Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Orelia Eleta Merchant
Nominee to be United States District Judge, Eastern District of New York

1. **Please discuss your criminal federal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many criminal jury trials you have participated in as lead/co-counsel?**

   Response: During my time as an Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of New York, from 2002 to 2016, I prosecuted several criminal forfeiture cases, including health care fraud and drug money laundering cases. Also, while serving as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, from 2000 to 2001, I represented the United States in criminal prosecutions, including general crimes and drug crimes cases. My representation in these matters included arraignments, pre-trial conferences, detention, revocation, and sentencing hearings, and assistance with criminal trials. I do not specifically recall the number of criminal cases that I handled.

2. **When was the last time you personally argued before a court?**

   Response: The last time I personally argued before a court was in or around 2016, when I was appointed as Executive Assistant United States Attorney in the U.S. Attorney's Office for Eastern District of New York (the "Office") with oversight of the Civil and Administrative Divisions of the Office. From 2002 to 2016, as an Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of New York, and from 2001 to 2001, as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, I personally argued in federal court routinely and appeared in all stages of litigation in a wide variety of practice areas on cases in federal district court frequently, often several times a week.

3. **How many antitrust cases have you personally handled during your legal practice?**

   Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases, handling a wide range of affirmative and defensive matters, including, but not limited to asset forfeiture, environmental, health care fraud, mortgage fraud, employment discrimination, medical malpractice, bankruptcy, constitutional challenges, and federal program litigation cases. Where a matter involved an area of law that I had not previously handled, I quickly came up to speed. I have not had an occasion to personally handle an antitrust case. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant binding Supreme Court and Second Circuit precedent before rendering any decisions in an antitrust case.

4. **How many securities litigation cases have you personally handled during your legal practice?**

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases, handling a wide range of affirmative and defensive matters, including, but not limited to asset forfeiture, environmental, health care fraud, mortgage fraud, employment discrimination, medical malpractice, bankruptcy, constitutional challenges, and federal program litigation cases. As an Executive Assistant United States Attorney, I represented the U.S. Attorney's Office for the Eastern District of New York in settlement discussions and negotiations related to complex residential mortgage-backed securities fraud investigations of several large banks. However, I have not served as counsel of record in a securities litigation case. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a securities case.

5. **How many class actions suits have you personally handled during your legal practice?**

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases, handling a wide range of affirmative and defensive matters, including, but not limited to asset forfeiture, environmental, health care fraud, mortgage fraud, employment discrimination, medical malpractice, bankruptcy, constitutional challenges, and federal program litigation cases. Where a matter involved an area of law that I had not previously handled, I quickly came up to speed. In my capacity as Chief Deputy Attorney General for State Counsel, overseeing the State Counsel Division in the New York State Attorney General's Office, I have provided oversight for defense of class action lawsuits. However, I have not served as counsel of record in a class action lawsuit. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a class action suit.

6. **How many narcotics cases have you personally handled during your legal practice?**

Response: During my time as an Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of New York, from 2002 to 2016, I prosecuted several criminal forfeiture cases, including drug money laundering cases. Also, while serving as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, from 2000 to 2001, I represented the United States in criminal prosecutions, including drug crimes cases. I do not specifically recall the number of narcotics cases that I handled. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a narcotics case.

7. **How many firearm cases have you personally handled during your legal practice?**

Response: During my time as a Special Assistant United States Attorney in the U.S. Attorney's Office for the Eastern District of Louisiana, from 2000 to 2001, I represented the United States in criminal prosecutions, including firearms related crimes. I do not specifically recall the number of firearms related cases that I handled. If confirmed as a district court judge, I would carefully review the facts and arguments of the parties, research the applicable law, and follow relevant Supreme Court and Second Circuit precedent before rendering any decisions in a firearms related case.

8. **Under Supreme Court and Second Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

Response: Black's Law Dictionary defines a "fact" as, inter alia, "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." The Supreme Court has explained that "findings of a "basic" or "historical" fact–addressing questions of who did what, when or where, how or why," are reviewable only for clear error. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). Regarding whether something is a question of fact or a question of law, the courts should examine "whether a given set of facts meets a particular legal standard as presenting a legal inquiry. Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard?" *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). If confirmed as a district court judge, in determining whether something is a question of fact or a question of law, I would faithfully apply binding Supreme Court and Second Circuit precedent.

9. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

Response: I understand criticism of judicial opinion to be an evaluation of the judge's opinion. Whereas depending upon the specific facts, "attacks" on a sitting judge or public officials could violate a number of state and federal statutes, including 18 U.S.C. § 115. I am not aware of any binding Supreme Court or Second Circuit precedent on this issue. If confirmed as a district court judge, I would faithfully and impartially apply Supreme Court and Second Circuit precedent to the specific facts and circumstances of the case before me.

10. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

Response: If confirmed as a district court judge, the principle that would guide my approach to sentencing would be to faithfully follow the law and to apply the law in a fair and neutral matter to the facts and circumstances of every case. The law to be applied

includes binding Supreme Court and Second Circuit precedent, the factors enumerated in 18 U.S.C. § 3553(a), and the relevant provisions of the United States Sentencing Guidelines. In 18 U.S.C. § 3553(a)(2), Congress articulated the four factors to be considered, but Congress did not indicate that any one factor is of greater importance than the others. *See* 18 U.S.C. § 3553(a)(2).

11. In what situation(s) does qualified immunity not apply to a law enforcement officer in New York?

Response: "[O]fficers 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.); *see also Francis v. Fiacco*, 942 F.3d 129, 145 (2019). If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent.

12. Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.

Response: Title 18, United States Code, Section 1507, provides: "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

13. Under Supreme Court precedent, is 18 U.S.C. § 1507, or a state statute modeled on § 1507, constitutional on its face?

Response: To my knowledge, the Supreme Court has not addressed a facial challenge to the constitutionality of 18 U.S.C. § 1507. As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to comment on the merits of a matter that may come before the courts. If confirmed as a district court judge, I would faithfully and impartially apply Supreme Court and Second Circuit precedent to the specific facts and circumstances of the case before me.

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

Response: In *Cohen v. California*, 403 U.S. 150 (1971), the Supreme Court held that states can prohibit the use of "fighting words," defined as "those personally abusive

epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id*. at 20.

15. What is the operative standard for determining whether a statement is not protected speech under the true threats doctrine?

Response: In *Virginia v. Black*, 538 U.S. 342 (2003), the Supreme Court held that where a speaker intends "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," the speaker's statement does not constitute protected free speech under the true threats doctrine. *Id*. at 359.

16. Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: If confirmed as a district court judge, my judicial philosophy would be to approach each case and controversy impartially and with an open mind, to faithfully apply Supreme Court and Second Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented. I have not studied whether there is one decision, or one judge or justice that best represents this philosophy of judging in the last 50 years. This approach is consistent with the judicial oath and the Code of Conduct for United States Judges.

17. Please identify a Second Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.

Response: Please see my response to Question 16.

18. Please state the governing law for self-defense in New York and the Second Circuit.

Response: In a criminal case, New York and federal law recognizes an exculpatory defense of self-defense, subject to limitations addressed in statues and caselaw. *See, e.g.*, N.Y. Penal Law §§ 35.05, 35.15; *United States v. Thomas*, 34 F.3d 44, 47 (2d Cir. 1994). Under N.Y. Penal Law § 35.15, for example, "[a] person may not use deadly physical force upon another person . . . unless: (a) The actor reasonably believes that such other person is using or about to use deadly physical force . . . ."

19. Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:

a. Was *Brown v. Board of Education* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Brown v. Board of*

Education was correctly decided, as the holding of this case is well settled law and the issue of de jure racial segregation is not likely to come before me, if confirmed, or be relitigated in other courts.

b. Was *Loving v. Virginia* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Loving v. Virginia* was correctly decided, as the holding in this case is well settled law, and the issue of anti-miscegenation laws is not likely to come before me, if confirmed, or be relitigated in other courts.

c. Was *Griswold v. Connecticut* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Griswold v. Connecticut* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

d. Was *Roe v. Wade* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. *In Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), the Supreme Court overruled the holding of *Roe v. Wade.* The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

e. Was *Planned Parenthood v. Casey* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. In *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), the Supreme Court overruled the holding of *Planned Parenthood v. Casey.* The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

f. Was *Gonzales v. Carhart* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Gonzales v. Carhart* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

g. Was *District of Columbia v. Heller* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *District of Columbia v. Heller* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

h. Was *McDonald v. City of Chicago* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *McDonald v. City of Chicago* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

j. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

k. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States

Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

20. How do you understand the difference, if any, between freedom of religion and freedom of worship?

Response: The right to free exercise of religion includes freedom of worship, but the Supreme Court has not limited the right solely to worship. The Supreme Court has stated that the Free Exercise Clause "protects religious exercises, whether communicative or not," and "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022) (quotation marks and citations omitted).

21. What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?

Response: The Supreme Court recently held in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the appropriate legal standard is whether the specific regulation of firearms is consistent with the "Nation's historical tradition." As explained in *Bruen*: "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal*., 366 U.S. 36, 50, n. 10 (1961)).

22. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."

a. Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No, not to my knowledge.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response: No, not to my knowledge.

23. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No, not to my knowledge.

    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response: No, not to my knowledge.

24. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response: No, not to my knowledge.

d. Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No, not to my knowledge.

25. The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."

a. Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with the Open Society Foundations?

Response: No, not to my knowledge.

c. Have you ever been in contact with anyone associated with the Open Society Foundations?

Response: No, not to my knowledge.

26. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

a. Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

b. Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No, not to my knowledge.

c. Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?

Response: No, not to my knowledge.

27. 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 approximately February 4, 2021, I submitted a judicial questionnaire to Senator Schumer's Judicial Screening Committee. On March 31, 2021, I interviewed with the Committee. On December 20, 2021, I interviewed with Senator Schumer. On June 13, 2022, I interviewed with attorneys from the White House Counsel's Office. Since June 15, 2022, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 6, 2022, my nomination was submitted to the Senate. On January 3, 2023, my nomination was returned to the President pursuant to Rule XXXI, Paragraph 6 of the United States Senate. On January 23, 2023, my nomination was resubmitted to the Senate.

28. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

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

Response: No.

30. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

32. During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

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

Response: Please see my response to Question 27.

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

Response: On February 1, 2023, the Department of Justice Office of Legal Policy (OLP) forwarded me the Senate Judiciary Committee's questions. I drafted responses to the questions, researching issues as necessary, and shared my draft responses with OLP, which provided limited feedback. I then finalize my responses, and forwarded them to OLP for submission to the Senate Judiciary Committee.

Senator Mike Lee
Questions for the Record
Orelia Merchant, Nominee to the United States District Court for the Eastern District of New York

1. How would you describe your judicial philosophy?

Response: If confirmed as a district court judge, my judicial philosophy would be to approach each case and controversy impartially and with an open mind, to faithfully apply Supreme Court and Second Circuit precedent, to treat everyone who appears before me equally and fairly, and to decide each case based on the application of the law to the facts presented.

2. 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, in deciding a case that turned on interpretation of a federal statute, I would faithfully apply Supreme Court and Second Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends here. If the text is ambiguous, I would consult sources authorized by the Supreme Court and Second Circuit precedent. This includes cases from other jurisdictions, as well as recognized canons of statutory construction, and where appropriate, persuasive authority. Lastly, I would consider the legislative history identified by the Supreme Court and Second Circuit precedent as reliable.

3. 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, in deciding a case that turned on the interpretation of a constitutional provision, I would faithfully apply binding Supreme Court and Second Circuit precedent. Assuming that the matter was one of first impression and no interpretive precedent existed, I would start with the text of the Constitution and would further be guided in the method of interpretation directed by Supreme Court and Second Circuit precedent.

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

Response: If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent. The Supreme Court has repeatedly held that when interpreting constitutional provisions, the inquiry must start with the text of the Constitution. The Supreme Court has applied the original public meaning in various contexts, notably regarding the interpretation of the Second Amendment. *See, e.g., District of Columbia v. Heller, 554 U.S. 570* (2008).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: Please see my response to Question 2. In addition, the Second Circuit has stated that "[i]t is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms." *Lee v. Bankers Tr. Co*., 166 F.3d 540, 544 (2d Cir. 1999) (cited with approval in *Springfield hospital, Inc. v. Guzman*, 28 F.4th 403, 422 (2d Cir. 2022)).

a. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: The Supreme Court has held that the ordinary public meaning of a text at the time of enactment is a primary consideration in determining the plain meaning of that text. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

6. What are the constitutional requirements for standing?

Response: To establish Article III standing, "a plaintiff must demonstrate: (1) that he or she suffered an injury in fact that is concrete, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that under the Necessary and Proper Clause, Congress has implied powers to carry out its enumerated powers in the Constitution.

8. 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 court judge, I would apply all relevant Supreme Court and Second Circuit precedent to evaluate whether Congress has legitimately exercised its authority to carry out an enumerated or implied power, including *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court provided the framework for evaluating whether an unenumerated fundamental right is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. In *Glucksberg*, the Supreme Court recognized that these rights include the right to marry, to have children, to direct the education and upbringing of one's children and to marital privacy, among others. *Id*.

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The substantive due process rights outlined in Question 9 do not reflect my personal beliefs and are instead those rights recognized by the Supreme Court. If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit precedent.

In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court held that there is not a constitutional right to an abortion. If confirmed, I would follow controlling Supreme Court precedent. Additionally, *Lochner* was rejected in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and was effectively overruled by *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would not follow *Lochner* as it is no longer controlling Supreme Court precedent.

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

Response: In *United States v. Morrison*, 529 U.S. 598, 618-19 (2000), the Supreme Court held that Congress, under the Commerce Clause, may regulate the channels of interstate commerce, persons or things in interstate commerce, and those activities that substantially affect interstate commerce.

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

Response: In determining whether a particular group qualifies as a "suspect class," the Supreme Court has looked to several factors, including whether the group shares "traditional indicia of suspectedness," such as "immutable characteristics determined solely by the accident of birth" or whether the group is "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 374 n.14

(1974). Race, religion, alienage, and national origin have been deemed suspect classes. *Id.*

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

Response: Checks and balances and separation of powers are foundational to the structure of the Constitution. The Constitution sets forth the three branches of government: legislative (Article I), executive (Article II) and judicial (Article III). Each branch has different powers and authority. The Framers developed this structure so each branch checks and limits the power of the others to ensure no single branch of government is all powerful. *See Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that, in the long term, structural protections against abuse of power critical to preserving liberty. The solution to governmental power and its perils was simple: divide it." (quotation marks and citation omitted)); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." (quotation marks and citations omitted)).

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

Response: If confirmed as a district court judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent and the text of the Constitution itself to the facts of the case to determine whether a branch of government has exceeded its authority.

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

Response: A judge's personal views should not play a role in resolving a case. If confirmed as a district court judge, I will faithfully and impartially apply the relevant law and applicable rules to the facts of every case that I consider.

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

Response: Both outcomes are equally undesirable.

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

Response: I do not know, nor have I considered what accounts for this increase. If confirmed as a district court judge, I would faithfully apply binding Supreme Court precedent, and fairly and impartially apply the law to the facts of every case that I consider.

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

Response: Judicial review refers to the principle that the "province and duty of the judicial department" is to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Black's Law Dictionary defines "judicial supremacy" as the "doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: Elected officials are duty bound to follow the Constitution and are required to follow judicial decisions regarding the Constitution's meaning. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958). As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on the matter in which elected officials should balance the obligations of their office. If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent and fairly and impartially apply the law to the facts if presented with a case raising this question.

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

Response: If confirmed as a district court judge, my limited role would be to faithfully apply the law to the facts of the cases before me, not to enforce the law or to create laws.

22. As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to

speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A district court judge must apply binding precedent from the Supreme Court and the relevant appellate court.

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

Response: In fashioning an appropriate sentence, district court judges must consider the factors outlined in 18 U.S.C. § 3553(a), including the "history and characteristics of the defendant." *Id*. at § 3553(a)(1). However, a defendant's race, sex, national origin, creed, religion, and socio-economic status are not relevant factors in the determination of a sentence. U.S.S.G. § 5H1.10.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?.

Response: I am not familiar with this statement from the Biden Administration nor am I aware of the context in which it was given. The term "equity" as defined by the Black's Law Dictionary includes "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law." Black's Law Dictionary (11th ed. 2019).

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

Response: Black's Law Dictionary defines "equity" as "[f]airness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right; natural law," and it defines "equality" as "[t]he quality, state, or conditional of being equal; esp., likeness in power or political status." Black's Law Dictionary (11th ed. 2019).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The Fourteenth Amendment's plain text provides in part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In interpreting the Fourteenth Amendment's Equal Protection Clause, I would be guided by the text as well as Supreme Court and Second Circuit precedent.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism." The term "systemic racism" appears to have different meanings to different people. If confirmed, I would ensure that every person who appears before me is treated equally, regardless of their race.

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

Response: I do not have a personal definition of "critical race theory." Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019).

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

Response: Please see my response to Questions 27 and 28.

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

Questions for the Record for Orelia Eleta Merchant, nominated to be United States District Judge for the Eastern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes, racial discrimination is generally unlawful under the Constitution and laws of the United States. Various federal statutes prohibit racial discrimination in a variety of contexts such as housing, employment, and voting. Classifications by race are subject to strict scrutiny and only permissible when narrowly tailored to achieve a compelling government interest. If confirmed as a district court judge, I would apply binding Supreme Court and Second Circuit precedent to determine whether alleged instances of racial discrimination violate the law.

2. Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty." (internal quotation marks and citations omitted). Under the Code of Conduct for United States Judges, as a judicial nominee, it would be inappropriate for me to comment on whether I believe there are other specific unenumerated rights, not yet articulated by the Supreme Court. If confirmed as a district court judge, I would apply *Glucksberg* and any binding Supreme Court and Second Circuit precedent as to unenumerated Constitutional rights.

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

Response: My philosophy is the role of a federal district court judge is to fairly and impartially decide cases or controversies, based on the facts before the court, and the binding precedent of the Supreme Court and the Court of Appeals for the circuit in which the court sits. If confirmed as a district court judge, I would commit to approaching each case with an open mind, carefully consider the submissions and arguments of the parties, neutrally apply the law to the facts, faithfully apply all binding Supreme Court and Second Circuit precent, and issue reasoned decisions on the justiciable issues presented. Throughout my career, I have read opinions of the Supreme Court to understand their importance and application, but without regard to the author or that justice's particular judicial philosophy. As such, I lack sufficient knowledge of each philosophy of the justices referenced in the question to respond.

4. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted . . . the

canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Black's Law Dictionary (11th ed. 2019). I do not characterize myself with any particular label. If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent and reach decisions based on the facts of the particular case and the application of the relevant law.

5. Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?

Response: Black's Law Dictionary defines "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019). This dictionary also defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Id.* I do not characterize myself with any particular label. The Article V amendment process is the only way to change the text of the Constitution. If confirmed, I would follow binding Supreme Court and Second Circuit precedent and reach decisions based on the facts of the particular case and the application of the relevant law.

6. 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: If confirmed as a district court judge, I would be bound by Supreme Court and Second Circuit precedent, and it is unlikely that a constitutional issue will come before me with no applicable precedent. However, to the extent that happened, I would look to the text and the Supreme Court guidance as to the method of interpreting the text, the role of the provision in the constitutional structure, and any evidence of the original public meaning of the provision.

7. 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: If confirmed as a district court judge, when interpreting a constitutional or statutory provision, I would first look to the text and be guided by the plain language of the text and binding Supreme Court and Circuit precedent in deciding any case or controversy that may come before me, including precedent on when the public's current understanding may be relevant. Generally, the public's current understanding of the Constitution or statute is not relevant when determining their meaning. For example, the Supreme Court has held that in the Second Amendment context, current understandings of the Constitution that are "inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022) (emphasis and internal quotation omitted).

However, there have been instances where the Supreme Court has determined that "contemporary community standards" should be used in evaluating certain constitutional questions such as under the First Amendment. *See Miller v. California,* 413 U.S. 15 (1973).

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

Response: The Article V amendment process is the only way to change the text of the Constitution. The Supreme Court has set forth the approach to interpreting the Constitution. If confirmed as s district court judge, I would apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

9. Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?

Response: The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, under the Code of Conduct for Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

10. Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?

Response: The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to opine on whether a case was correctly decided. The holding in *New York Rifle & Pistol Association v. Bruen* is binding Supreme Court precedent. If confirmed as a district court judge, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

Response: The holding in *Brown v. Board of Education* is binding Supreme Court precedent.

a. Was it correctly decided?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would be bound by, and would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Brown v. Board of Education* was correctly decided, as the holding of this case is well settled law, and the issue of de jure racial segregation is not likely to come before me, if confirmed, or be relitigated in other courts.

12. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: The Bail Reform Act of 1984, 18 U.S.C. §§3141, *et seq*., provides for the rebuttable presumption in favor of pretrial detention for certain enumerated drug offenses carrying a sentence of ten years or more, certain crimes involving acts of terrorism, certain crimes of violence, and certain crimes involving minors. Specifically, 18 U.S.C. §3142 (f)(1) lists the offenses or criteria that create a presumption in favor of pre-trial detention.

a. What are the policy rationales underlying such a presumption?

Response: I am not aware of Supreme Court or Second Circuit precedent articulating the policy rationale for the rebuttable presumption discussed above. If confirmed as a district court judge, I would apply the statute as written, which states that where the presumption applies and subject to rebuttal, courts should presume that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3).

13. 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: Yes. There are many restrictions inherent in the Constitution on government power over private institutions. For example, the Supreme Court has repeatedly outlined the limitations on Congress's Commerce Clause powers as well as the First Amendment rights of private companies. The Supreme Court has also repeatedly held that state laws that burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable. Further, the Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA) both apply strict scrutiny to federal and certain state actions alleged to substantially burden the free exercise of religion, even if the laws are neutral and generally applicable. *See also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). Laws are not neutral and

generally applicable if they target religious conduct or demonstrate hostility to religion. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Laws are also not neutral and generally applicable when they treat comparable secular conduct more favorably than religious conduct. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Generally, no. Laws prohibiting religious discrimination include the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act, and the Religious Land use and Institutionalized Persons Act. To engage in action that might burden religion, the government must comply with the requirement of these and other relevant federal, state and local laws. Governmental action that is not "neutral" or "generally applicable" would be permissible only if it survived strict scrutiny. *See Kennedy v. Bremerton School Distric*t, 142 S. Ct. 2407, 2421-2422 (2022). Laws or policies accompanied by "official expression of hostility" will be set aside "without further inquiry." *Id*. at 2433 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)). Further, to survive strict scrutiny review, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993) (internal quotation marks and citations omitted). If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit precedent to cases before me that involve claims of religious discrimination.

15. 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 (2020), the Supreme Court held that the plaintiffs were entitled to a preliminary injunction enjoining the enforcement of certain New York COVID-19 restrictions that imposed capacity limits on religious activities. The Court found that the applicants met the requirement for a preliminary injunction: likelihood of success on the merits, irreparable harm, and public interest. *Id*. First, with respect to likelihood of success on the merits, the Court found "[t]he applicants have made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Id.* at 66 (internal quotations omitted). This conclusion was based on statements "viewed as targeting" religion and because the regulations "single out houses of worship for

especially harsh treatment." *Id*. Second, the Court found irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. (internal quotations omitted). Finally, the court concluded that "it has not been shown that granting the applications will harm the public." *Id*.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted emergency relief, enjoining certain California restrictions on religious gatherings during the pandemic. The Supreme Court found that the state treated "comparable secular activity more favorable than religious exercise" and as such was not neutral and generally applicable, triggering strict scrutiny. *Id*. at 1296. The Court held plaintiffs were likely to succeed on the merits of their claim under the Free Exercise Clause; plaintiffs were irreparably harmed; the order was not narrowly tailored; and the state had not shown that the public interest would be harmed by the injunction. *Tandon*, 141 S. Ct. 1249, 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's initiation of an enforcement action against a cake shop owner who declined for religious reasons to make a wedding cake for a same-sex couple violated the Free Exercise Clause of the First Amendment. Examining the evidentiary record, the Supreme Court found that the Commission demonstrated "clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection." *Id.* at 1729.

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

Response: Yes, if the beliefs are sincerely held. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *Frazee v. Illinois Department of Employment*, 489 U.S. 829, 834 (1989). The Supreme Court has held that an individual's sincerely held beliefs are protected even if the belief is not "the command of a particular religious organization." *Id*. Whether the First Amendment protects a religious belief does not "turn upon a judicial perception of the particular belief or practice in question" and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to other in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Emp. Sec. Div*., 450 U.S. 707, 715.

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

Response: Please see response to Question 19.

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

Response: Please see response to Question 19.

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

Response: I am not familiar with the position of the Catholic Church.

20. 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 (2020), Catholic school teachers sued their employers alleging employment discrimination. The Supreme Court held that the "ministerial exception" protects religious institutions from certain discrimination claims, and that such institutions are permitted to "decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (*quoting Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 186 (2012)). In determining whether a case falls under the ministerial exception, the Court's inquiry looked to the functions performed by the employee in question. The Court found that even though the teachers were not "ministers" the specific role of the teachers was "educating young people in their faith, inculcating its teachings, and training them to live their faith," which the Court concluded was central to the school's mission. *Our Lady of Guadalupe*, 140 S. Ct. at 2064. As such, the ministerial exemption barred the teachers' employment discrimination suits.

21. 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 (2021), the Supreme Court applied strict scrutiny to the city's policy excluding a Catholic organization from its foster care program on account of the organization's refusal to certify same-sex couples as foster parents. The Court found the policy was not neutral and generally

applicable in light of certain opportunities for exceptions to the policy, granted at the government's discretion. *Id.* at 1879. The Court held that the city's stated interests of maximizing the number of foster families, of protecting the city from liability, and in the equal treatment of foster parents and foster children were not compelling interests that justified burdening the agency's free exercise rights. *Id.* at 1881–82.

22. In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court invalidated Maine's nonsectarian requirement for its tuition assistance program for private secondary schools. Plaintiffs claimed that the exclusion of religious schools from the program that offered tuition assistance to private secular schools burdened their free exercise of religion. The Court applied strict scrutiny because it concluded that the requirement conditioned benefits in a way that "effectively penalizes the free exercise" of religion. *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). The Court held that the program violated the Free Exercise Clause of the First Amendment because the "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit." *Carson*, 142 S. Ct. at 1998. Relying on *Espinoza v. Montana Department of Revenue*, the Court held that "[a] State need not subsidize private education, but once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 1997 (internal citation and quotation omitted).

23. Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the First Amendment by terminating a high school football coach who engaged in personal prayer on the field at the conclusion of games. The Supreme Court determined that the school district's restriction of the coach's private speech and religious expression violated the Free Exercise Clause and the Free Speech Clause. With respect to the coach's Free Exercise Claim, the Court explained that there was no dispute that the coach's desire to pray was sincere, and the school district's prohibition on prayer targeted his religious conduct, rather than applying a neutral rule. Accordingly, strict scrutiny applied, and the Court concluded that the school district's prohibition on the coach's religious conduct was not narrowly tailored to achieve a compelling purpose. The Court further rejected the school district's argument that the Establishment Clause compelled the school district's policy, and further clarified that courts should determine whether a law or practice violates the Establishment Clause by looking at history and the understanding of the drafters of the Constitution.

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

Response: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), concerned the enforcement of regulations requiring Amish homes to have septic systems to dispose of "gray water," and religious objections to the enforcement of those regulations by petitioners under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Amish alleged that the modern septic requirements burdened their religious exercise by requiring them to use technology prohibited by their religion. The lower court rejected petitioners'' claim that enforcement of the regulations would violate RLUIPA. The Supreme Court granted the petition for certiorari, vacated the decision of the lower court, and remanded for further consideration in light of its decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch wrote separately to "highlight a few issues the lower courts and administrative authorities may wish to consider on remand." *Mast*, 141 S. Ct. at 2430. In Justice Gorsuch's view, RLUIPA was misapplied by Fillmore County and the lower courts as to the issue of whether an Amish community was subject to the County's septic system mandate. Calling for the "more precise" application of strict scrutiny articulated in *Fulton v. Philadelphia*, Justice Gorsuch reasoned that the County and the lower courts erred by treating the County's general interest in regulating sanitation as compelling without reference to the impact of the County's septic mandate on the specific Amish community at issue. Justice Gorsuch's concurrence also noted that the lower courts failed to consider exemptions granted to other groups but denied to the Amish here. As such, Justice Gorsuch suggests that the framework should focus on whether the County has a compelling interest in denying an exception to the Amish, not whether the County's general interest in sanitation is sufficiently compelling standing alone. Specifically, Justice Gorsuch noted that the government "must 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*. at 2433.

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: If confirmed, I would decide such a case based on the record before the court, faithfully and impartially applying binding Supreme Court and Second Circuit precedent as to the interpretation and application of 18 U.S.C. § 1507. As a judicial nominee, and consistent with the Code of Conduct for United States Judges, it would be inappropriate for me to comment further on an issue that could come become the subject of litigation.

26. Would it be appropriate for the court to provide its employees trainings which

include the following:

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

27. 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.

28. Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?

Response: Yes.

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

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on the political decisions or whether such decisions are constitutional. Article II, Section 2, Clause 2 of the Constitution vests the authority to make political appointments with the President of the United States, upon advice and consent of the Senate. If confirmed as a district court judge and a case concerning the constitutionality of a specific appointment came before me, I would faithfully apply binding Supreme Court and Second Circuit precedent.

30. Is the criminal justice system systemically racist?

Response: Whether certain policies or practices within the United States criminal justice system are systemically racist is a question for policymakers. If confirmed as a district court judge, I would commit to treat all litigants fairly and impartially, and in

any case before me asserting claims of racial discrimination, I would carefully evaluate the specific legal claim asserted and the evidence in the record, and faithfully and impartially apply the binding Supreme Court and the Second Circuit precedent to the facts of the case.

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

Response: Whether or not the Supreme Court should be expanded is a question for policymakers to consider. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent regardless of its size or any proposal to modify its size.

32. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

33. What do you understand to be the original public meaning of the Second Amendment?

Response: My understanding of the original public meaning of the Second Amendment is that articulated by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the original public meaning of the Second Amendment guarantees the right of an individual to keep and bear arms in the home for self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court concluded that the original public meaning of the Second Amendment also affords the right to keep and bear arms for self-defense outside the home.

34. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: The Supreme Court recently held in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the appropriate legal standard is whether the specific regulation of firearms is consistent with the "Nation's historical tradition." As explained in *Bruen*: "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal*., 366 U.S. 36, 50, n. 10 (1961)).

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the Second Amendment confers "an individual right to keep and bear arms." *Id*. at 595. *See also McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: No. In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "the constitutional right to bear arms in public for self-defense is not a second class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id*. at 2156 (quoting *McDonald v. City of Chicago*, 561 U.S. 742 (2010)) (internal quotation marks omitted.)

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

Response: No.

38. 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 Executive Branch shall "take care the laws be faithfully executed." The Supreme Court has further observed the "absolute discretion" to make prosecution decisions vested in the Executive Branch. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As a judicial nominee, it is inappropriate for me to comment on prosecutorial decisions of the executive. If confirmed as a district court judge and confronted with an issue about executive power and discretion, I would review and apply relevant binding Supreme Court and Second Circuit precedent.

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

Response: I understand prosecutorial discretion to refer to the authority of a prosecuting agency to make decisions as to whether to proceed with criminal charges against a defendant, and what charges to proceed on, in an individual case. I am not aware of the definition of a "substantive administrative rule change" outside the Administrative Procedure Act (APA) context. Such a rule change would be subject to requirements imposed by applicable law, which in the Eastern District of New York would include binding Supreme Court and Second Circuit precedent, as well as statutory law including the APA.

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

Response: Under 18 U.S.C. § 3591, a defendant found guilty of an offense eligible for the death penalty "shall be sentenced to death if, after consideration of the factors set forth in [the Act] in the course of a hearing held pursuant to [the Act], 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." The President cannot unilaterally abolish the death penalty. However, Article II of the Constitution vests the President with the authority to "grant reprieves and pardons for offenses against the United States," including cases in which the death penalty was imposed.

41. 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 and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control lacked the authority to impose a nationwide moratorium on evictions to protect tenants from COVID-19, and to slow the spread of disease. Finding that petitioners were likely to succeed on the merits of their claim, the Court vacated a stay imposed pending appeal of a district court's nationwide injunction against the imposition of the moratorium.

42. Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, research the applicable law, and apply any binding Supreme Court and Second Circuit precedent.

43. Would it be improper for a government attorney to publicly announce that a member of the community committed civil offenses without having done a shred of investigatory work about the case?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented and apply relevant Supreme Court and Second Circuit precedent.

44. Were you aware of New York Attorney General Letitia James' statement that her office was going to sue Donald Trump before even doing a day of investigation into his conduct?

Response: I am not familiar with the above purported statement or the context in which it was made.

a. Should you be confirmed, would this be appropriate conduct by a government attorney appearing in your court?

Response: As a judicial nominee, under the Code of Conduct for United States Judges,

it would be inappropriate for me to comment on hypotheticals or issues that could become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, apply the relevant law, and follow binding Supreme Court and Second Circuit precedent.

45. Were you aware of New York Attorney General Letitia James' statement the day after her election where she stated, "Oh, we're going to definitely sue him. We're going to be a real pain in the ass. He's going to know my name personally."?

Response: I am not familiar with the above purported statement or the context in which it was made.

46. Were you aware that Attorney General James, prior to her election, accused then-President Trump of criminal offenses—specifically obstruction of justice, defrauding Americans, and money laundering—and called him an illegitimate president?

Response: I am not familiar with the above purported statement or the context in which it was made.

47. Were Attorney General James's comments prejudging President Trump proper?

Response: I am not familiar with the above purported statement or the context in which it was made. What I can commit to you and the American people, is that if confirmed as a district court judge, I would not prejudge any litigant who came before me.

48. Were Attorney General James's comments prejudging President Trump ethical?

Response: I am not familiar with the above purported statement or the context in which it was made. What I can commit to you and the American people, is that if confirmed as a district court judge, I would not prejudge any litigant who came before me.

49. If you are confirmed as a district judge, and you learned that a prosecutor that practices in front of you has publicly stated their intent to prosecute or sue a member of the community, before engaging in any investigation, would that concern you?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to opine on issues that may become the subject of litigation. If confirmed as a district court judge, should a case involving this issue come before me, I would fairly and impartially review the facts presented, apply the relevant law, and follow binding Supreme Court and Second Circuit precedent.

50. Do judges need to undergo implicit bias training?

Response: I am not aware of whether implicit bias training is provided to federal district court judges. If confirmed as district court judge, I would commit to adhering to the judicial oath and the Code of Conduct for United States Judges and treat all who come

before me fairly and impartially.

51. Are there instances where a judge should not honor the judicial code of conduct?

Response: I cannot think of an instance.

a. If so, can you please identify all instances?

Response: Please see response to Question 51.

b. What justifies a departure from the judicial code of conduct?

Response: Please see response to Question 51.

Senator Josh Hawley
Questions for the Record

Orelia Merchant
Nominee, U.S. District Court for the Eastern District of New York

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    Response: I have not studied Justice Jackson's sentencing practices during her time as a district judge. If confirmed as a judge, in any criminal case that came before me, including cases involving child pornography, I would carefully review the record, Supreme Court and Second Circuit precedent, and the factors set forth in 18 U.S.C. § 3553(a), including whether a given sentencing enhancement is appropriate, before imposing an individualized sentence. While the sentencing guidelines are not mandatory, district judges should first begin by calculating the applicable guidelines range, including any appropriate sentencing enhancements. *See Gall v. United States*, 552 U.S. 38, 49 (2007).

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    Response: Please see my response to Question 1a.

    c. **The enhancement for offenses involving the use of a computer**

    Response: Please see my response to Question 1a.

    d. **The enhancements for the number of images involved**

    Response: Please see my response to Question 1a.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

Response: The appropriate penalties for federal criminal offenses are decisions that rest with Congress. If confirmed as a district court judge, I would faithfully apply the law as written to each case that comes before me.

b. If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?

Response: Please see my response to Question 2a.

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response: Please see my response to Question 2a.

3. Justice 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 familiar with the above referenced statement or the context in which it made. My philosophy is that a district court judge should approach each case impartially and with an open mind, faithfully apply Supreme Court and relevant court of appeals precedent, and decide each case based on the application of law to the facts presented, not based on personal beliefs or values. If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent and faithfully apply the law to each case that came before me.

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

Response: Please see my response to Question 3a. As a judicial nominee, it would be inappropriate for me to opine on whether any particular statement violated the judicial oath.

4. Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding Supreme Court precedent. If confirmed as a district court judge, I will faithfully and impartially apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: Generally, abstention doctrines refer to instances in which a federal court may or must refuse to hear a case within its jurisdiction in order to avoid authority of a state court. There are several potentially applicable abstention doctrines in the Second Circuit, including *Pullman*, *Younger*, *Colorado River*, *Burford*, *Rooker-Feldman*, *Thibodaux* and *Brillhart/Wilton*.

The *Pullman* abstention doctrine directs federal courts "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). *See also R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 498-501 (1941). The Second Circuit has established a three-part test for *Pullman* abstention to apply: "(1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)).

The *Younger* abstention doctrine "forbid[s] federal courts [from] stay[ing] or enjoin[ing] pending state court" criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 41 (1971). Based on *Younger* and its progeny, the Second Circuit has articulated the following three-factor test for determining when a federal court should abstain from exercising jurisdiction: "(1) there is an ongoing state criminal proceeding; (2) the claim raises important state interests; and (3) the state proceedings provide an adequate opportunity to raise the constitutional claims." *Schlagler v. Phillips*, 166 F.3d 439, 442 (2d Cir. 1999).

The *Colorado River* abstention doctrine applies when a parallel action is filed in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). In deciding whether to abstain, the Second Circuit has directed courts to consider whether: (1) "the controversy involves a res over which one of the courts has assumed jurisdiction"; (2) "the federal forum is less inconvenient than the other for the parties"; (3) "staying or dismissing the federal action will avoid piecemeal litigation"; (4) "proceedings have advanced more in one forum than in the other"; (5) "federal law provides the rule of decision"; and (6) "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).

The *Burford* abstention doctrine applies when "a federal court sitting in equity" is asked to "interfere with the proceedings or orders of state administrative agencies" and where "timely and adequate state-court review is available." *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (construing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). The Second Circuit has identified three factors to consider when determining whether to abstain under *Burford*. Those factors are: "(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).

The *Rooker-Feldman* abstention doctrine "bars federal district courts from hearing cases that in effect are appeals from state court judgments, because the Supreme Court is the only federal court with jurisdiction over such cases." *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021). *See also Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v.Feldman,* 460 U.S. 462 (1983). The Second Circuit has established a four-part test for *Rooker-Feldman* abstention: "(1) the federal-court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by a state-court judgment; (3) the plaintiff must invite district court review and rejection of that judgment; and (4) the state- court judgment must have been rendered before the district court proceedings commenced." *Dorce*, 2 F.4th at 101 (cleaned up).

Under *Thibodaux* abstention, a district court may abstain from "deciding questions of state law otherwise within [its] jurisdiction" "where a difficult question of state law of substantial import is present." *Smith v. Metro. Prop. & Liab. Ins. Co.*, 629 F.2d 757, 759 (2d Cir. 1980) (citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-29 (1959)).

Lastly, under *Brillhart/Wilton* abstention, a district court may "dismiss declaratory judgment actions where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 104 (2d Cir. 2012) (internal quotations omitted). There are five factors that a court must consider: (1) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (2) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (3) "whether the proposed remedy is being used merely for procedural fencing or a race to res judicata"; (4) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (5) "whether there is a better or more effective remedy." *Id.*

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

Response: I have not served as counsel of record in opposition to a party's religious liberty claims. However, in an abundance of caution, I note that in my role as Chief Deputy Attorney General for State Counsel, I provide overall supervision of the litigation bureaus that handle the defense and representation of the State of New York, its agencies and officials, in state and federal trial courts. In any particular case, including matters involving religious liberty claims, my involvement may include, but not be limited to, review of papers, strategy consultation, and general guidance as needed. I do not maintain a list of my involvement on cases or categories of cases or actions taken on particular case.

   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: Please see my response to Question 6.

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

Response: When interpreting the Constitution, I would follow Supreme Court and Second Circuit precedent on the role of original public meaning of a constitutional provision. For example, the Supreme Court has applied the original public meaning when considering the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). If confirmed as a district court judge, I would follow Supreme Court and Second Circuit precedent in making this determination.

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

Response: If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent in making this determination. Consistent with Supreme Court and Second Circuit precedent, I would only consider legislative history when there is no applicable, binding precedent and when the text of the statute at issue is ambiguous. *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) ("Legislative 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.") (quotation marks and citations omitted); *Lee v. Bankers Tr. Co.*, 166 F.2d 540, 544 (2d Cir. 1999) ("Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.").

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 held 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 found that other forms of legislative history are less persuasive. *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."); *United States v. Craft*, 535 U.S. 274, 285 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (internal quotation marks and citation omitted).

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

Response: I am unaware of any Supreme Court or Second Circuit precedent that stands for the proposition that it is appropriate to consult the laws of foreign nations when interpreting the Constitution. If confirmed as a district court judge, I would only do so if directed to do so by the Supreme Court or Second Circuit.

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: The Supreme Court recently reiterated that a petitioner must: (1) demonstrate that the method of execution presents a "substantial risk of serious harm," including "severe pain over and above death itself"; and (2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]" the risk of harm involved. *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015).

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: Yes. Please see my 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: No. The Supreme Court in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), held that the respondent had no right post-conviction to access DNA evidence the prosecution had. The Second Circuit has likewise held that there is "no freestanding substantive due process right to DNA evidence." *Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015).

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: The Supreme Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877 (citing *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)). *See also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "A law is not generally applicable if it invites the government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (internal quotations omitted). *See also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Free Exercise Clause also creates a "ministerial exception" to employment discrimination laws, prohibiting courts from adjudicating "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). If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent on this issue.

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: Please see my response to Question 13.

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Supreme Court has held "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (citation omitted). The court's inquiry in determining the sincerity of a religious belief is to evaluate whether the belief asserted reflects "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citations and quotations omitted).

The Supreme Court held that an individual's sincerely held religious beliefs are protected even if there is "disagreement among sect members" about the belief. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). The Court also stated: "we reject the notion that, to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. *See also Welsh v. United States*, 398 U.S. 333, 339 (1970) ("[S]incere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion.").

The Supreme Court and Second Circuit employ a subjective test to determine whether a religious belief is sincerely held. *Ford v. McGinnis*, 352 F.2d 582, 589 (2d Cir. 2003) (citing *Frazee*, 489 U.S. at 834). In the Second Circuit, a court's "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Id*. at 589-90 (*quoting Jolly v. Coughlin*, 76 F.3d. 468, 476 (2d Cir. 1996). If confirmed as a district court judge, I would follow binding Supreme Court and Second Circuit precedent.

16. 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*, the Supreme Court held that the Second Amendment protects the right of an individual to own a firearm for the purpose of self-defense within the home.

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.

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 this statement and his dissent, Justice Holmes expresses that the Constitution "is not intended to embody a particular economic theory …." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As a judicial nominee, it is inappropriate for me to comment or opine on whether I agree with a comment made by another judge.

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

Response: *Lochner* was abrogated by the Supreme Court and is no longer controlling law. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent regarding the Due Process clauses of the Fifth and Fourteenth Amendment.

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

Response: I am not aware of any Supreme Court opinions that have not been formally overruled that are no longer good law.

a. If so, what are they?

Response: Please see my response to Question 18a.

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

Response: Yes.

19. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with Judge Hand's statement or the context in which it was made. If confirmed as a district court judge and a case came before me concerning monopolies, I would decide the case based on a careful review of the record and the applicable Supreme Court and Second Circuit precedent. To my knowledge, *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), has not been explicitly overruled, and if confirmed as a district court judge, I would be bound to apply its holding.

The Second Circuit has more recently stated in *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc.*, 651 F.2d 122, 129 (2d Cir. 1983) that "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." The Second Circuit, relying on Supreme Court precedent, has cautioned that market share percentages alone are not conclusive of determining monopoly power. *Id.* (citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). Instead, market share must be considered along with "additional market characteristics, among them, the strength of the competition, the probable development of the industry, and consumer demand." *Id.*

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

Response: Please see my response to Question 19a.

c. **What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a umerical answer or appropriate legal citation.**

Response: Please see my response to Question 19a.

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

Response: In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that there is "no federal common law." *Id.* at 78. However, the Supreme Court has recognized "limited areas" in which "federal common law" may apply. *See Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (identifying "admiralty disputes and certain controversies between States").

21. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: A federal court interpreting a state's constitution would apply the substantive law of the state in question, and decide questions of state law as the highest court of the state has defined the scope of the relevant right. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). When interpreting a state constitutional provision, I would defer to the "views of the state's highest court with respect to state law" as directed by the Supreme Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). If confirmed as a district court judge, I would interpret federal law consistent with Supreme Court and Second Circuit precedent.

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

Response: Please see my response to Question 21.

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

Response: Please see my response to Question 21.

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

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view of whether a binding Supreme Court case was correctly decided. If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent. However, I am comfortable stating that *Brown v. Board of Education* was correctly decided, as the holding of this case is well settled law, and the issue of de jure racial segregation is not likely to come before me, if confirmed, or be relitigated in other courts.

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

Response: I know of no precedent from the Supreme Court or Second Circuit that precludes federal courts from issuing nationwide injunctions.

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

Response: The authority to issue injunctions is found in Federal Rule of Civil Procedure 65 and the courts' equitable powers. The Second Circuit in *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 87 (2d Cir. 2020) concluded that there is "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions" and "that such injunctions may be an appropriate remedy in certain circumstances." The Court further instructed district courts not to issue a nationwide injunction when the same issue is being litigated in multiple courts across the country. *Id.* To date, the Supreme Court has not held that "nationwide injunctions" are *per se* impermissible. If confirmed as a district court judge, I would faithfully and impartially follow the Supreme Court and Second Circuit precedent with respect to the scope of injunctive.

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

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

24. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

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

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

Response: Federalism is defined in Black's Law Dictionary as "the legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state government." Black's Law Dictionary (11th ed. 2019). Under our federal constitutional system, the federal government possesses enumerated powers while other powers are reserved to the states or the people. In this way, liberty is enhanced and a healthy balance of power is achieved. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.") (internal quotations and citations omitted)).

26. 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.

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

Response: As a judicial nominee, it would be inappropriate for me to comment or opine on any issue which potentially could come before me.

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

Response: Substantive due process is a concept derived from the Fifth and Fourteenth Amendments that protects certain unenumerated fundamental rights from government interference, notwithstanding procedural protections. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court explained that any such rights must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 719–21. The Supreme Court has recognized unenumerated rights, including among others, the right to marry, *see Loving v. Virginia*, 388 U.S.1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right 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). If confirmed as a district court judge, I would faithfully follow binding Supreme Court and Second Circuit precedent in addressing issues concerning the scope of rights secured by the Constitution.

29. 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: Burdens on the First Amendment's right to free exercise of religion generally must satisfy strict scrutiny. Please see my responses to Questions 13, 14, and 15.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: The Supreme Court has stated that free exercise "embraces" both a "freedom of conscience and worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: Please see my response to Questions 13, 14, and 15. As the Second Circuit stated in *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007), "Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'"

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 15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Supreme Court has held that the Religious Freedom Restoration Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). RFRA prohibits "substantially burden[ing] a person's exercise of religion even if the burden results for a rule of general applicability unless the government demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 705 (2014) (quotation marks omitted).

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with this statement or the context in which it was made. However, I read this statement to suggest that a judge should set aside his or her personal views when deciding cases, regardless of the judge's personal views as to what the outcome should be.

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

Response: No, not to the best of my recollection.

a. If yes, please provide appropriate citations.

Response: Not applicable.

32. Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.

Response: No.

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

Response: The role of a federal district court judge is to fairly and impartially adjudicate specific legal claims on a cases-by case basis adhering to the rule of law and equal justice under the law. If confirmed as a district court judge, in any case before me where a party asserted a racial discrimination claim in violation of federal law, I would carefully evaluate the specific legal claim asserted and the evidence in the record based on the binding Supreme Court and Second Circuit precedent. In each case that comes before me, I would work hard to treat all litigants fairly and impartially.

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

Response: Yes.

35. How did you handle the situation?

Response: As an attorney, I am duty bound to zealously advocate for my client's position, without regard to my personal views, within the bounds of the law. I have taken that obligation seriously throughout my career.

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

Response: Yes.

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

Response: No specific Federalist Paper has most shaped my views of the law. If confirmed as a district court judge, my view of the law would be shaped by binding Supreme Court and Second Circuit precedent, which I would apply faithfully and impartially.

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

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court expressly reserved the question of fetal personhood. As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment or opine on this issue as this question could potentially come before me.

39. 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: To the best of my recollection, approximately thirty years ago, I testified in court as a witness. I do not have a record of that testimony and it is not available online as far as I am aware.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No, I do not hold any individual shares.

b. Amazon?

Response: No, I do not hold any individual shares.

c. Google?

Response: No, I do not hold any individual shares.

d. Facebook?

Response: No, I do not hold any individual shares.

e. Twitter?

Response: No, I do not hold any individual shares.

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

Response: To the best of my recollection, I have not authored a brief that was filed in court without my name on the brief. Over the course of my career, I have proofread and/or suggested edits to briefs of my colleagues. In my role as Chief Deputy Attorney General for State Counsel, I provide overall supervision of seven statewide bureaus that handle representation of the State of New York, its agencies and officials in state and federal court on over 8,000 active matters. In this capacity, I routinely provide comments and/or suggested edits to briefs. The final work product ultimately belongs to the attorneys of record in a given matter, and I do not maintain a list of my involvement on cases or categories of cases or actions taken on particular case.

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

Response: Please see my response to Question 42.

44. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

45. If so, please describe the circumstances.

Response: Not applicable.

46. 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: My understanding is that judicial nominees must answer all questions fully and truthfully to the best of their ability, consistent with their professional and ethical obligations.

Questions from Senator Thom Tillis
for Orelia Eleta Merchant
Nominee to be United States District Judge for the Eastern 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.

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

   Response: Black's Law Dictionary defines "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I do not consider judicial activism appropriate.

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

   Response: The Code of Conduct for United States Judges requires judges to be impartial. It is both an expectation and a requirement.

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

   Response: No. A judge should fairly and impartially decide each case based on the facts and the applicable law.

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

   Response: Yes. A judge plays a significant, yet defined role in the justice system. The role of a judge is to faithfully interpret and impartially apply the relevant law to the facts of a case. Cases should be decided based on the facts and the law, not any personal views or desires of the judge or the public. Changes in the law and public policy are issues for the executive and legislative branches to consider.

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

   Response: No.

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

Response: If confirmed as a district court judge, I would follow all Second Circuit and Supreme Court binding precedent concerning Second Amendment rights, including *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits?

Response: If confirmed as a district court judge, I would follow and apply Supreme Court and Second Circuit precedent on the Second Amendment, including *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: Qualified Immunity is a legal doctrine that "[P]rotects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), the Supreme Court held that officers are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." If confirmed as a district court judge, I would faithfully follow all binding Supreme Court and Second Circuit precedent in any case involving a qualified immunity claim to determine if this standard has been met.

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

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is inappropriate for me to comment or opine on Supreme Court or Second Circuit jurisprudence on this issue. Whether current qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question best left to policymakers to consider. If confirmed as a district court judge, I would faithfully and impartially apply all binding Second Circuit and Supreme Court precedent to any case involving a qualified immunity claim.

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

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the

standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about Supreme Court decisions or areas of jurisprudence. If confirmed as a district court judge, I would address any case involving patent eligibility by applying the Patent Act, 35 U.S.C. § 101, and would faithfully and impartially apply all applicable and binding precedent from the Supreme Court and Second Circuit, including *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); and *Mayo Collaborative Servs. v. Prometheus Labs., Inc*., 566 U.S. 66 (2012), to the facts of the case before me.

13. **Do you believe the current patent eligibility jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

Response: The extent to which current patent law effectively incentivizes innovation is a question for policymakers to consider. If confirmed as a district court judge, I will faithfully and impartially apply all binding Supreme Court and Second Circuit precedent. As a judicial nominee, under the Code of Conduct for United States Judges, it is generally inappropriate for me to express a personal view about Supreme Court decisions or areas of jurisprudence. If confirmed as a district court judge, I would address any case involving patent eligibility by applying the Patent Act, 35 U.S.C. § 101, and would faithfully and impartially apply all applicable and binding precedent from the Supreme Court and Second Circuit, including *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); and *Mayo Collaborative Servs. v. Prometheus Labs., Inc*., 566 U.S. 66 (2012), to the facts of the case before me.

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

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

    Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving copyright law. If confirmed as a district court judge and a case were to come before me involving patent issues, I would carefully review the record and

the applicable law, and apply it so as to reach only the judiciable issues before the court.

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

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving the Digital Millennium Copyright Act. If confirmed as a district court judge, I would carefully review the record and the applicable law, and apply it so as to reach only the judiciable issues in a case 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: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving intermediary liability for online service providers. If confirmed as a district court judge, I would carefully review the record and the applicable law, and apply it so as to reach only the judiciable issues in a case involving intermediary liability for online service providers.

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

Response: In my over twenty years of federal court litigation practice representing federal and state governments, agencies, officers, and officials, I have overseen thousands of cases and personally litigated hundreds of cases in a wide range of practice areas; however, I have not had occasion to litigate an issue involving the intersection of free speech and intellectual property. If confirmed as a district court judge, I would carefully review the record and the applicable law, and apply it so as to reach only the judiciable issues in a case involving the intersection of free speech and intellectual property.

15. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright**

Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

Response: If confirmed as a district court judge, when interpreting a statute, I would look to the statutory text, as the Supreme Court has directed. The text of the statute is the best evidence of congressional intent. If the text is unambiguous, the inquiry ends, and the legislative history would play no interpretive role. If the statutory text is ambiguous, I would next consult Supreme Court and Second Circuit precedent interpreting related or analogous statutory provisions, the canons of statutory construction, and persuasive authority from other courts addressing the same or similar issues. Finally, I would consider legislative history if necessary. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020); *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014).

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

Response: If confirmed as a district court judge, I would review and apply binding Supreme Court and Second Circuit precedent regarding the appropriate level of deference to give an expert agency's analysis or advice, depending on the facts and circumstances of the case. *See e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984); *Skidmore v. Swift & Co*., 323 U.S. 134 (1944); *see also Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

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

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to provide an opinion on a hypothetical issue that may come before me in the future. If confirmed as a district court judge, I would follow all binding Supreme Court precedent on copyright infringement issues,

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

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

Response: If confirmed as a district court judge, I will faithfully and impartially apply all binding Supreme Court and Second Circuit precedent. It is the role of policy makers to consider whether laws should be amended in light of contemporary conditions.

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: Please see my response to Question 16a.

17. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about this practice.

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

Response: To the best of my knowledge, cases in the Eastern District of New York are randomly assigned to judges by the Clerk of the Court. *See* Local Rules of the Division of Business for the Eastern District of New York, Rule 2(b). Accordingly, the issue of "judge shopping" is not likely to be an issue in the Eastern District of New York. If confirmed as a district court judge, I would follow all binding Supreme Court and Second Circuit precedent regarding venue, as well as the rules of the United States District Courts and the local rules of the Eastern District of New York.

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

Response: Please see my response to Question 17a.

c. Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?

Response: No. If confirmed as a district court judge, I would not proactively take steps to attract any particular case or litigant.

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

Response: Please see my response to Question 17c.

18. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on an issue that could come before me.

19. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: As a judicial nominee, under the Code of Conduct for United States Judges, it would be inappropriate for me to comment on an issue that could come before me.