Silfen approaches legal issues with a deep understanding of the law and an open mind to the merits. She is invariably well prepared, and she teaches complex issues of law and the subtleties of litigation practice with equal care.

Ms. Silfen's temperament is perfectly suited to serving on the bench. She is uniquely brilliant and approachable. She treats students and colleagues alike with professionalism, and she fosters an atmosphere of mutual respect and integrity in the classroom. And despite her outstanding academic and professional qualifications, Ms. Silfen is also unfailingly humble.

We are proud to recommend that the Committee confirm Ms. Silfen's nomination to the United States Court of Federal Claims. We are confident that she will serve the Court with honor and distinction.

Respectfully submitted,

Ken Randall
Dean
Antonin Scalia Law School
George Mason University

Naveen Modi (2007-2023)

James Sherwood (2015-2020)

Andrew Trask (2020-2023)

Jaynie Lilley (2021-2023)

Current and former Adjunct Professors
Antonin Scalia Law School
George Mason University

March 20, 2023

The Honorable Dick Durbin
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United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Molly Silfen to the U.S. Court of Federal Claims

Dear Chairman Durbin and Ranking Member Graham:

We write to express our enthusiastic support for the nomination, and confirmation, of Molly Silfen to the United States Court of Federal Claims. We are all former law clerks at the United States Court of Appeals for the Federal Circuit and we overlapped with Ms. Silfen during her clerkship from 2008-2010. We come from across the political spectrum and, since clerking, have worked in academia, private companies, law firms, and around the government.

As a clerk, Ms. Silfen consistently mastered the facts and issues in the cases that she handled. She assisted the Court with diligent research and provided thoughtful insights into the decision-making process of each case. In preparation for a case, she was even-handed in her approach, asking probing questions of fellow clerks that were designed to illuminate the legal issues on both sides. Her ultimate goal in every case was to determine the correct outcome under the law and advise the court accordingly. In doing so, Ms. Silfen always demonstrated an unbiased and impartial demeanor. Since clerking, some of us have been opposing counsel opposite Ms. Silfen and we found her to be an exceedingly intelligent, hard-working, judicious, and fair-minded attorney.

Ms. Silfen's thoughtfulness, intellect, and work ethic—among other qualities—will make her an excellent addition to the United States Court of Federal Claims. We are proud to recommend that the Committee confirm Ms. Silfen's nomination to the United States Court of Federal Claims. We are confident that she will serve the Court honorably and represent the Judiciary with distinction.

Respectfully submitted,

*References to law firms, corporations, or other institutions are for identification purposes only and do not constitute endorsements by those entities.

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Law Clerk to Judge Linn, '08-'09

**Record Statement of Former Senator Patrick Leahy**
**On Molly Silfen's Senate Judiciary Committee Hearing**
**For Her Nomination to the U.S. Court of Federal Claims**
**March 22, 2023**

I am thrilled the Senate Judiciary Committee is holding this hearing to consider the nomination of Molly Silfen, former Counsel-Detailee on my Judiciary Committee staff, to the U.S. Court of Federal Claims. One of the most important and impactful functions this committee plays is to closely examine nominees put forward by the President. As a longtime member of this committee who has voted for many qualified Republican and Democratic nominees, I am absolutely confident that President Biden could not have made a better choice in nominating Molly Silfen to the U.S. Court of Federal Claims.

In addition to being one of our country's brightest legal minds on intellectual property and other issues that come before the Court of Federal Claims, Molly possesses the character and temperament all Americans expect to see on our federal bench. There is a reason Molly received enthusiastic support from both Senator Thom Tillis, my Republican partner on the Senate's Intellectual Property Subcommittee, and me for this nomination. I have no doubt she will excel as a judge on the Court of Federal Claims and treat all parties who appear before her with respect and fairness.

When I took over as Chairman of the Senate's IP Subcommittee this past Congress, I wanted the counsel of someone who had mastered the intricacies of our IP system and could think creatively about ways we could improve it for all Americans. That is exactly why I hired Molly Silfen as my Counsel-Detailee from the U.S. Patent and Trademark Office to guide my final tenure as the Senate's IP Subcommittee Chairman. For two years, Molly expertly worked across the aisle and with countless stakeholders to help me craft innovative legislative solutions to update and strengthen our IP system. I am particularly proud of her efforts to help successfully enact my *Unleashing American Innovators Act of 2022*, a bipartisan bill to improve access to our IP system for women and other underrepresented communities.

All in all, Molly possesses the intellect, experience, and integrity to excel as a judge on the Court of Federal Claims. I am confident that she will bring a deep reverence for the rule of law and a sense of humility to her role as a federal judge. I hope my Republican and Democratic friends on this Committee and in the Senate will also see the merits of Molly's nomination and swiftly vote to confirm her.

#####

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AMERICAN BAR ASSOCIATION
Standing Committee on the Federal Judiciary

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March 21, 2023

**Via Email**
The Honorable Dick Durbin
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Washington, DC 20510

**Via Email**
The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

*Re: Nomination of Judge Amanda Brailsford to the United States District Court for the District of Idaho*

Dear Chairman Durbin and Ranking Member Graham:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of Judge Amanda Brailsford, who has been nominated by the President to the United States District Court for the District of Idaho. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence, and judicial temperament. The Standing Committee is of the unanimous opinion that Judge Brailsford is **"Well Qualified"** to serve on the United States District Court for the District of Idaho.

Very truly yours,

Hon. Ann Claire Williams (Ret.)
*Chair, Standing Committee on the Federal Judiciary*

cc: Stuart F. Delery, Assistant to the President and Counsel to the President (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (*via email*)
Judge Amanda Brailsford (*via email*)
ABA Standing Committee on the Federal Judiciary (*via email*)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary, Staff Counsel (*via email*)

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ABA AMERICAN BAR ASSOCIATION
Standing Committee on the Federal Judiciary

Please reply to:

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March 20, 2023

**Via Email**

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Via Email**

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: *Nomination of Magistrate S. Kato Crews to the United State District Court for the District of Colorado*

Dear Chairman Durbin and Ranking Member Graham:

The American Bar Association's Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of S. Kato Crews, who has been nominated by the President to the United States District for the District of Colorado. As you know, the Standing Committee confines its evaluation to the qualities of integrity, professional competence and judicial temperament. The Standing Committee is of the unanimous opinion that Magistrate Judge Crews is **"Well Qualified"** to serve on the United States District Court for the District of Colorado. Judge Ann Claire Williams (Ret.), the Chair of the Standing Committee, was recused from this evaluation.

Very truly yours,

David L. Brown
*Vice Chair, Standing Committee on the Federal Judiciary*

cc: Stuart F. Delery, Assistant to the President & Counsel to the President (via email)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (via email)
S. Kato Crews
ABA Standing Committee on the Federal Judiciary (via email)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary Staff Counsel (via email)