Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Dale Ho
Nominee to the U.S. District Court for the Southern District of New York
December 8, 2021

1. **At your hearing, members of the Senate Judiciary Committee asked you questions about statements you made on social media and on other platforms. Some Committee members suggested that these statements raise concerns about whether you have the appropriate temperament to serve on the Southern District of New York. But several letters submitted to the Committee contradict that claim and speak directly to your judicial temperament. Judge Robert Smith—a former Republican appointee to the New York Court of Appeals for whom you clerked—wrote a letter explaining why your "personality and temperament make [you] exceptionally well suited for judicial office." In addition, a bipartisan group of more than 90 of your Yale Law School classmates—which includes Texas Supreme Court Justice Jimmy Blacklock, who was appointed by Republican Governor Greg Abbott—wrote that they remember you "not just for [your] careful and thoughtful approach to the law, but also for [your] ability to listen and engage with [your] classmates and professors in a reasoned and principled way that allowed for robust and open-minded debate."**

   How do you respond to concerns about your temperament?

   Response: As I testified in during my hearing, I recognize and regret that I have engaged in overheated rhetoric on social media. The best evidence of the kind of judge I would be, however, is my extensive track record throughout my career of maintaining high standards of professional courtesy and respect in my actual legal work—including in court and in dealings with counsel. I believe that record is reflected in my American Bar Association rating of "Well Qualified," which I understand is based on dozens of interviews of judges, opposing counsel, and colleagues. If confirmed, I will maintain high standards of professional courtesy and respect in both formal and informal communications, in both public and private.

   I am very grateful for the support of former Judge Robert Smith of the New York Court of Appeals, for whom I clerked, and who wrote a letter to this Committee stating that my "personality and temperament make [me] exceptionally well suited for judicial office"; that I express my views "appropriately and respectfully"; and that I am "equally courteous" to all, stemming from a "sense of the innate worth and dignity of every human being." I am also deeply grateful for the support of more than 90 of my law school classmates, a "bipartisan group . . . reflect[ing] a wide range of ideological and political views – and includ[ing] members of both major political parties," who wrote that they are "confident that [I] will apply the laws and precedents of the Unites States fairly and objectively." And I am also grateful to have the support of dozens lawyers from 19 law firms who have worked with me in a variety of contexts, "reflect[ing] a broad ideological spectrum (including affiliation with both major political parties), who wrote that "[t]ime

and again, we have collectively observed [my] ability to carefully consider competing points of view, . . . and to encourage the search for common ground," and that they would "welcome a judge of [my] temperament, consideration, and commitment to preside over our matters."

Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Dale E. Ho
Nominee to be United States District Judge for the Southern District of New York

1. **In your 2010 law review article, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, you wrote that the Supreme Court's "Fourteenth Amendment jurisprudence demonstrates the tremendous value of modes of interpretation other than originalism" and that "[p]rogressives should not shy away from a tradition of constitutional interpretation that has produced the finest moments in the Court's history." You also suggested that, instead of originalism, the "lived experience of contemporary Americans" should inform constitutional interpretation, adding, "[t]his is far from a novel or embarrassing concept, and progressives should not shy away from it."**

   a. **Please describe your understanding of Supreme Court and Second Circuit case law concerning how to interpret constitutional and statutory text.**

      Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to methods of constitutional interpretation. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*.

   b. **In your view, how should a federal judge apply the "lived experience of contemporary Americans" to the interpretation of law?**

      Response: In *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), the Supreme Court, in an opinion by Chief Justice Marshall, observed that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Examples of this principle are the Supreme Court's decisions in *Kyllo v. United States*, 533 U.S. 27 (2001) and *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Kyllo*, the Court, in an opinion by Justice Scalia, observed that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," and held that "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment," 533 U.S. at 29. The Court kept "Founding-era understandings in

mind when applying the Fourth Amendment to innovations in surveillance tools," in order to "'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo*, 533 U.S. at 34). And in *Brown*, the Supreme Court held that de jure racial segregation in public schools is unconstitutional, explaining that the Court, in reaching its decision, "must consider public education in the light of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *McCulloch*, *Kyllo*, and *Brown*.

2. **In the same law review article, you acknowledged that the Supreme Court's substantive due process jurisprudence cannot be justified based on an original understanding of the Constitution. You wrote that the "case for substantive due process" is "not clean," and added that "even if the intellectual underpinnings of substantive due process are shaky" and even if "substantive due process makes little sense from a textualist or an originalist perspective," it is justified because of the "fundamental" rights at stake.**

    a. **Please describe your understanding of the legal basis for the Supreme Court's substantive due process jurisprudence.**

    Response: As Justice Scalia explained in his concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the doctrine of substantive due process provides that the Due Process Clause of the Fourteenth Amendment "incorporate[es] certain guarantees in the Bill of Rights" to protect against intrusion by state and local governments, under precedent that "is both long established and narrowly limited." *Id.* at 791 (Scalia, J. concurring). The Supreme Court has also held that, separate and apart from the protections of the Bill of Rights, the Due Process Clause protects certain substantive rights that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (holding that the Due Process Clause does not protect a right to physician-assisted suicide).

    b. **Do you still believe that the intellectual underpinnings of the Supreme Court's substantive due process jurisprudence are shaky and make little sense from a textualist or an originalist perspective?**

    Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to substantive due process. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is

therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce.

3. **Under what circumstances is it appropriate for a federal judge to reach a decision with respect to a statute or constitutional provision that is unsupported by the text or original understanding of that statute or provision?**

   Response: A federal district judge is bound by precedent from the Supreme Court and the relevant Circuit. Absent binding precedent, the Supreme Court has instructed that, in interpreting the Constitution, courts 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." In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), (quotation marks and citation omitted). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller* with respect to methods of constitutional interpretation.

4. **In 2009, you co-authored a law review article titled *Ready, Aim, Fire? District of Columbia v. Heller and Communities of Color*. The article argued in favor of a "general presumption" certain communities are best situated to determine the scope of the Second Amendment's protections. The article stated that "where a minority community supports and enacts a firearms regulation . . . the presumption should be that the community has adequately weighed the civil liberties costs and possibly racially disproportionate effects of the regulation at issue against its benefits to public safety. To assume otherwise is essentially to privilege the viewpoints of libertarian theorists and Second Amendment enthusiasts over those of the very citizens who live daily with the civil liberties costs of firearms regulations and the risk of victimization by firearms-related violence."**

   a. **Please describe the Supreme Court and Second Circuit case law you would consider in a case concerning an individual's right to keep and bear arms.**

      Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Supreme Court held that "the right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States." In *Heller*, the Court "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions," leaving the application of the Second Amendment to other kinds of regulation "to future evaluation." *Id.* at 634-35. The Second Circuit has held that, "[i]n determining whether heightened scrutiny applies" to a firearms regulation, a court must "consider two factors: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *New York State Rifle & Pistol Ass'n,*

Inc. v. Cuomo, 804 F.3d 242, 258 (2d Cir. 2015) (internal quotation marks and citation omitted). Under *New York State Rifle & Pistol Association*, regulations that fall short of an outright prohibition, but still "impose a substantial burden on Second Amendment rights" are subject to "intermediate, rather than strict, scrutiny." *Id.* at 259-60. If confirmed to serve as a District Judge in the Southern District of New York, I would be bound by all Supreme Court and Second Circuit precedent. A case is currently pending before the Supreme Court, however, that implicates these issues, *see New York State Rifle & Pistol Ass'n, Inc. v. Corlett*, 141 S. Ct. 2566 (2021) (granting certiorari), and if confirmed, I would be bound by all Supreme Court precedent, including *Heller* and any decision in *New York State Rifle Association*.

b. **In your view, does the Constitution permit minority communities to determine the scope of the rights protected by the Second Amendment? If so, to what other Bill of Rights Amendments does this presumption apply?**

   Response: No. As the Supreme Court held in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is."

5. **In the same law review article, you described the Supreme Court's decision in *District of Columbia v. Heller* as "cavalier." In a 2008 National Law Journal article you co-wrote, you suggested that the Supreme Court's decision "will almost certainly cause more Americans to be killed."**

   a. **Please explain how the Supreme Court's decision in *Heller* has caused Americans to be killed.**

      Response: As I testified at my hearing, I recognize that I have engaged in overheated rhetoric on occasion. I have tremendous respect for the authority of the Supreme Court. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller*.

   b. **If you are confirmed, do you commit to faithfully and accurately apply the Supreme Court's Second Amendment case law?**

      Response: Yes. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller* and *McDonald*.

6. **Please describe your understanding of Supreme Court and Second Circuit precedents concerning the permissibility of requiring prospective voters to show identification in order to vote.**

Response: The Supreme Court held in *Crawford v. Marion County Election Board*., 553 U.S. 181 (2008) that voter identification requirements are not facially unconstitutional. (plurality op. of Stevens, J.) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). I am not aware of any Second Circuit precedent addressing this issue. If appointed as a district judge, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including *Crawford*. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

7. **Is the cost of obtaining a birth certificate or state-issued photo ID a poll tax? Why or why not?**

   Response: See response to question 6.

8. **On July 17, 2020, you retweeted an ACLU tweet saying, "DC statehood is a racial justice issue."**

   a. **Please describe your understanding of the Constitution's provisions concerning the Seat of the Government of the United States, citing any relevant Supreme Court precedent.**

      Response: The District and Federal Enclaves Clause provides for a federal district that "may" serve as the "Seat of Government." U.S. Const. art. I, § 8, cl. 17. In *Phillips v. Payne*, 62 92 U.S. 130 (1875), the Supreme Court considered a challenge to the 1846 retrocession of approximately one-third of the District's area to Virginia, and held that, because 30 years had passed between the retrocession and the constitutional challenge, the plaintiff was "estopped" from bringing his claim. *See id*. at 132-34.

   b. **In your view, how is the question of federal control over the seat of the federal government a racial justice issue?**

      Response: This question references my retweet of a retweet of a tweet by the ACLU, which linked to a Letter to the Editor of the Wall Street Journal, written by one of my colleagues. The status of the District of Columbia presents important public policy issues for policy makers to consider. The role of a judge, however, is not to make policy but to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit. I also fully recognize that the role of a judge is to set aside one's personal views, if any, and to impartially apply the law and precedent to the facts as established by the record in individual cases, and, if confirmed, will swear an oath to do so.

9. **A December 12, 2020 *New York Times* article, *An Indelible Stain: How the GOP Tried to Topple a Pillar of Democracy*, you are quoted as saying "[t]here is an anti-democratic virus that has spread in mainstream Republicanism, among mainstream Republican elected officials."**

    a. **Do you believe the *New York Times* misquoted you?**

    Response: My full published quotation, including the context, can be found at: Jim Rutenberg & Nick Corasaniti*, 'An indelible stain': How the GOP tried to topple a pillar of Democracy*, N.Y. Times (Dec. 12, 2020), https://www.nytimes.com/2020/12/12/us/politics/trump-lawsuits-electoral-college.html:

    > Republican state legislators across the country are already contemplating new laws to make voting harder, as they continue to falsely portray the expansion and ease of mail-in voting during the pandemic as nefarious. Many of them view this year's expanded voting ranks as bad for their party, despite Republican successes further down the ballot. Their consideration of new voting restrictions amounts to an ongoing attack on the integrity of the voting system, involving still more false and debunked claims.
    >
    > "There is an anti-democratic virus that has spread in mainstream Republicanism, among mainstream Republican elected officials," said Dale Ho, director of the Voting Rights Project at the A.C.L.U. "And that loss of faith in the machinery of democracy is a much bigger problem than any individual lawsuit."
    >
    > Indeed, after the Supreme Court's ruling, the Texas Republican Party effectively called for secession by red states whose attorneys general joined in the Texas suit.
    >
    > "Perhaps law-abiding states should bond together and form a Union of states that will abide by the Constitution," a statement from its chairman, Allen West, read. It followed an observation Rush Limbaugh made earlier in the week, when he said, "I actually think that we're trending toward secession."

    b. **If not, please explain what you meant by the suggestion that mainstream Republicanism and mainstream Republican elected officials have been infected by an "anti-democratic virus."**

    Response: In the article, I was quoted referring to "a loss of faith in the machinery of democracy." I am aware of public opinion research showing that outcomes in presidential elections affect voter confidence, with members of the party whose candidate loses a presidential election tending to have less

"confidence their vote was counted as intended," as was the case for Democrats as compared to Republicans after the 2000, 2004 and 2016 presidential elections, and vice versa after the 2008, 2012, and 2020 presidential elections. *See* MIT Election Data and Science Lab, *Voter Confidence*. (April 2, 2021), https://electionlab.mit.edu/research/voter-confidence. The Supreme Court stated in *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."

10. In a 2016 op-ed in the *New York Times*, you called a Virginia law prohibiting former felons from voting "racist" and chided the Commonwealth for "shun[ning] from civic life" "our neighbors and our co-workers." You also called the United States of America "the world's most enthusiastic jailer."

a. Please describe your understanding of the Fourteenth Amendment and its interpretation by the Supreme Court with respect to whether states may disenfranchise convicted felons.

Response: In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court held that, under the Fourteenth Amendment, states may disenfranchise people upon conviction for a felony offense. In *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), the Supreme Court, in an opinion by then-Justice Rehnquist, held that Alabama's felon disenfranchisement law was unconstitutional because its enactment was motivated by racially discriminatory intent, observing that even otherwise-permissible facially neutral laws may run afoul of the Fourteenth Amendment, "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law." Upon such a showing, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* (quoting *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Richardson* and *Hunter*.

11. In a blog post for the ACLU titled *What Voters Under 30 Should Know About the Voting Rights Act*, you suggested that the Supreme Court "ignored its own precedent" in *Shelby County v. Holder*.

a. Please describe your understanding of the Court's holding in *Shelby County*.

Response: In *Shelby County v. Holder*, 570 U.S. 529, 556 (2013), the Supreme Court held that Congress's 2006 reauthorization of Section 4(b) of the Voting Rights Act of 1965 is unconstitutional, because it was not based on "current needs."

b. **Please identify which precedent(s) you believe the Supreme Court ignored in its decision.**

Response: My comment was merely meant to note that, prior to *Shelby County*, the Supreme Court had upheld the constitutionality of the initial enactment and three reauthorizations of Sections 4(b) and/or 5 of the Voting Rights Act, before ruling that the 2006 reauthorization of Section 4(b) was unconstitutional in *Shelby County*. *Cf. South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999). I have tremendous respect for the authority of the Supreme Court. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Shelby County*.

12. **During an interview on MSNBC in 2019 about the U.S. Census, you said that President Trump "threw a temper tantrum and on Twitter announced he was going to put the [citizenship] question back on" the 2020 Census.**

a. **In your view, should "a temper tantrum" on Twitter be disqualifying for someone seeking appointment to the federal bench?**

Response: As I testified at my hearing, I recognize that several of my tweets included overheated rhetoric. Throughout my career, I have sought to maintain high standards of professional courtesy and respect in my actual legal work—including in court and in dealings with counsel. I believe that is reflected in my American Bar Association evaluation, which I understand is based on dozens of interviews of judges, opposing counsel, and colleagues. That is the best evidence of the kind of judge I would be. If confirmed, I will maintain high standards of professional courtesy and respect in both formal and informal communications, and in both public and private. I also fully recognize that the role of a judge is to set aside one's personal views, if any, and to impartially apply the law and precedent to the facts as established by the record in individual cases, and, if confirmed, will swear an oath to do so.

b. **Given this statement and your numerous attacks on President Trump on social media and in the press, how can conservatives be confident that you will be fair and impartial towards those with whom you have political disagreements?**

Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. A district judge is bound by the law, including all precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully. As I testified in during

my hearing, I have represented clients from across the political spectrum, including members of both political parties, consistent with my deep reverence for the principle of equal justice under law for all. I am also deeply grateful for the support of more than 90 of my law school classmates, a "bipartisan group . . . reflect[ing] a wide range of ideological and political views – and includ[ing] members of both major political parties," who wrote that they are "confident that [I] will apply the laws and precedents of the Unites States fairly and objectively." I am also grateful to have the support of dozens lawyers from 19 law firms who have worked with me in a variety of contexts, "reflect[ing] a broad ideological spectrum (including affiliation with both major political parties), who wrote that "[t]ime and again, we have collectively observed Dale's ability to carefully consider competing points of view, . . . and to encourage the search for common ground." And I am grateful for the support of attorney Michael Kimberly, who represented Republican voters in the Supreme Court challenging a Democratic partisan gerrymander, and who wrote that my "amicus engagement in the case, and [my] support of [the] plaintiffs, reflected a genuine concern for the rule of law, without regard for the politics of [the] plaintiffs," with "evenhandedness and impartiality . . . regardless of the identity, position, or politics of the parties."

13. On July 11, 2019, in a comment posted on the ACLU's website, you described the Department of Justice as "keystone cops" who "couldn't even figure out how to swap out legal teams."

a. In light of this comment and your other criticisms of the Trump Administration, how can federal government officials who appear before you be confident that you will be fair and impartial even when you disagree with their position?

b. Do you believe this is the level of respect that litigants should expect from you if you are confirmed?

c. If you are confirmed, is this the level of respect that you would expect litigants to show the other parties in your courtroom?

Response to all subparts: Please refer to my response to Question 12.

14. In a hearing before the House Committee on the Judiciary in 2019, you suggested that the Trump Administration's "plan to add a citizenship question" to the 2020 Census "was part of an ongoing scheme to attack the political power of Latinx communities."

a. Please describe your definition of the terms "Latinx" and "Latinx communities."

Response: Merriam-Webster's dictionary defines "Latinx" as "of, relating to, or marked by Latin American heritage —used as a gender-neutral alternative to Latino or Latina." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/Latinx. Merriam-Webster's dictionary defines "community" (*i.e.*, the singular form of the word "communities") as "a unified body of individuals: such as":

> a: the people with common interests living in a particular area
> b: a group of people with a common characteristic or interest living together within a larger society
> c: a body of persons of common and especially professional interests scattered through a larger society
> d: a body of persons or nations having a common history or common social, economic, and political interests
> f: an interacting population of various kinds of individuals (such as species) in a common location
> g: STATE, COMMONWEALTH

b. Please describe the "ongoing scheme to attack the political power" of these communities that you referenced.

Response: In *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019) the Supreme Court held that an attempt to add a citizenship question was invalid under the Administrative Procedure Act because the "explanation offered" for it was "contrived" as a "distraction" from the actual purpose.

c. Will you commit to not use a term to describe an ethnic group that an overwhelmingly larger number of members of that group find bothersome or offensive than the number of members who use the term?[1]

Response: If confirmed, I will seek to address all litigants and people how they refer to themselves, and to treat all people with courtesy and respect.

15. In a 2013 interview on MSNBC, you said that "[i]f we had a court that was respectful of our civil rights precedents, I wouldn't be concerned about [voting rights] at all. But *Shelby County* I think dashes these hopes to a certain extent."

a. Please identify the civil rights precedents you believe the Supreme Court has failed to respect.

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[1] Marc Caputo & Sabrina Rodriguez, *Democrats fall flat with 'Latinx' language*, Politico (Dec. 6, 2021), https://www.politico.com/news/2021/12/06/hispanic-voters-latinx-term-523776 (showing that "[o]nly 2 percent of those polled refer to themselves as Latinx" and "40 percent said Latinx bothers or offends them to some degree" with "20 percent sa[ying] it disturbed them 'a lot'").

b. Given your views on the Supreme Court and its treatment of precedent, how can we be confident that you will faithfully and accurately apply the binding decisions of the Supreme Court?

Response to subparts (a) and (b): Please see my response to Question 11(b). I have tremendous respect for the authority of the Supreme Court. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Shelby County*.

16. Please describe your understanding of the constitutionality of nationwide or universal injunctions based on current Supreme Court and Second Circuit precedent.

Response: Injunctive relief is governed by Federal Rule of Civil Procedure 65. The Supreme Court has observed 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), and has instructed that injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The legal authority of district courts to issue nationwide injunctions is currently the subject of debate in courts, including the Supreme Court. *See, e.g.*, *Department of Homeland Security v. New York*, 140 S. Ct. 599 (2020) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III."). As matters concerning the propriety of nationwide injunctions are currently pending in courts, it would be inappropriate for me, as a judicial nominee, to comment on such issues. *See* Canon 3(A)(6), Code of Conduct for United States Judges. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including on the issue of the proper scope of injunctive relief.

17. What Second Circuit and Supreme Court precedent would you apply in evaluating whether a redistricting map is racially gerrymandered?

Response: As the Supreme Court explained in *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017), "[t]he Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Id.* (quoting *Bethune–Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 797 (2017) (internal quotation marks and alteration omitted). A plaintiff alleging racial gerrymandering must first "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). "Second, if racial considerations predominated over others, the design of the district must

withstand strict scrutiny." *Id.* at 1464. I am not aware of Second Circuit precedent with respect to racial gerrymandering. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including on the issue of the racial gerrymandering.

18. Do parents have a constitutional right to direct the education of their children?

Response: In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (citing cases). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including on the issue of parental rights regarding the education of their children.

19. In a False Claims Act case, what is the standard used by the Second Circuit for determining whether a false claim is material?

Response: In a nonprecedential decision, *Coyne v. Amgen, Inc.*, 717 F. App'x 26, 29 (2d Cir. 2017), the Second Circuit held that for claims under the False Claims Act, "[t]he materiality standard is demanding and materiality cannot be found where noncompliance is minor or insubstantial." (internal quotation marks and citation omitted). "Specifically, to be material the government must have made the payment as a result of the defendant's alleged misconduct." *Id.* (internal quotation marks and citation omitted). A "complaint must present concrete allegations from which the court may draw the reasonable inference that the misrepresentations . . . caused the Government to make the [payment at issue]" *Id.*

20. When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?

Response: As an attorney, when I am considering a case, I investigate the available evidence and assess the likely facts as best as I can understand them without formal fact-finding; carefully research the law; and then apply the law to the likely facts as I understand them, and determine if the legal standard has been met.

21. 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?**

Response to all subparts: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce. The constitutionality of *de jure* racial segregation in public schools or anti-miscegenation laws, however, are extremely unlikely to arise. Therefore, like prior judicial nominees, I believe that I can make exceptions to the general rule prohibiting comment on the correctness of precedent for *Brown v. Board of Education* and *Loving v. Virginia*, and to state that I agree that *Brown* and *Loving* were correctly decided.

22. 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 25, 2021, I spoke with White House Chief of Staff Ron Klain regarding potential consideration for a judicial nomination. In March, I applied to Senator Schumer's judicial screening committee. On March 18, 2021, I interviewed with Senator Schumer's judicial screening committee. On May 23, 2021, I interviewed with Senator Schumer. On June 26, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On September 30, 2021, my nomination was submitted to the Senate.

23. 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: I have spoken with Chris Kang, who described the judicial nomination process generally, based on his experience in the White House Counsel's Office. As I stated in my Judiciary Committee Questionnaire, at no point has anyone discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

24. **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: I have spoken with Jill Dash and Zach Gima, who described the judicial nomination process generally. As I stated in my Judiciary Committee Questionnaire, at no point has anyone discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

25. **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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response: No, as far as I know. I am not aware of the employer of every person with whom I speak.

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

    Response: No, as far as I know. I am not aware of the employer of every person with whom I speak.

27. **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, and/or Jen Dansereau?**

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, and/or Jen Dansereau?**

   Response to subparts (b) and (c): Please see Response to question 23. I have not been in contact with any of these individuals in connection with my current nomination other than Christopher Kang. As I stated in my Judiciary Committee Questionnaire, at no point has anyone discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

28. **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: I have spoken at approximately two events held by Alliance for Justice, as set forth in my Senate Judiciary Committee Questionnaire.

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

       Response to subparts (b) and (c). I have spoken with Nan Aron and Daniel Goldberg, who described the judicial nomination process generally. I have been not been in contact with any of these individuals in connection with my current nomination other than Ms. Aron and Mr. Goldberg. As I stated in my Judiciary Committee Questionnaire, at no point has anyone discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

29. **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? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

b. **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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

c. **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, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response to all subparts: No, as far as I know. However, I am not aware of the employer of every person with whom I speak.

30. **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?**

Response to all subparts: No, as far as I know. However, I am not aware of the employer of every person with whom I speak.

31. **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?**

Response to all subparts: No, as far as I know. However, I am not aware of the employer of every person with whom I speak.

32. **On December 6, 2021, Demand Justice announced that it was launching a six-figure advertising campaign to support your nomination.**

a. **Did you discuss this advertising campaign with anyone before it was announced?**

Response: No.

b. **After your hearing before the Senate Judiciary Committee, did you ask anyone to help support your nomination?**

Response: No.

33. **Do the answers you have provided to these questions reflect your true and personal views?**

Response: With respect to factual questions, such as Question 22, I have sought to provide factual answers to the best of my ability and recollection. With respect to legal questions, such as Question 6, I have sought to provide my understanding of the law to the best of my ability. With respect to my personal views, canons of judicial ethics prohibit judges from commenting or expressing personal views on issues that could become the subject of litigation. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law—including precedent from the Supreme Court and the relevant Circuit—to the facts as established by the evidence in the record.

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

Response: On December 8, 2021, I received questions from the Committee via the Department of Justice Office of Legal Policy (OLP). I drafted my answers, and, where necessary, conducted legal research and reviewed my records to refresh my recollection.

I shared my draft with OLP, which provided feedback. I reviewed and considered OLP's feedback, and then submitted my answers to the Committee.

Senator Marsha Blackburn
Questions for the Record to Dale Ho
Nominee for the Southern District of New York

1. **Do you agree with the Supreme Court that the Second Amendment is a civil right?**

   Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In the next Second Amendment case to reach the Supreme Court, I signed an amicus brief arguing that, in considering the application of the Second Amendment to state and local governments, the Court should "look to its well-established framework under the Due Process Clause for determining whether a provision of the Bill of Rights applies to state and local governmental action." *McDonald v. City of Chicago*, No. 08-1521, Amicus Brief of NAACP Legal Defense & Educational Fund, Inc. in Support of Neither Party, 2009 WL 4074858 at *5 (U.S. Nov. 23, 2009). In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Supreme Court, relying on Due Process principles, held that "the right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States." If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller* and *McDonald*.

2. **In response to the Supreme Court's decision in *Heller*, you argued that "local legislatures are best suited to balance the costs and benefits of firearms regulations. Moving forward, municipalities should be afforded broad discretion in enacting such regulations." For which other constitutional rights does the exercise depend on the discretionary issuance of a license by a local official?**

   Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit. For example, while the First Amendment protects a right of assembly, the Supreme Court has held that local officials can sometimes require obtaining a permit as a condition of holding an event on public property, provided that there are sufficient limits on the licensing official's discretion. *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 317 (2002) (upholding a municipal park ordinance requiring individuals to obtain a permit before conducting large-scale events under the First Amendment, where ordinance sufficiently limited licensing official's discretion). With respect to the Second Amendment, a case is currently pending before the Supreme Court that implicates the licensing issues raised in this question; the case arises from the Second Circuit, whose precedents I would be bound to follow if confirmed as a district judge for the Southern District of New York. *See New York State Rifle & Pistol Ass'n, Inc. v. Corlett*, 141 S. Ct. 2566 (2021) (granting certiorari). If confirmed, I would be bound by, and would faithfully and impartially follow all Supreme Court precedent, including any decision in *New York State Rifle & Pistol Association*. If for some reason the Supreme Court does not issue a decision on the

merits in *New York State Rifle & Pistol Association*, I would be bound to follow the decision of the Second Circuit in the underlying case.

3. **Should the Supreme Court afford local legislatures broad discretion in enacting abortion regulations? If not, how do you distinguish this with your past statements on the role of local legislatures in regulating firearms?**

   Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to abortion regulations. In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016), the Supreme Court held that "'[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right'" and are therefore "constitutionally invalid." (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)). *See also June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2112 (2020). A case is currently pending before the Supreme Court that implicates the issues raised in this question. *See Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2566 (2021) (granting certiorari). If confirmed, I would be bound by, and would faithfully and impartially follow all Supreme Court precedent, including any decision in *Dobbs*.

4. **Should the Supreme Court afford local legislatures broad discretion in enacting election integrity laws? If not, how do you distinguish this with your past statements on the role of local legislatures in regulating firearms?**

   Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to election laws. The Supreme Court has applied the *Anderson-Burdick* test to election laws. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). That test requires that "a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality op. of Stevens, J.) (quoting *Burdick*, 504 U.S. at 434). Under the *Anderson-Burdick* test, "the rigorousness of [a court's] inquiry into the propriety of [a voting restriction] depends upon the extent to which [it] burdens" voters' rights. *Burdick*, 504 U.S. at 434. Generally speaking, "evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious." *Crawford*, 553 U.S. at 189–90 (plurality opinion of Stevens, J.).

5. **You have described laws requiring voters to show identification as "simply too onerous," "confusing," and even equated them to poll taxes. Do you believe states and local governments should be afforded broad discretion in enacting voter ID**

regulations? If not, how do you distinguish this with your past statements on the role of local legislatures in regulating firearms?

Response: I am not aware of the precise quotations referred to in this question, or the context in which they occurred. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to voter ID laws. The Supreme Court held in *Crawford v. Marion County Election Board.*, 553 U.S. 181 (2008) that voter identification requirements are not facially unconstitutional. (plurality op. of Stevens, J.) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

6. **In *NAACP v. Alabama*, the Supreme Court unanimously upheld the freedom of association and held that a state cannot compel a political advocacy organization to reveal the names and addresses of its members. In a 2012 law review article, you argued that the Court's decision did not establish a neutral principle against compelled disclosure, but that it concerned "the need to have special protections for minority or disfavored speech." Is it your position that the First Amendment provides different levels of protection to individuals based on the minority status of the person asserting the right? Where in the text of the First Amendment do you derive your position on this? Do you hold this view for any other constitutional rights?**

   Response: The standard of review for First Amendment protections is the same regardless of the minority status of the person asserting the right. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court held that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as direct government sanctions. More recently, in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021) the lead opinion by Chief Justice Roberts explained that "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." To withstand "exacting scrutiny," "there must be a 'substantial relation between the disclosure requirement and a sufficiently important government interest.'" *Id*. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

   Generally speaking, the Constitution does not provide different levels of protection for a right based on the minority status of the person asserting the right. The Supreme Court, however, has held that different standards of review apply to different types of claims of discrimination under the Equal Protection Clause. *Compare Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013) (claims of racial discrimination are subject to strict scrutiny) *with United States v. Virginia*, 518 U.S. 515, 533 (1996) (claims of sex discrimination are subject to "heightened" or intermediate scrutiny), *and San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973) (claims of discrimination based on wealth are subject to rational basis review). The Supreme Court has also held that candidate ballot access requirements may "fall[] unequally on new or small political

parties or on independent candidates," and thereby "impinge[], by [their] very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983).

7. **In the context of the Second Amendment, you've said that minority communities should be given deference when they enact firearms regulations. Please explain your views of how courts should factor race into their assessment of constitutional rights.**

   Response: The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination on the basis of race. *See* U.S. Const., amend. XIV, §1. In 2009, as an advocate, I co-authored a law review article exploring ways that *Heller* might be applied going forward. A district judge does not apply academic theories, but rather is bound by the law, including all precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully, and if a case came before me involving the Second Amendment, I would faithfully and impartially apply *Heller*, *McDonald*, and any other relevant precedent from the Supreme Court or Second Circuit to that case. I am unaware of any precedent holding that race is relevant to the consideration of claims brought under the Second Amendment.

8. **You have said that the "lived experience of contemporary Americans" should inform constitutional interpretation and that "this is far from a novel or embarrassing concept, and progressives should not shy away from it." If you are confirmed, what would it look like in practice for you to incorporate "the lived experience of contemporary Americans" into your constitutional interpretation?**

   Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to methods of constitutional interpretation. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). In *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), the Supreme Court, in an opinion by Chief Justice Marshall, observed that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Examples of this principle are the Supreme Court's decisions in *Kyllo v. United States*, 533 U.S. 27 (2001) and *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Kyllo*, the Court, in an opinion by Justice Scalia, observed that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," and held that "the use of a thermal-imaging device aimed at a private home

from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment," 533 U.S. at 29. The Court kept "Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools," in order to "'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo*, 533 U.S. at 34). And in *Brown*, the Supreme Court held that de jure racial segregation in public schools is unconstitutional, explaining that the Court, in reaching its decision, "must consider public education in the light of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*, *McCulloch*, *Kyllo*, and *Brown*.

9. In what situations should a judge deviate from the text of the Constitution or precedent in favor of "the lived experience of contemporary Americans"?

Response: Please see my response to Question 8. A district judge's decisions in constitutional cases are bound by precedent from the Supreme Court and the relevant Circuit. In absence of controlling precedent, a judge's decisions in constitutional cases should be based on the text of the Constitution, and a judge should not deviate from the text of the Constitution in favor of any other considerations or factors.

10. There is a documented record of your opinions—in tweets, statements, and writings—espousing various controversial positions. For example, you support abolishing the Electoral College, you seem to believe that constitutional rights only protect certain groups, and you have taught critical race theory as an adjunct professor at New York University. How will these opinions affect your decisions as a federal judge? How can Americans be reassured that you can be an impartial arbiter of the law?

Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. A district judge does not apply academic theories, but rather is bound by the law, including all precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

The Constitution's protections apply regardless of whether individuals are members of any particular groups. As I testified in during my hearing, I have represented clients from across the political spectrum, including members of both political parties, consistent with my deep reverence for the principle of equal justice under law for all. I am also deeply grateful for the support of more than 90 of my law school classmates, a "bipartisan group . . . reflect[ing] a wide range of ideological and political views – and includ[ing] members of both major political parties," who wrote that they are "confident that [I] will apply the

laws and precedents of the Unites States fairly and objectively." I am also grateful to have the support of dozens lawyers from 19 law firms who have worked with me in a variety of contexts, "reflect[ing] a broad ideological spectrum (including affiliation with both major political parties), who wrote that "[t]ime and again, we have collectively observed Dale's ability to carefully consider competing points of view, . . . and to encourage the search for common ground." And I am grateful for the support of attorney Michael Kimberly, who represented Republican voters in the Supreme Court challenging a Democratic partisan gerrymander, and who wrote that my "amicus engagement in the case, and [my] support of [the] plaintiffs, reflected a genuine concern for the rule of law, without regard for the politics of [the] plaintiffs," with "evenhandedness and impartiality . . . regardless of the identity, position, or politics of the parties."

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

<u>Questions for the Record for Dale E. Ho, Nominee for the Southern District of New York</u>

I. Directions

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

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

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

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

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

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

II. Questions

1. **Please briefly describe the interpretative methods known as originalism and textualism.**

   Response: A description of originalism can be found in *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). A description of textualism can be found in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), where the Supreme Court explained that courts should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738.

a. Are these methods of judicial interpretation inherently racist?

Response: No.

b. Do you believe that an originalist judge can be fair-minded?

Response: Yes.

2. You have advocated for other modes of interpretation other than originalism, and have previously written in a law journal article that "[p]rogressives should not shy away from a tradition of constitutional interpretation that has produced the finest moments in the Court's history." More specifically, you wrote that "the lived experience of contemporary Americans" should inform constitutional interpretation, adding, "[t]his is far from a novel or embarrassing concept, and progressives should not shy away from it."

a. Whose "lived experiences" should matter for your proposed method of judicial interpretation?

b. Why did you view "lived experience" modes of interpretation as particularly useful for progressives?

Response to subparts (a) and (b): Respectfully, I do not believe that I "proposed [a] method of judicial interpretation" in the law review article referenced in the question. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to methods of constitutional interpretation.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). In *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), the Supreme Court, in an opinion by Chief Justice Marshall, observed that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Examples of this principle are the Supreme Court's decisions in *Kyllo v. United States*, 533 U.S. 27 (2001) and *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Kyllo*, the Court, in an opinion by

Justice Scalia, observed that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," and held that "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment," 533 U.S. at 29. The Court kept "Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools," in order to "'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo*, 533 U.S. at 34). And in *Brown*, the Supreme Court held that de jure racial segregation in public schools is unconstitutional, explaining that the Court, in reaching its decision, "must consider public education in the light of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*, *McCulloch*, *Kyllo*, and *Brown*.

c. Will you still view yourself as a progressive if confirmed as a judge?

Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. A district judge is bound by and must faithfully and impartially follow all precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

3. Please briefly describe the interpretive method often referred to as living constitutionalism. Is it any different than what you have proposed?

Response: Please see my Response to Question 2. Chief Justice Rehnquist wrote, "the phrase 'living Constitution' has about it a teasing imprecision that makes it a coat of many colors," and that "[t]he phrase is really a shorthand expression that is susceptible of at least two quite different meanings." William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 694 (1976). According to Chief Justice Rehnquist, "[t]he first meaning . . . with which scarcely anyone would disagree," provides that "[t]he framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live." *Id.* Chief Justice Rehnquist also identified "a second connotation of the phrase," which he described as "a living Constitution with a vengeance," involving the "substitution of some other set of values for those which may be derived from the language and intent of the framers." *Id.* at 695.

4. If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original

public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: Yes. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*.

5. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court similarly explained that courts should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738. If a statute were enacted or a constitutional amendment ratified today, then the current ordinary public meaning of its terms would be relevant.

6. **In 2010, Justice Kagan famously said, "we are all originalists." Do you agree?**

Response: If the statement means that, in absence of controlling precedent from the Supreme Court on a particular issue of constitutional interpretation, a lower court is "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," *District of Columbia v. Heller*, 554 U.S. 570 (2008), then I agree with it. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*.

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

Response: No. The Constitution changes through the Article V amendment process.

8. **In a 2009 article in the Harvard Blackletter Law Journal, you wrote about reasons that you opposed the Supreme Court's decision in *District of Columbia v. Heller*. You explained that from a Constitutional perspective, "it seems reasonable to give deference to the views of the average inner-city resident over those of the Second Amendment civil libertarian." You also wrote that "where a minority community supports and enacts a firearms regulation—as was the case with the handgun ban in**

the District [of Columbia]—the presumption should be that the community has adequately weighed the civil liberties costs and possibly racially disproportionate effects of the regulation at issue against its benefits to public safety. To assume otherwise is essentially to privilege the viewpoints of libertarian theorists and Second Amendment enthusiasts over those of the very citizens who live daily with the civil liberties costs of firearms regulations and the risk of victimization by firearms-related violence."

a. Should the Bill of Rights offer different levels of protection based on the race of the person asserting the right?

Response: The Bill of Rights does not provide different levels of protection based on the race of the person asserting the right. *Cf. Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013) (claims of racial discrimination are subject to strict scrutiny).

b. Should minorities get to decide how constitutional rights apply to everyone based on their lived experiences?

Response: As the Supreme Court held in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is."

c. As a minority, and a progressive, will your lived experience inform how you consider what level of constitutional protections apply to litigants of other races?

Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. A district judge is bound by, and must faithfully and impartially follow all precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

d. Should some racial groups receive greater or different constitutional protections than others?

Response: The constitutional protections a person receives, and the standard of review for claims asserted, does not depend on what racial group a person belongs to. *Cf. Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013) (claims of racial discrimination are subject to strict scrutiny).

9. Describe how you would characterize your overall judicial philosophy. Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: I have not served as a judge, and therefore cannot identify an existing judicial philosophy. The duty of a judge is to set aside whatever personal views she or he may

have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed, I would swear an oath to discharge that duty fully and faithfully. I have not carefully studied the judicial philosophies of Supreme Court Justices in a manner that would enable me to conclude which Justice's philosophy would be most analogous to mine, if I had one. If appointed as a district judge, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods.

10. **Name a Supreme Court case that (1) came to the right result for the right reason, (2) came to the right result but for the wrong reason, (3) came to the wrong result for the right reason, and (4) came to the wrong result for the wrong reason.**

    Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, without regard to any personal views regarding the correctness of the result reached or the reasoning employed. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce. The constitutionality of de jure racial segregation in public schools or anti-miscegenation laws, however, are extremely unlikely to arise. Therefore, like prior judicial nominees, I believe that I can make exceptions to the general rule prohibiting comment on the correctness of precedent for *Brown v. Board of Education* and *Loving v. Virginia*, and to state that the Court reached the right results in these cases.

11. **You have previously stated in congressional testimony that you believe "the Supreme Court's decision in *Shelby County v. Holder* unleashed a wave of voter suppression and other discriminatory voting laws unlike anything the country had seen in a generation." You also have said in an interview that *Shelby County* dashes hopes for civil rights attorneys that the Supreme Court is disrespectful of civil rights precedents.**

    a. **Are you willing to follow precedent from a Court that you view as disrespectful of the issues you have spent your whole career fighting against?**

       Response: I have tremendous respect for the authority of the Supreme Court, and I am well-aware of the difference between being an advocate and serving as a judge. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If appointed as a district judge, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

    b. **Are voter identification laws racist?**

Response: The Supreme Court held in *Crawford v. Marion County Election Board.*, 553 U.S. 181 (2008) that voter identification requirements are not facially unconstitutional. (plurality op. of Stevens, J.) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). If appointed as a district judge, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including *Crawford*. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

c. Should judges consider whether a legislative body that passes a voting-related law had a discriminatory intent?

Response: Other than the issue of subject matter jurisdiction, which a federal court has an independent duty to consider, *see Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94–95 (1998) (explaining the Court's independent duty to assure itself of Article III standing), a court should generally only consider arguments raised by the parties. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), in an opinion by then-Justice Rehnquist, the Supreme Court observed that, "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." (quoting *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)).

12. Did you state the following in an interview with the New York Times on December 12, 2020?

There is an anti-democratic virus that has spread in mainstream Republicanism, among mainstream Republican elected officials.

Response: My full published quotation, including the context, can be found at: Jim Rutenberg & Nick Corasaniti*, 'An indelible stain': How the GOP tried to topple a pillar of Democracy*, N.Y. Times (Dec. 12, 2020), https://www.nytimes.com/2020/12/12/us/politics/trump-lawsuits-electoral-college.html:

> Republican state legislators across the country are already contemplating new laws to make voting harder, as they continue to falsely portray the expansion and ease of mail-in voting during the pandemic as nefarious. Many of them view this year's expanded voting ranks as bad for their party, despite Republican successes further down the ballot. Their consideration of new voting restrictions amounts to an ongoing attack on the integrity of the voting system, involving still more false and debunked claims.

> "There is an anti-democratic virus that has spread in mainstream Republicanism, among mainstream Republican elected officials," said Dale Ho, director of the Voting Rights Project at the A.C.L.U. "And that loss of faith in the machinery of democracy is a much bigger problem than any individual lawsuit."
>
> Indeed, after the Supreme Court's ruling, the Texas Republican Party effectively called for secession by red states whose attorneys general joined in the Texas suit.
>
> "Perhaps law-abiding states should bond together and form a Union of states that will abide by the Constitution," a statement from its chairman, Allen West, read. It followed an observation Rush Limbaugh made earlier in the week, when he said, "I actually think that we're trending toward secession."

In the article, I was quoted referring to "a loss of faith in the machinery of democracy." I am aware of public opinion research showing that outcomes in presidential elections affect voter confidence, with members of the party whose candidate loses a presidential election tending to have less "confidence their vote was counted as intended," as was the case for Democrats as compared to Republicans after the 2000, 2004 and 2016 presidential elections, and vice versa after the 2008, 2012, and 2020 presidential elections. *See* MIT Election Data and Science Lab, *Voter Confidence*. (April 2, 2021), https://electionlab.mit.edu/research/voter-confidence. The Supreme Court stated in *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."

13. Several liberal dark money organizations have applauded your nomination because of the positions you took as a litigant. Demand Justice has called you "democracy's lawyer," and the People for the American Way described you as "the type of judicial nominee[] America needs at a time when the voting rights we hold sacred are under attack." Since your nomination hearing, Demand Justice has aired another advertisement urging your confirmation because of your approach to voting rights issues.

a. Do you agree with their assertion that you are "democracy's lawyer," and what do you believe this means?

Response: I am not aware of precisely what was intended in describing me in this manner. As I testified at my hearing, I have represented individual clients from across the political spectrum, including members of both political parties, consistent with my deep reverence for the principle of equal justice under law for all. I am deeply grateful for the support of more than 90 of my law school classmates, a "bipartisan group . . . reflect[ing] a wide range of ideological and political views – and includ[ing] members of both major political parties," who wrote that they are "confident that [I] will apply the laws and precedents of the Unites States fairly and

objectively." I am also grateful to have the support of dozens lawyers from 19 law firms who have worked with me in a variety of contexts, "reflect[ing] a broad ideological spectrum (including affiliation with both major political parties), who wrote that "[t]ime and again, we have collectively observed Dale's ability to carefully consider competing points of view, . . . and to encourage the search for common ground." And I am grateful for the support of attorney Michael Kimberly, who represented Republican voters in the Supreme Court challenging a Democratic partisan gerrymander, and who wrote that my "amicus engagement in the case, and [my] support of [the] plaintiffs, reflected a genuine concern for the rule of law, without regard for the politics of [the] plaintiffs," with "evenhandedness and impartiality . . . regardless of the identity, position, or politics of the parties."

b. Do you believe that voting integrity laws like those passed in Texas and Georgia are a grave threat to democracy?

Response: Because matters concerning these laws are currently pending in several courts, it would be inappropriate for me, as a judicial nominee, to comment on such issues. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

14. In *Brnovich v. DNC*, the U.S. Supreme Court held that Arizona's out-of-precinct voting policy, early mail-in voting policy, and its ballot-collection law (H.B. 2023) do not violate Section 2 of the VRA, and that H.B. 2023 was not enacted with a racially discriminatory purpose. Shortly after this, the United States dropped its lawsuit challenging adjacent voting laws enacted by the State of Georgia. Explain your understanding of the analysis and reasoning employed in *Brnovich*.

Response: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court upheld the challenged Arizona provisions referenced in this question under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, *et seq.* ("Section 2"). Section 2 prohibits voting laws or practices that "deny or abridge the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b)." 52 U.S.C. § 10301(a). Subsection 2(b) provides that "[a] violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)." *Id*. § 10301(b).

In upholding the challenged Arizona provisions, the Court set forth five non-exhaustive factors for courts to consider in the "totality of the circumstances analysis" to determine whether a violation of Section 2 has occurred, including (1) "size of the burden imposed by a challenged voting rule"; (2) "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982"; (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups"; (4) "[t]he opportunities provided by a State's entire system of voting when assessing the burden imposed by a

challenged provision"; and (5) "the strength of the state interests served by a challenged voting rule." *Brnovich*, 141 S. Ct. at 2338-39.

15. Is the criminal justice system systemically racist?

Response: The question of whether there are systemic issues in the criminal justice system presents important public policy questions for policy makers. The role of a judge, however, is not to make policy but to decide individual cases by applying the law—including binding precedent from the Supreme Court and the relevant Circuit—impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function.

16. Do you believe that structural racism is a feature of every American institution?

Response: The question of whether there are structural issues in American institutions presents important public policy questions for policy makers. The role of a judge, however, is not to make policy but to decide individual cases by applying the law—including binding precedent from the Supreme Court and the relevant Circuit—impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function.

17. What should be the role of a judge to combat structural racism?

Response: The questions of whether structural issues exist, and what if anything should be done about them are important public policy questions for policy makers. The role of a judge, however, is not to make policy but to decide individual cases by applying the law—including binding precedent from the Supreme Court and the relevant Circuit—impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function.

18. Would it be appropriate for you as a judge to consider whether a policy or decision before you is expressly or structurally racist without having the parties raise that allegation or brief the issue?

Response: Other than the issue of subject matter jurisdiction, which a federal court has an independent duty to consider, *see Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94–95 (1998) (explaining the Court's independent duty to assure itself of Article III standing), a court should generally only consider arguments raised by the parties. Under the Fourteenth Amendment, claims of express racial discrimination are subject to strict scrutiny. *See Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013). Structural issues are important public policy questions for policy makers. The role of a judge, however, is not to make policy but to decide individual cases by applying the law—

including binding precedent from the Supreme Court and the relevant Circuit—impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function.

19. In a syllabus for the Racial Justice Clinic that you taught at New York University, you described the class to students as follows: "You will engage in strategic thinking about the effectiveness of the various means of achieving racial justice. You will become familiar with theories of race and the law, including critical race theory, and will explore whether and how these theories can help in developing legal strategies. And most important, you'll leave us having done some important work." How do you define 'critical race theory'?

Response: An article on the American Bar Association website defines "critical race theory" as "a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship." Janel George, *A Lesson on Critical Race Theory*, Americans Bar Association (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

20. Should federal judges be informed by the ideas or approaches promoted by critical race theory?

Response: The duty of a judge is to impartially apply the law to the facts as established by the evidence in the record. A district judge's decisions are not guided by academic theories, but rather the law, including all binding precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

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

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

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

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

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

Response to all subparts: No. I am not aware of any trainings of that nature. I am also unaware of the content of trainings provided by the Southern District of New York, or what role, if any, I would have in formulating the content of trainings provided by the court, if confirmed. All trainings provided by the court should comply with all applicable legal requirements.

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

Response: Yes. Please see response to Question 21.

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

Response: Under the Appointments Clause, the President has the power, with the advice and consent of the Senate, to make appointments to certain political positions in the federal government. U.S. Constitution, Art. II, §2, cl. 2. Generally speaking, under the Due Process Clause of the Fifth Amendment, the federal government is subject to the same antidiscrimination provisions of the Equal Protection Clause of the Fourteenth Amendment that apply to state actors. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court, such as the lawfulness of factors to be considered in making political appointments.

24. In *Comcast v. National Association of African American-Owned Media*, the U.S. Supreme Court was asked to decide whether a racial discrimination claim under 42 U.S.C. § 1981 requires a plaintiff to show either "but-for" causation, or only that race is a motivating factor. Explain your understanding of the Court's holding and reasoning in its unanimous reversal of the Ninth Circuit.

Response: In *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1014–15 (2020), the Supreme Court held that under 42 U.S.C. § 1981, "a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant." The Court's rejection of a more lenient "motivating factor" standard was based on "the statute's language and history," as well as the Court's precedents, which employ the phrase "because of," which is "often associated with but-for causation." *Id.* at 1016. The Court observed that nothing in its prior decisions "even gesture[d] toward the possibility that this rule of causation sometimes might be overlooked or modified in the early stages of a case." *Id.*

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

Response: Federal law places various limits on government action that imposes or places requirements on private institutions, including religious organizations and small businesses operated by observant owners. For example, under the First Amendment, the "ministerial exception" provides that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Also, under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq. ("RFRA"), the federal "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b). In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014), the Supreme Court held that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA." If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit in this area.

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

Response: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), the Supreme Court held that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021) the Court explained that the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Court further explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."

27. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S.

Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020), the Supreme Court held that the religious entity-applicants were entitled to a preliminary injunction. First, the Court held that the applicants had made "a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion," based on: (1) "statements made in connection with the challenged rules" that could "be viewed as targeting the ultra-Orthodox Jewish community"; and (2) the fact that the regulations in question "single out houses of worship for especially harsh treatment." *Id.* at 66 (cleaned up). Next, the Court then considered the equitable factors governing issuance of preliminary injunctive relief, and, finding that they weighed in the applicants' favor, held "that enforcement of the [New York] Governor's severe restrictions on the applicants' religious services must be enjoined." *Id.* at 69.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Court held that California's system for restrictions on private gatherings during the COVID-19 pandemic violated the First Amendment rights of plaintiffs who wished to gather for at-home religious exercise. The Court explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id.* at 1296

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's (CCRC) decision and issuance of a cease-and-desist order, in a proceeding arising from a cakeshop's refusal to sell a wedding cake to a same-sex couple, did not comply with the Free Exercise Clause's requirement of religious neutrality. The Court held that "[t]he neutral and respectful consideration to which [the plaintiff] was entitled was compromised," given the CCRC's "treatment of his case," which had "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729.

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

Response: In *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), the Tenth Circuit affirmed a grant of summary judgment against a website design company and its founder, who brought a pre-enforcement action against Colorado challenging the accommodation and communication clauses of Colorado Anti-Discrimination Act (CADA), raising claims based on free speech, free exercise of religion, vagueness, and overbreadth. The plaintiffs' lawsuit arose from her intention to refuse to create custom wedding websites for same-sex marriages based on her religious beliefs. Judge Tymkovich dissented, writing that Colorado was unconstitutionally requiring the plaintiff to "create expressive content celebrating same-sex weddings as long as she will create expressive content celebrating opposite-sex weddings. This is paradigmatic compelled speech." *Id.* at 1192 (Tymkovich, J., dissenting).

32. Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?

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

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

Response to Question 32, and subparts (a) and (b): In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that, "[t]o qualify for RFRA's protection, an asserted belief must be sincere," and that "the federal courts have no business addressing" the question "whether the religious belief asserted in a RFRA case is reasonable." *Id.* at 717 (quotation marks omitted). In *Welsh v. United States*, 398 U.S. 333, 339-40 (1970), the Supreme Court held that sincere religious beliefs "stem from [a person's] moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions," and furthermore, that such beliefs "need not be confined in either source or content to traditional or parochial concepts of religion." The Court has instructed that this issue "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

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

Response: Please see my response to Questions 32, 32(a) and 32(b). As a judicial nominee, it is not appropriate for me to comment on what is or is not the official position of the Catholic Church.

33. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), the Supreme Court held that the ministerial exception, grounded in the First Amendment's Religion Clauses, barred the plaintiffs' employment discrimination claims brought under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). The Court explained that, under the First Amendment, the "ministerial exception" provides that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id*. at 2060.

34. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878-81 (2021), the Supreme Court held that section 3.21 of Philadelphia's standard foster care contract, which requires an agency to provide services to prospective foster parents without regard to their sexual orientation., was "not generally applicable as required by *Smith*" and thus, strict scrutiny applied. The Court observed that the provision at issue "incorporates a system of individual exemptions" and that the inclusion of such "a formal mechanism for granting exceptions renders a policy not generally applicable." *Id.* at 1878-79. Applying strict scrutiny, the Court concluded that "the interest of the City in the equal treatment of prospective foster parents and foster children . . . cannot justify denying [plaintiff] an exception for its religious exercise," and that the provision at issue "violates the First Amendment." *Id.*

35. Explain your understanding of Justice Gorsuch's concurrence in the Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Amos Mast v. Fillmore County.*

Response: In *Mast v. Fillmore County, Minnesota*, 141 S. Ct. 2430 (2021), the Supreme Court vacated the judgment below and remanded the case to the Court of Appeals of

Minnesota for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). *Mast* involved a dispute between Fillmore County, which adopted an ordinance requiring most homes to have a modern septic system for the disposal of gray water (*i.e.*, water from dishwashing and laundry), and denied a request for an exception by the Swartzentruber Amish, who had "submitted a letter explaining that their religion forbids the use of such technology," and offering a different solution (mulch basins) "that respected the Amish's faith. *Mast*, 141 S. Ct. at 2431 (Gorsuch, J., concurring in the decision to grant, vacate, and remand). The Swartzentruber Amish asserted that the County's denial of the exception violated the Religious Land Use and Institutionalized Persons Act; the trial court sided with the County, and the state appellate court affirmed.

Justice Gorsuch's concurrence identified at least four issues in the judgment below. First, he wrote that the "courts below erred by treating the County's general interest in sanitation regulations as 'compelling' without reference to the specific application of those rules to this community," as strict scrutiny requires. *Id.* (Gorsuch, J., concurring in the decision to grant, vacate, and remand). Second, the "lower courts erred by failing to give due weight to exemptions other groups enjoy." *Id.* at 2432 (Gorsuch, J., concurring in the decision to grant, vacate, and remand). Third, the "lower courts failed to give sufficient weight to rules in other jurisdictions. Governments in Montana, Wyoming, and other States allow for the disposal of gray water using mulch basins of the sort the Amish have offered to employ." *Id.* at 2433 (Gorsuch, J., concurring in the decision to grant, vacate, and remand). And fourth, "despite acknowledging that mulch basins could 'theoretically' work, the County and lower courts rejected this alternative based on certain assumptions," but did not "prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." *Id.* (Gorsuch, J., concurring in the decision to grant, vacate, and remand).

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

Response: In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382-83 (2021), Chief Justice Roberts' opinion (joined by Justices Kavanaugh and Barrett), stated that the standard of review for challenges to a disclosure requirement on the grounds that it burdens donors' First Amendment right to freedom of association is "exacting scrutiny," under which "there must be a 'substantial relation between the disclosure requirement and a sufficiently important government interest.'" *Id.* at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). Justice Thomas's opinion stated that strict scrutiny should be applied in this context. *Id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment). Justice Alito's opinion (joined by Justice Gorsuch) stated that there was "no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under

the First Amendment." *Id.* at 2392 (Alito, J., concurring in part and concurring in the judgment).

In determining which standard to apply in future cases presenting these issues, a lower court should be guided by the Supreme Court's instruction in *Marks v. United States*, 430 U.S. 188, 193 (1977), that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred on the judgment on the narrowest grounds.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

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

Response: If confirmed as a district judge, I would be bound to follow all Supreme Court precedent (and relevant Second Circuit precedent) regardless of the size of the Court (or of the Second Circuit). It would therefore be inappropriate for me to comment on the size of the Court or whether it should be expanded.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller*.

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

Response: No. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second Amendment is subject to the same Due Process incorporation principles for protection against state and local governmental action that apply to other individual rights protections enumerated in the Constitution. *See also id.* at 791 ("[T]he right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States."). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *McDonald*.

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

Response: With respect to the right to own a firearm, In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court has thus far "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions," leaving the application of the Second Amendment to other kinds of regulation "to future evaluation." *Id.* at 634-35. The Second Circuit has held that, "[i]n determining whether heightened scrutiny applies" to a firearms regulation, a court must "consider two factors: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 258 (2d Cir. 2015) (internal quotation marks and citation omitted). Under *New York State Rifle & Pistol Association*, regulations that fall short of an outright prohibition, but still "impose a substantial burden on Second Amendment rights" are subject to "intermediate, rather than strict, scrutiny." *Id.* at 259-60. If confirmed to serve as a District Judge in the Southern District of New York, I would be bound by all Supreme Court and Second Circuit precedent. A case is currently pending before the Supreme Court, however, that implicates these issues, *see New York State Rifle & Pistol Ass'n, Inc. v. Corlett*, 141 S. Ct. 2566 (2021) (granting certiorari), and if confirmed, I would be bound by all Supreme Court precedent, including any decision in that case.

With respect to the right to vote, the Supreme Court has applied the *Anderson-Burdick* test. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). That test requires that "a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality op. of Stevens, J.) (quoting *Burdick*, 504 U.S. at 434). Under the *Anderson-Burdick* test, "the rigorousness of [a court's] inquiry into the propriety of [a voting restriction] depends upon the extent to which [it] burdens" voters' rights. *Burdick*, 504 U.S. at 434. Generally speaking, "evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious." *Crawford*, 553 U.S. at 189–90 (plurality opinion of Stevens, J.). If confirmed, I would be bound by all Supreme Court precedent, including *Anderson*, *Burdick*, and *Crawford*.

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

Response: With respect to public education institutions, the Supreme Court has held that the Due Process Clause applies to school disciplinary processes with certain consequences such as suspension. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("The Due Process Clause will not shield [a student] from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted."). In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 573 (1972), the Supreme Court explained that "the range of interests protected by procedural due process is not infinite," and that due process requirements apply "only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property," such as where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."

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

Response: Article II of the Constitution provides that the President "shall take care that the laws be faithfully executed." U.S. Const., Art. II, §3. With respect to criminal law, the Supreme Court has held that 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). With respect to executive branch agencies, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court held that there is "a general presumption of unreviewability of decisions not to enforce" by agencies. *Id.* at 834. The Court explained, however, that Congress may "indicate[] an intent to circumscribe agency enforcement discretion," and may "provide[] meaningful standards for defining the limits of that discretion," such that "courts may require that the agency follow that law"—otherwise, as a generally matter, "an agency refusal to institute proceedings is a decision 'committed to agency discretion by law'" within the meaning of [5 § 701(a)(2)]." *Id.* at 834–35.

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

Response: Please see my response to Question 45. The Supreme Court has observed that "'substantive' is not defined in the [Administrative Procedure Act]," but the Court has "described a substantive rule—or a legislative-type rule—as one affecting individual rights and obligations. This characteristic is an important touchstone for distinguishing those rules that may be binding or have the force of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979) (cleaned up). As matters concerning what distinguishes an act of "prosecutorial discretion" from that of a substantive administrative rule change are currently pending in courts, it would be inappropriate for me, as a judicial nominee, to comment on such issues. Canon 3(A)(6), Code of Conduct for United States Judges.

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

Response: Congress has established the death penalty as a possible punishment for certain federal offenses. Under 18 U.S.C. § 3591, a defendant who has been found guilty of certain offenses "shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense." Because Article I of the Constitution vests Congress with "all legislative Powers herein granted," changing the law would require an act of Congress.

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court granted an application to vacate a stay of a district court order enjoining a nationwide eviction moratorium for residential rental properties imposed by Director of Centers for Disease Control and Prevention (CDC) in response to COVID-19 pandemic. The effect of the Court's ruling was to permit the district court's injunction to go into effect, thus blocking the CDC's nationwide eviction moratorium.

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

Response: In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court described two factors that should be considered when determining whether to apply the Fourth Amendment third-party doctrine in the context of "innovations in surveillance tools": (1) the "nature of the particular documents sought" and "whether there is a legitimate expectation of privacy concerning their contents"; and (2) whether the information was "truly 'shared' as one normally understands the term." *Id.* at 2219-20 (internal quotation marks and citation omitted).

47. Please explain your understanding of Justice Gorsuch's dissent in *Carpenter*.

Response: Justice Gorsuch's dissent in *Carpenter* describes an approach to Fourth Amendment jurisprudence that focuses on the protection from search or seizure of materials in which a person has a common law or positive law property interest because "[u]nder its plain terms, the [Fourth] Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized." *Carpenter v. United States*, 138 S. Ct. 2206, 2264 (2018).

a. **What is the judicial value of tying positive law and common law property interests to the test of what constitutes a "search"?**

   Response: In his dissenting opinion, Justice Gorsuch wrote that an approach to Fourth Amendment jurisprudence that ties positive law and common law property interests to the test of what constitutes a "search" may, among other things, "help provide detailed guidance on evolving technologies without resort to judicial intuition." *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting).

b. **Would Gorsuch's suggested supplementation of *Katz* offer more 4th Amendment protections or less? Why?**

Response: Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent—or any Supreme Court Justice's views about precedent—that a lower court judge may be called upon to interpret or enforce. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to the Fourth Amendment.

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

Response: In *United States v. Miller*, 425 U.S. 435, 442–43 (1976), the Supreme Court held that people generally have "no legitimate 'expectation of privacy'" in the content of certain bank records, which "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." To the extent that "financial affairs" may be understood as a term that is broader than the type of bank records at issue in *Miller*, canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on this issue. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit.

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

Response: Please see my response to Question 48. In *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018), the Supreme Court expressly noted that its decision did "not disturb the application of ... *Miller*," but the Court also did "not express a view on matters not before us...." Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on this issue. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit.

50. Explain the Supreme Court's holdings in *Goldman Sachs v. Arkansas Teacher Retirement System* when it decided to vacate the Second Circuit's ruling. How did the Court arrive at this decision?

Response: In *Goldman Sachs Group., Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951, (2021), the Supreme Court, in a putative securities-fraud class action, vacated

and remanded a decision to grant class certification. The plaintiffs in the case alleged that Goldman Sachs maintained an artificially inflated stock price by repeatedly making false and misleading generic statements about its ability to manage conflicts. The Supreme Court held that "the generic nature of a misrepresentation often is important evidence of price impact that courts should consider at class certification," and vacated the decision below because there was "sufficient doubt" as to whether the decision below "properly considered the generic nature of Goldman's alleged misrepresentations. *Id.* at 1958, 1961. The Supreme Court, however, rejected the defendant's second argument on appeal, and held that a defendant in a securities-fraud class action "bear[s] the burden of persuasion on price impact at class certification"—*i.e.*, that at class certification, a defendant bears the burden of persuasion as to a lack of price impact by a preponderance of the evidence. *Id.* at 1962.

51. In *U.S. Agency for Int'l Development v. Alliance for Open Society*, the question before the Supreme Court was whether the federal law restricting funding to organizations with "a policy explicitly opposing prostitution and sex trafficking" is unconstitutional as applied to foreign affiliates of American NGOs. Explain the Court's holding in this case.

Response: In *Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S. Ct. 2082 (2020), the Supreme Court held that foreign affiliates of domestic organizations, who brought a First Amendment challenge to a federal statute requiring that, in order to receiving funding, organizations must adopt a policy explicitly opposing prostitution and sex trafficking, have no First Amendment rights.

Senator Josh Hawley
Questions for the Record

Dale Ho
Nominee, U.S. District Court for the Southern District of New York

1. **In a 2018 article in the *William & Mary Law Review* entitled "Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases," you wrote that it might "be counterproductive for civil rights advocates to embrace colorblindness as a constitutional principle, which has been deployed to undermine race-conscious civil rights remedies in a range of areas, including education and employment."**

   a. **Do you believe that the Equal Protection Clause mandates colorblindness as a constitutional principle?**

      Response: In *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013), the Supreme Court held that "'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)). The Court "made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). If the term "colorblindness" means "treating all people the same regardless of race," *see* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/color-blind, then I agree that the Equal Protection Clause incorporates colorblindness as a constitutional principle. *See Fisher*, 570 U.S. at 310.

   b. **If not, why not?**

      Response: See my response to Question 1(a).

   c. **Do you agree with the statement: "The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."**

      Response: I am not familiar with the context in which this statement was made. Under federal law, the various remedies for claims of racial discrimination include damages, injunctive relief, and declaratory relief. *See, e.g.* 42 U.S.C. § 1981a (damages in cases of intentional discrimination in employment); 42 U.S.C. § 2000a–3 (civil actions for injunctive relief).

   d. **If so, why?**

Response: N/A.

e. **Do you believe that any policy that has a disparate impact across different racial groupings, irrespective of discriminatory intent, is per se racist?**

Response: No. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (standard for liability under Title VII of the Civil Rights Act of 1964); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (standard for liability under Section 2 of the Voting Rights Act); *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (standard for liability under Fair Housing Act).

2. **When Senator Graham was chair of the Judiciary Committee, did you ever publish a tweet, or retweet another person's tweet, in response to something he said?**

Response: I do not recall whether, when Senator Graham was chair of the Judiciary Committee, I ever published a tweet, or retweeted another person's tweet, in response to something he said.

3. **Please provide a complete record of your Twitter feed dating back through 2015, including copies of any deleted tweets.**

Response: Respectfully, I have provided the Committee with all materials responsive to the Senate Judiciary Committee Questionnaire for Judicial Nominees, including more than 4,200 pages of briefs, law review articles, speeches, op-eds, and blogs. It is my understanding that social media posts are not deemed to be responsive to the Senate Judiciary Committee Questionnaire. As I testified at my hearing, I recognize that I sometimes published tweets with overheated rhetoric. Throughout my career, I have sought to maintain high standards of professional courtesy and respect in my actual legal work—including in court and in dealings with counsel. I believe that is reflected in my American Bar Association evaluation, which I understand is based on dozens of interviews of judges, opposing counsel, and colleagues. If confirmed, I will maintain high standards of professional courtesy and respect in both formal and informal communications, and in both public and private. I also fully recognize that the role of a judge is to set aside one's personal views, if any, and to impartially apply the law and precedent to the facts as established by the record in individual cases, and, if confirmed, will swear an oath to do so.

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

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

Response: I am not aware of the full context of that quote. As stated here, I do not agree with it.

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

Response: My understanding is that the judicial oath requires a judge to faithfully and impartially follow the law, including all precedent from the Supreme Court and the relevant Circuit Court of Appeals.

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

Response: Under *Pullman* abstention, federal courts "ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). That is, in a case where a plaintiff alleges both a federal claim and a state law claim, a federal court should abstain from deciding the case if the state law issue is unclear and its determination (by a state court) could resolve the case. The Second Circuit has held that courts "have an independent obligation to consider whether *Pullman* abstention is appropriate." *Nicholson v. Scoppetta*, 344 F.3d 154, 167–68 (2d Cir. 2003).

The *Burford* abstention doctrine has been "distilled" by the Supreme Court as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of *650 state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989). The Second Circuit has

> identified three factors to consider in connection with the determination of whether federal court review would work a disruption of a state's purpose to establish a coherent public policy on a matter involving substantial concern to the public. Those factors are as follows: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern."

Liberty Mut. Ins. Co. v. Hurlbut, 585 F.3d 639, 650 (2d Cir. 2009) (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998)).

Younger abstention "generally requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). The Second Circuit has instructed that

> *Younger* abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims.

Id.

Under *Colorado River* abstention, a "court may abstain in order to conserve federal judicial resources only in 'exceptional circumstances,' where the resolution of existing concurrent state-court litigation could result in 'comprehensive disposition of litigation.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976). Six factors are relevant:

> (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction, (2) whether the federal forum is less inconvenient than the other for the parties, see id.; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, see id., and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

Woodford v. Cmty. Action Agency of Greene Cty., Inc., 239 F.3d 517, 522 (2d Cir. 2001) (internal citations omitted). Furthermore,

> No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. *Only the clearest of justifications will warrant dismissal.*

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15-16 (1983) (quoting *Colorado River*, 424 U.S. at 818–19, 96 S.Ct. 1236 (emphasis in *Moses H. Cone*)).

The *Rooker-Feldman* doctrine stands for the "principle that federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments." *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). There are

> four requirements for the application of *Rooker–Feldman*. First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must "complain[ ] of injuries caused by [a] state-court judgment[.]" Third, the plaintiff must "invit[e] district court review and rejection of [that] judgment[ ]." Fourth, the state-court judgment must have been "rendered before the district court proceedings commenced"—i.e., Rooker–Feldman has no application to federal-court suits proceeding in parallel with ongoing state-court litigation. The first and fourth of these requirements may be loosely termed procedural; the second and third may be termed substantive.

Id. at 85.

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

   Response: No, as far as I can recall.

   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: N/A.

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

   Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to methods of constitutional interpretation. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*.

8. **Do you consider legislative history when interpreting legal texts?**

   Response: The Supreme Court has instructed that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports,

we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted). The Second Circuit has held that, if the plain meaning of a statute "is ambiguous, then a court may resort to the canons of statutory construction" to help resolve the ambiguity. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). The Second Circuit has also held that, if this does not resolve the ambiguity, a court may "resort to other interpretive aids (like legislative history)." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

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 instructed that, "[i]n 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 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has advised that other forms of legislative history are not as probative. *See, e.g., id.* ("We have eschewed reliance on the passing comments of one Member, . . . and casual statements from the floor debates.") (internal citations omitted); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

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

Response: As a general matter, it is not appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution. The Supreme Court, however, has on limited occasions referenced foreign law, such as English common law, in constitutional cases. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (citing Blackstone, 4 Commentaries on the Laws of England 55 (1769); 1 W. & M., ch. 15, § 4, in 3 Eng. Stat. at Large 422 (1689); 1 W. Hawkins, Treatise on the Pleas of the Crown 26 (1771)).

9. **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 *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019), the Supreme Court stated that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test." That test provides that a prisoner must establish that there is "objectively intolerable risk of harm"—*i.e.*, that

"prisoners must identify an alternative" to the default method of execution "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008). I do not believe the Second Circuit has had occasion to interpret or apply the *Baze-Glossip* test, but the Second Circuit and district courts in the Second Circuit are bound by Supreme Court precedent.

10. **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 9.

11. **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 *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), the Supreme Court held that a habeas petitioner does not have a due process right to access DNA evidence.

12. **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.

13. **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: With respect to federal governmental action, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.* ("RFRA"), provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b). While RFRA applies to federal governmental action, *see, e.g.*, *Gonzales v. O Centro Espirita Beneficient Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court has held that RFRA does not apply to state and local governmental action, *see City of Boerne v. Flores*, 521 U.S. 507 (1997). With respect to state and local governmental action, the Supreme Court held in

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-82 (1990), that, under the Free Exercise Clause of the First Amendment, otherwise-valid, facially neutral state laws of general applicability do not ordinarily trigger strict scrutiny. In *Smith*, the Court further observed that "the First Amendment bars the application of a neutral, generally applicable law to religiously motivated action" when a free exercise claim also involves other constitutional protections, such as freedom of speech or the right of parents to direct the education of their children. *Id.* at 881.

14. 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: In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), the Supreme Court held that

> [a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests. . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021) the Court explained that the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Court further explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."

15. 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: Injunctive relief is governed by Federal Rule of Civil Procedure 65. The Supreme Court has observed 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), and has instructed that injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).. The legal authority of district courts to issue nationwide injunctions is currently the subject of debate in courts, including the Supreme Court. *See, e.g.*, *Department of Homeland Security v. New York*,

140 S. Ct. 599 (2020) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III."). As matters concerning the propriety of nationwide injunctions are currently pending in courts, it would be inappropriate for me, as a judicial nominee, to comment on such issues. *See* Canon 3(A)(6), Code of Conduct for United States Judges. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including on the issue of the proper scope of injunctive relief.

16. 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, 717 (2014), the Supreme Court held that, "[t]o qualify for [the Religious Freedom Restoration Act's] protection, an asserted belief must be sincere." (quotation marks omitted). The Court explained that "the federal courts have no business addressing" the question "whether the religious belief asserted in a RFRA case is reasonable." *Id.* at 724. In *Welsh v. United States*, 398 U.S. 333, 339-40 (1970), the Supreme Court held that sincere religious beliefs "stem from [a person's] moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions," and furthermore, that such beliefs "need not be confined in either source or content to traditional or parochial concepts of religion." The Court has instructed that this issue "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). The Second Circuit is bound by Supreme Court precedent.

17. 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 his dissenting opinion in *Lochner v. New York*, 198 U.S. 45 (1905), Justice Holmes stated that the "Constitution is not intended to embody a particular economic theory." *Id.* at 75 (1905) (Holmes, J., dissenting). I believe that, in this statement, Justice Holmes meant to express the view that the Fourteenth Amendment did not mandate the majority opinion's holding that "the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *See Lochner*, 198 U.S. at 64.

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

Response: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court repudiated *Lochner*'s characterization of the freedom of contract as absolute, stating that

> the Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. . . . "[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

Id. at 391-92 (quoting *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 565 (1911)). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *West Coast Hotel*. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce.

18. 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 understand this statement to mean that judges should faithfully and impartially follow the law, without regard to their personal views or whether the result reached in an individual case is one that the judge "likes." If that is the meaning of the statement, then I agree that it describes the role and duty of a judge.

19. **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: My understanding of the statement that *Korematsu v. United States*, 323 U.S. 214 (1944) had been "overruled in the court of history," is that it means that, while *Korematsu* had not been formally overruled or clearly abrogated by the Supreme Court, it was widely or even universally viewed as discredited. For example, Justice Scalia ranked *Korematsu* "as among the court's most shameful blunders," and Justice Breyer wrote that "[t]he decision has been so thoroughly discredited . . . that it is hard to conceive of any future court referring to it favorably or relying on it." Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. Times, Jan. 27, 2014, https://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html.

20. **Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?**

    a. **If so, what are they?**

       Response: I am not aware of any particular Supreme Court opinions that are no longer good law without having been formally overruled or clearly abrogated.

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

       Response: Yes. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

21. **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 subparts: In *United States v. Grinnell Corporation*, 384 U.S. 563, 570–71 (1966), the Supreme Court explained that "[t]he offense of monopoly under [Section 2] of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) 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." In *Eastman Kodak Company v. Image Technical Services., Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court held that "evidence that [the defendant] controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is . . . sufficient" to establish monopoly power under Section 2 of the Sherman Act.

The Second Circuit has held that a particular threshold of market share is not always necessary to establish monopoly power. As the Second *Circuit explained in International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir. 1987),

> market share analysis, while essential, is not necessarily determinative in the calculation of monopoly power under [Section 2]. Other market characteristics must also be considered in determining whether a given firm has monopoly power or has a dangerous probability of acquiring monopoly power. . . . Among these characteristics are the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.

If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to issues of monopoly power.

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

Response: In *Rodriguez v. Federal Deposit Insurance Corporation*, 140 S. Ct. 713, 717 (2020), the Supreme Court explained that

> 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. . . . In the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'" *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S. Ct. 2061, 68 L.Ed.2d 500 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S. Ct. 923, 11 L.Ed.2d 804 (1964)).

23. 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?

Response: With respect to federal constitutional provisions, the Supreme Court has explained that it is the "duty of [federal courts] to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit on all questions of federal constitutional law.

With respect to state constitutional provisions, "the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from a state's highest court with respect to any questions arising under that state's constitution.

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

Response: The United States Constitution provides that it is "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI cl. 2. The protections in federal constitutional provisions are binding on states, "notwithstanding" anything to the contrary in a state's constitution. With respect to the protections of state constitutional provisions, please see my response to Question 26(a).

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

Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce. There are, however, a few exceptions with respect to issues that are extremely unlikely to arise, such as the constitutionality of *de jure* racial segregation in public schools. Therefore, like prior judicial nominees, I believe that I can make exceptions to the general rule prohibiting comment on the correctness of precedent for *Brown v. Board of Education*, and to state that I agree that *Brown* was correctly decided.

25. 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: Please see response to Question 15.

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

Response: The Supreme Court has stated that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (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." *Bond v. United States*, 564 U.S. 211, 221 (2011). The Court has also "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Federalism "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.'" *Bond*, 564 U.S. at 221 (quoting *Gregory*, 501 U.S. at 458).

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

Response: It is difficult to identify a single case that I would say that I am most proud of. I have been honored to represent many clients over the course of my career, but I often think about my work in a clinic in law school, when I successfully represented several clients seeking asylum.

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

Response: Please see my response to Question 5.

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

Response: Generally speaking, damages are awarded to remedy past harm that has already occurred, while injunctive relief is awarded to prevent future harm that has not yet occurred. The availability of a particular form of relief depends on the circumstances of an individual case.

30. 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 responses to Questions 13 and 14.

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 United States Supreme Court has referred to both "freedom of worship" and "free exercise of religion," but does not appear to have delineated what, if any, differences there may be between the two terms. *Compare Lee v. Weisman*, 505 U.S. 577, 591 (1992) (referring to the right protected by the Free Exercise Clause in the First Amendment as the "freedom of worship") *with Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019-20 (referring to the right protected by the Free Exercise Clause as "the free exercise of religion").

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: The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq. ("RFRA"), provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b). In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014), the Supreme Court held that, because a federal "contraceptive mandate" would impose significant costs on an employer "if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit on these and other issues.

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 16.

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: By its plain terms, the Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. §§ 2000bb(a)(1). "RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citing 42 U.S.C. § 2000bb–3(b)).

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.

31. 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: In *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the Supreme Court stated that, with respect to standards of proof such as probable cause, "an effort to fix some

general, numerically precise degree of certainty corresponding to ‘probable cause’ may not be helpful.” The Second Circuit has held that it was not plain error to instruct a jury as follows to explain the concept of “reasonable doubt” as follows:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If based upon your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

United States v. Reese, 33 F.3d 166, 170 (2d Cir. 1994).

32. 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 all subparts: Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Harrington*.

33. In your legal career:

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

Response: I have been sole lead counsel at trial in three cases. I have been co-lead counsel at trial in two other cases. I have served as supervising attorney at trial in one case.

b. How many have you tried as second chair?

Response: See response to Question 33(a).

c. How many depositions have you taken?

Response: I cannot recall with precision how many depositions I have taken, but I would estimate more than a dozen.

d. How many depositions have you defended?

Response: I cannot recall with precision how many depositions I have taken, but I would estimate more than ten.

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

Response: I have argued on six occasions before a federal appellate court: four times before Courts of Appeals, and two times before the Supreme Court.

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

Response: I have argued one case before a state appellate court.

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

Response: I appeared on behalf of clients in immigration proceedings on three occasions through a clinic in law school.

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

Response: I cannot recall with precision how many dispositive motions I have argued before trial courts, but I would estimate approximately five.

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

Response: I cannot recall with precision how many dispositive motions I have argued before trial courts, but I have argued such motions are routinely during trial.

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

Response: Yes.

a. **If yes, please provide appropriate citations.**

I have taken the position in litigation that state statutes violated the U.S. Constitution in several cases, including: *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), *cert denied*, 141 S. Ct. 965 (2020); *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020) (en banc); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018); *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied* 137 S. Ct. 1399 (2017); *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *stay issued*, 573 U.S. 988 (2014).

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: Throughout my time using social media for more than a decade, I have deleted content for different reasons. I cannot recall with particularity the dates when I have done so. Please also see my response to Question 3.

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

Response: As Justice Scalia explained in his concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the doctrine of substantive due process provides that the Due Process Clause of the Fourteenth Amendment "incorporate[es] certain guarantees in the Bill of Rights" to protect against intrusion by state and local governments, under precedent that "is both long established and narrowly limited." *Id.* at 791 (Scalia, J. concurring). The Supreme Court has also held that, separate and apart from the protections of the Bill of Rights, the Due Process Clause protects certain substantive rights that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (holding that the Due Process Clause does not protect a right to physician-assisted suicide).

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

Response: The term "systemically racist" has different meanings to different people. Systemic issues—including whether or not such systemic issues exist—present important public policy questions for policy makes. The role of a judge, however, is not to make policy but to decide individual cases by applying the law impartially to the facts as

established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit.

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

Response: Yes.

a. How did you handle the situation?

Response: As with any case, I investigate the available evidence and assess the likely facts as best as I can understand them without formal fact-finding; carefully research the law; and then apply the law to the likely facts as I understand them, and determine if the legal standard has been met.

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: This question presents important ethical, religious, and public policy questions. The role of a judge, however, is not to make policy but to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit.

41. 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, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller*.

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.

42. **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: I have testified in state legislatures and in the United States Congress on several occasions, as set forth in my Senate Judiciary Committee Questionnaire.

43. **In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**

a. ***Roe v. Wade,* 410 U.S. 113 (1973)?**

b. **The Supreme Court's substantive due process precedents?**

c. **Systemic racism?**

d. **Critical race theory?**

Response to all subparts: No.

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

a. **Apple?**

b. **Amazon?**

c. **Google?**

d. **Facebook?**

e. **Twitter?**

Response to all subparts: I do not own any individual shares in any company. My assets are set forth in my Financial Disclosure Statement submitted to this Committee.

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

Response: I have occasionally reviewed and/or offered advice to colleagues including minor suggested edits to briefs, and did not place my name on the brief because my contributions were too minimal to warrant entering an appearance in the case.

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

Response: Cases in which I reviewed and/or offered advice such as minor suggested edits to a brief without placing my name on the brief include: *Green Party of Georgia v. Kemp*, 674 F. App'x 974, 975 (11th Cir. 2017); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871 (11th Cir. 2016); and *Howard v. Augusta-Richmond Cty.*, 615 F. App'x 651 (11th Cir. 2015).

46. Have you ever confessed error to a court?

Response: To the best of my recollection, I have not confessed error to a court.

a. If so, please describe the circumstances.

Response: N/A.

47. 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: A nominee should be forthcoming and truthful in stating their views on their judicial philosophy.

Senator Mike Lee
Questions for the Record
Dale Ho, Nominee to the District Court for the Southern District of New York

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

Response: I have not served as a judge, and therefore cannot identify an existing judicial philosophy. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If appointed as a district judge for the Southern District of New York, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods or judicial philosophy. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

2. **In a 2010 law review article you said that, instead of an originalist interpretation, "the lived experience of contemporary Americans" should form the basis of constitutional interpretation. Can you expound on this proposed method of interpretation?**

Response: Respectfully, I do not believe that I "proposed [a] method of judicial interpretation" in the law review article referenced in the question. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to methods of constitutional interpretation. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." *Id.* at 576 (quotation marks and citation omitted). In *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), the Supreme Court, in an opinion by Chief Justice Marshall, observed that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Examples of this principle are the Supreme Court's decisions in *Kyllo v. United States*, 533 U.S. 27 (2001) and *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Kyllo*, the Court, in an opinion by Justice Scalia, observed that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," and held that "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment," 533 U.S. at 29. The Court kept "Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools," in order to "'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo*, 533 U.S. at 34). And in *Brown*, the Supreme Court held

that de jure racial segregation in public schools is unconstitutional, explaining that the Court, in reaching its decision, "must consider public education in the light of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller*, *McCulloch*, *Kyllo*, and *Brown*.

3. How would this mode of interpretation be implemented without undermining the rule of law?

Response: Please see my response to Question 2.

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

Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to methods of statutory interpretation. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court explained that courts should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738. In assessing the ordinary public meaning of statutory terms at the time of enactment, the Court has consulted sources such as dictionaries that are from the same time period as the statute in question. *See, e.g.*, *id.* at 1740 (in interpreting Civil Rights Act of 1964, citing Webster's New International Dictionary (2d ed. 1954), Webster's New Collegiate Dictionary 326 (1975)). The Supreme Court has further explained that, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

The Second Circuit has held that, if the plain meaning of a statute "is ambiguous, then a court may resort to the canons of statutory construction" to help resolve the ambiguity. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). The Supreme Court, however, has cautioned that "interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Albertini*, 472 U.S. 675, 680 (1985). The Second Circuit has also held that, if canons of construction do not resolve the ambiguity, a court may "resort to other interpretive aids (like legislative history)." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). The Supreme Court, however, has cautioned that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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

Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to methods of constitutional interpretation. In *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), the Supreme Court explained that, in interpreting the Constitution, courts 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." In assessing the normal and ordinary meaning of words and phrases in the Constitution, the Court has consulted sources such as dictionaries that are from the same time period as the constitutional provision in question. *See, e.g.*, *id.* at 581 (in construing Second Amendment, citing the 1773 edition of Samuel Johnson's dictionary, 1 Dictionary of the English Language (4th ed.); Timothy Cunningham's 1771 legal dictionary, 1 A New and Complete Law Dictionary; and Noah Webster's 1828 dictionary, N. Webster, American Dictionary of the English Language (1828)).

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

Response: Please see my response to Question 5.

7. **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 4.

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: Please see my response to Question 4.

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

Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 1992), the Supreme Court explained that "the irreducible constitutional minimum of standing contains three elements."

> First, the plaintiff must have suffered an **injury in fact**—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical . . . Second, there must be **a causal connection** between the injury and the conduct complained of—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 not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be **redressed by a favorable decision**.

Id. (emphasis added, cleaned up).

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

Response: Under the Necessary and Proper Clause, Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18. In *McCullough v. Maryland*, 17 U.S. 316, 400 (1819), the Supreme Court held that the power of Congress to incorporate a federal Bank of the United States was "implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect."

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

Response: If confirmed as a district judge for the Southern District of New York, I would evaluate such a case by impartially applying the relevant law, including precedent from the Supreme Court and the Second Circuit, to the facts as established by the evidence of the record in that particular case, and then determining if the applicable legal standards for any claims have been met. The Supreme Court has held that, "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012). The Court has also explained that a law should not be struck down merely "because Congress used the wrong labels," as the "the '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 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

11. 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 Clause protects certain substantive rights that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (holding that the Due Process Clause does not protect a right to physician-assisted suicide). The Supreme Court summarized these rights in *Glucksberg*:

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

Id. at 720.

12. What rights are protected under substantive due process?

Response: Please see my response to Question 11.

13. 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: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent

from the Supreme Court and Second Circuit, including with respect to substantive due process. How I personally might distinguish among the various decisions of the Supreme Court and/or of the Second Circuit in this area would be irrelevant, as I would be bound by all precedent from the Supreme Court and the Second Circuit.

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

Response: Under the Commerce Clause, Congress has the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. The Supreme Court has "read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) ("*NFIB*") (citing *United States v. Morrison*, 529 U.S. 598, 618-19 (2000)). While Congress may regulate certain intrastate "activity" where such activity "substantially affects interstate commerce," it may not regulate "inaction," for example by "compel[ling] individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." *NFIB*, 567 U.S. at 536 (internal citations and quotation marks omitted).

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

Response: The Supreme Court has described various factors that may qualify a particular group as a "suspect class," including that they have "been subjected to discrimination;" that they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and that they are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

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

Response: In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court explained that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Id.* at 693 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). "[T]he claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances," because "individuals, too, are protected by the operations of separation of powers and checks and balances." *Bond v. United States*, 564 U.S. 211, 222–23 (2011).

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

Response: If confirmed, I would decide such a case by impartially applying the law to the facts as established by the evidence of the record in that particular case, and then determining if the applicable legal standards for any claims have been met. For example, with respect to "claims of Presidential power," the Supreme Court applies "Justice Jackson's familiar tripartite framework from" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015). Under this three-part framework, the exercise of Presidential power is divided into three categories: first, "when 'the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"; second, "'in absence of either a congressional grant or denial of authority' there is a 'zone of twilight in which he and Congress may have concurrent authority,' and where 'congressional inertia, indifference or quiescence may' invite the exercise of executive power"; and third, "when 'the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.'" *Id.* (quoting *Youngstown*, 343 U.S. at 635-37). "To succeed in this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue." *Id.* (quoting *Youngstown*, 343 U.S. at 637-38).

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

Response: A district court judge's feelings are not relevant to the judge's consideration of a case. A district judge is bound by, and must faithfully and impartially follow the law, including all precedent from the Supreme Court and the relevant Circuit.

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

Response: Both are undesirable results that judges should seek to avoid.

20. 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 the frequency with which the Supreme Court has exercised its power of judicial review to strike down federal statutes as unconstitutional during different time periods, and what changes, if any, there have been in the frequency of such rulings. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit. I would swear an oath to discharge that duty fully and faithfully.

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

Response: "Judicial review" refers to the authority of courts to hear and decide cases concerning the legality of actions of the legislative and executive branches of government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). I have not used the term "judicial supremacy" as a lawyer, and it appears to have been used in different ways by different people. Some academics have used "the term 'judicial supremacy' to describe the Court's claim to exclusive power to interpret the Constitution," a "broader phenomenon than the related concepts of judicial independence and judicial review. It was an assertion that constitutional pronouncements of the judiciary or a high court in a specific case govern the actions of political actors, even outside the bounds of that case." Barry Friedman & Erin F. Delaney, Becoming Supreme: *The Federal Foundation of Judicial Supremacy*, 111 Colum. L. Rev. 1137, 1143 (2011). Justice Scalia used the term to refer to decisions by the Supreme Court that he viewed as exceeding the Court's "statutorily and constitutionally conferred" authority. *Boumediene v. Bush*, 553 U.S. 723, 842 (2008) (Scalia, J., dissenting).

22. 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: All federal and state legislators, executive officers, and judicial officers are "bound by Oath or Affirmation, to support [the United States] Constitution. U.S. Const., Art. VI. State officials are bound to follow the decisions of the United States Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18

(1958) ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.").

23. 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 role of a judge is not to make policy but is limited to deciding individual cases, by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit.

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

Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit. My personal views as to the correctness of precedent would be irrelevant, as I would be bound by all precedent from the Supreme Court and the Second Circuit.

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

Response: A judge should not discriminate in sentencing based on a defendant's group identity(ies). Under 18 U.S.C. § 3553(a), a federal district court must consider certain factors in imposing sentences. One (out of several) of these factors is ""the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

26. In a 2012 law review article you appear to have argued that the Supreme Court's ruling in NAACP v. Alabama addressed the "need to have special protections for minority speech." Should the First amendment apply differently to minority or disfavored speech than it does to other types of speech? Which Supreme Court rulings support your conclusion?

Response: Generally speaking, First Amendment protections are the same regardless of the minority status of the person asserting the right. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court held that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as direct government sanctions. More recently, in *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) the lead opinion by Chief Justice Roberts explained that "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." To withstand "exacting scrutiny," "there must be a 'substantial relation between the disclosure requirement and a sufficiently important government interest.'" *Id*. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

In the context of candidate ballot access, however, the Supreme Court has held that candidate ballot access requirements may "fall[] unequally on new or small political parties or on independent candidates," and thereby "impinge[], by [their] very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983).

27. In a 2009 law review article, you characterized the Supreme Court's decision in *District of Columbia v. Heller* as "cavalier." You then went on to state "where a minority community supports and enacts a firearms regulation—as was the case with the handgun ban in the District [of Columbia]—the presumption should be that the community has adequately weighed the civil liberties costs and possibly racially disproportionate effects of the regulation at issue against its benefits to public safety. To assume otherwise is essentially to privilege the viewpoints of libertarian theorists and Second Amendment enthusiasts over those of the very citizens who live daily with the civil liberties costs of firearms regulations and the risk of victimization by firearms-related violence." How can we trust you to follow the Court's Second Amendment precedents when you have so harshly criticized them?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In the next Second Amendment case to reach the Supreme Court, I signed an amicus brief arguing that, in considering the application of the Second Amendment to state and local governments, the Court should "look to its well-established framework under the Due Process Clause for determining whether a provision of the Bill of Rights applies to state and local governmental action." *McDonald v. City of Chicago*,

No. 08-1521, Amicus Brief of NAACP Legal Defense & Educational Fund, Inc. in Support of Neither Party, 2009 WL 4074858 at *5 (U.S. Nov. 23, 2009). In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Supreme Court, relying on Due Process principles, held that "the right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States." If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller* and *McDonald*.

28. 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: Issues of fairness for individuals who belong to purportedly "underserved communities" present important public policy questions for policy makers. The role of a judge, however, is not to make policy but to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit.

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

Response: Merriam-Webster's dictionary defines "equity" as "fairness or justice in the way people are treated." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/equity. Merriam-Webster's dictionary defines "equality" as "the quality or state of being equal." *Id.*, https://www.merriam-webster.com/dictionary/equality.

30. 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 provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1. Please also see my response to Question 27.

31. How do you define "systemic racism?"

Response: I do not have a personal definition of that term. Merriam-Webster's dictionary defines "systemic" as "of, or relating to, or common to a system." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/systemic. Merriam-Webster's dictionary defines "racism" as "a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race," and "the systemic oppression of a racial group to the social, economic, and political advantage of another." *Id*., https://www.merriam-webster.com/dictionary/racism.

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

Response: An article on the American Bar Association website defines "critical race theory" as "a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship." Janel George, *A Lesson on Critical Race Theory*, Americans Bar Association (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

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

Response: Please see my responses to Questions 30 and 31.

34. Last summer, rioters in Portland Oregon attempted to set fire to the Mark O. Hatfield Federal Courthouse. They also repeatedly ambushed federal law enforcement officers as they tried to leave the building and attacked U.S. Marshals with a hammer. In response to attempts by Federal law enforcement to protect federal property and federal employees from these rioters, the ACLU filed a lawsuit in federal court. You tweeted your support for this lawsuit on July 17, 2020 and said "I love my colleagues in this organization." How can we expect you to respect and uphold your duties as a federal judge when you are so willing to dismiss the willful and wanton destruction of federal property and assaults on federal employees?

Response: I have not worked on the lawsuit referenced in this question, *Index Newspapers LLC v. City of Portland*, Case No. 3:20-cv-1035-SI (D. Or.). The matter remains ongoing, and as a pending nominee, I am bound by canons of judicial ethics that prohibit judges from commenting on pending litigation, beyond a factual

description of the complaint and rulings thus far. *Index Newspapers* was brought on behalf of a newspaper, journalists and legal observers, alleging claims under the First, Fourth, and Fourteenth Amendment, and the Oregon Constitution. The district court granted a temporary restraining order, and subsequently, a preliminary injunction, in favor of the plaintiffs. *See Index Newspapers LLC v. City of Portland*, 474 F. Supp. 3d 1113 (D. Or. 2020) (TRO); *Index Newspapers LLC v. City of Portland*, No. 3:20-CV-1035-SI, 2020 WL 4883017 (D. Or. Aug. 20, 2020) (preliminary injunction).

The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. A district judge is bound by the law, including all precedent from the Supreme Court and the relevant Circuit. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

Questions from Senator Thom Tillis
for Dale E. Ho
Nominee to be United States District Judge for the Southern District of New York

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

   Response: Yes. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record.

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

   Response: My understanding is that the term "judicial activism" means different things to different people. If the term "judicial activism" refers to the basing of decisions on a judge's personal political or policy views, rather than the applicable law, then I agree that it is inappropriate.

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

   Response: Yes. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record.

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

   Response: No. The role of a judge is not to make policy but to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case.

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

   Response: Yes. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record, regardless of whether the outcome in a case might be deemed "undesirable" by the judge or anyone else.

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

Response: No. The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Supreme Court held that "the right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States." If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including *Heller* and *McDonald*.

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

Response: As with any lawsuit, I would impartially apply the law to the facts as established by the evidence in the record. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court.

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 has held that "officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citations omitted). If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Wesby*.

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: Issues concerning the sufficiency of protection for law enforcement officers present important public policy questions for policy makes. The role of a judge, however, is not to make policy but to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to qualified immunity.

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

    Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to qualified immunity.

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

    Response: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce.

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

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

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

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

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

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

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

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

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

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

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

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

Response to all subparts: If I were fortunate to be confirmed, and if I encountered a case presenting any of the hypotheticals listed above, I would impartially apply the law to the facts as established by the evidence in the record. Respectfully, canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court.

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

Response: Please see my response to Question 12.

15. **Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has**

become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: To the best of my recollection, I worked on a few copyright cases as a judicial law clerk.

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

Response: I do not recall having any particular experiences 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?

Response: I do not recall having any experience 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?

Response: I have litigated several cases raising First Amendment and free speech issues. I do not recall having any experience addressing free speech and intellectual property issues, including copyright.

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

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

Response: The Supreme Court has instructed that "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the*

Navy, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted). The Second Circuit has held that, if the plain meaning of a statute "is ambiguous, then a court may resort to the canons of statutory construction" to help resolve the ambiguity. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). The Second Circuit has also held that, if this does not resolve the ambiguity, a court may "resort to other interpretive aids (like legislative history)." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

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?

The Supreme Court has held that an expert federal agency's advice or analysis as to the interpretation of legislative text, as contained in an agency opinion letter, policy statement, agency manual, or enforcement guideline, receives *Skidmore* deference, *see Skidmore v. Swift*, 323 U.S. 134 (1944)—*i.e.*, it is entitled to respect, but only to the extent it is persuasive—rather than more deferential *Chevron*-style deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

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

Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to the necessity of remedial action for copyright infringement. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court.

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

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

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 to both subparts: If confirmed as a district judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to the interpretation and application of laws like the DMCA. The issue of whether the DMCA remains sufficient in the internet era, and whether new laws might be necessary, present important public policy questions for policy makers. The role of a judge, however, is not to make policy but to set aside whatever personal views she or he may have, if any, and to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function.

18. 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 the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

a. Do you see "judge shopping" and "forum shopping" as a problem in litigation?

Response: The Second Circuit has stated that

> the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands...

Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001)

b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?

Response: District court judges preside over the matters that are assigned to them, according to the local rules of the district court on which they serve. As a general matter, district court judges should not encourage or discourage the filing of any particular matter, or the choice of filing a case in any particular court or any division within a court. Once a matter is filed, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). However, "[a] federal court has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has

jurisdiction to hear [the] case, and ... trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience, or ... the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (internal citations and quotation marks omitted).

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: I cannot think of instances in which it would be appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant. Please see my response to Question 18(b).

d. **If so, please explain your reasoning. If not, do you commit not to engage in such conduct?**

Response: I commit not to engage in such conduct.

19. **In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.**

a. **What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?**

b. **Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?**

Response to all subparts: Under 28 U.S.C. § 1651(a): "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Supreme Court has stated that mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259–260, (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). "[O]only exceptional circumstances amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1967)," or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S., at 95.

The Supreme Court has explained that "three conditions must be satisfied before [mandamus] may issue":

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires . . . . Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004) (internal quotation marks and citation omitted). "These hurdles, however demanding, are not insuperable." *Id.* at 381.

As a judicial nominee, it would be inappropriate for me to comment on matters pending in any courts. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

20. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?

a. 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?

b. 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 to all subparts: If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow, the Federal Rules of Civil Procedures and the Local Rules of United States District Courts for the Southern and Eastern Districts of New York, https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf. As a pending nominee, it would inappropriate for me to comment on the merits of those Local Rules, of those of any other district court.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

a. **If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?**

b. **Would five mandamus reversals be sufficient? Ten? Twenty?**

Response: Please see my response to Question 19.