

**Senator John Kennedy
Questions for the Record**

Sarah French Russell

1. Did you sign a letter entitled “Urgent Action Needed to Protect Individuals in Connecticut’s Prisons and Jails from Coronavirus-19 Pandemic”?

Response: In preparing my Senate Judiciary Questionnaire and its attachments, I undertook an extensive effort to locate all responsive documents. My efforts included searching my computer files and emails, searching through hard copies of documents (including going through boxes in my attic), conducting searches on Westlaw, Lexis, and LexisNexis databases, conducting searches through the interface of specific websites (e.g., websites for the Connecticut General Assembly, the Connecticut Sentencing Commission, the Connecticut Judicial Branch, PACER, YouTube), and running dozens of google searches of various versions of my name along with different modifiers. I regret that my searches did not turn up the letter referenced at my confirmation hearing, which I did not write or edit but to which my name was added as an “endorsing individual,” and apologize to the Committee for the unintentional omission.

2. If you do not recall whether you signed the above-referenced letter, do you believe that there is a reasonable possibility that you signed the letter?

Response: Please see my response to Question 1.

3. Did you intentionally omit this letter from your filings with the U.S. Senate Committee on the Judiciary?

Response: No. Please see my response to Question 1.

4. In the past 10 years, have you ever signed your name to a public letter that expressed views you disagree with? If so, why?

Response: As discussed in response to Question 1 above, I had not recalled that my name was listed as an “endorsing individual” on the open letter to the Governor of Connecticut issued in March 2020 in the early days of the pandemic. In my roles as a lawyer and academic, I have occasionally joined legal filings, testimony, and other documents drafted by others where I would have chosen different words if I had drafted the documents myself.

5. Did you call on (or possibly call on) Governor Lamont to “[i]mmediately release, to the maximum extent possible, people incarcerated pre-trial and post-conviction”?

Response: To begin, let me state unequivocally that, if confirmed as district judge, I would not hesitate to impose a prison sentence on a criminal defendant where appropriate

under the law. I agree wholeheartedly with Congress's directive that imprisonment of some criminal defendants is necessary to incapacitate dangerous offenders, protect the public from further harm, deter the defendant or others from committing crimes, promote respect for the rule of law, and provide just punishment. *See* 18 U.S.C. § 3553(a). In addition, I would not hesitate to order the pretrial detention of a criminal defendant where appropriate under the law. I agree entirely with Congress's directive that pretrial detention of some criminal defendants is necessary based on risk of flight and/or dangerousness. *See* 18 U.S.C. § 3142. It would be my duty if confirmed to faithfully apply the law—including the sentencing and pretrial detention schemes established by Congress—and I would do so without reservation.

As for the letter, I understand it was drafted and sent to the Governor of Connecticut in the very early days of the pandemic to raise concerns about the risk of serious illness and death that people incarcerated in Connecticut faced from COVID and to urge the Governor to take significant action in line with that taken by other states. I did not write or edit the letter and, until my hearing before the Senate Judiciary Committee, I did not recall that my name had been listed as an “endorsing individual”—along with more than 1,500 others. Reviewing the letter today, I regret allowing my name to be added, as the letter does not accurately reflect my views. In particular, the letter's suggestions were overbroad and failed to make expressly clear that all decisions about whether to incarcerate people and whether to release people who are already incarcerated must be conducted in a manner consistent with the law and public safety of people in the community.

As I observed firsthand during my clerkships with the Honorable Michael B. Mukasey, then Chief Judge of the U.S. District Court for the Southern District of New York, and the Honorable Chester J. Straub of the U.S. Court of Appeals for the Second Circuit, the role of a judge is not to make policy or offer policy suggestions. If confirmed as a district judge, my role would be limited to resolving individual cases that are properly before the court by impartially applying the law to the facts as established by the evidence in the record in each case. In the sentencing context, I would follow Congress's directive in 18 U.S.C. § 3553(a) to sentence people convicted of federal crimes in accordance with the sentencing purposes set forth in the statute and after consideration of the federal sentencing guidelines. With respect to pretrial detention, I would follow Congress's directive in 18 U.S.C. § 3142. I would faithfully and impartially follow all precedents of the Supreme Court and Second Circuit.

6. Did you call on (or possibly call on) Governor Lamont to “[d]eclare a moratorium on incarceration”?

a. Does this demand include those convicted of murder or rape?

Response: Please see my response to Question 5. As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community.

- b. If not, what about this demand excludes murderers and rapists from the moratorium?**

Response: Please see my response to Question 5 and 6(a). As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community.

- c. In March 2020, did you believe there should be a “moratorium” on admitting murderers and rapists to jails and prisons in Connecticut?**

Response. No. Please see my response to Question 5.

- 7. Did you call on (or possibly call on) Governor Lamont to declare a “moratorium on new admissions into jails and prisons”?**

- a. Does this statement include those convicted of murder or rape?**

- b. If not, what about this statement excludes murderers and rapists from the moratorium?**

Response to all subparts: Please see my response to Question 5. As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community.

- 8. Did you call on (or possibly call on) Governor Lamont to “issue an executive order to direct the State’s Attorney Offices and law enforcement entities, including town and city police departments and any federal law enforcement entity operating within the state, to immediately cease adding to the incarcerated population”?**

Response: Please see my response to Question 5. As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community.

- 9. What legal basis did Governor Lamont have for ordering federal law enforcement entities in the state from “adding to the incarcerated population”?**

Response: Please see my response to Question 5. As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community. That said, it is my general understanding that a Governor serves as the intergovernmental liaison to the federal government on behalf of the state and may,

in carrying out that function, have some influence with respect to how federal law enforcement operates within the state, although I have not researched this issue closely.

10. Did you call on (or possibly call on) Governor Lamont to “release all individuals currently in state custody who are awaiting transfer to Immigration and Customs Enforcement (ICE) custody”?

Response: Please see my response to Question 5. As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community.

11. Did you call on (or possibly call on) Governor Lamont to “declare a moratorium on all” transfers to ICE?

Response: Please see my response to Question 5. As discussed above, I think the suggestions contained in the letter were overbroad and should have made clear that incarceration and release decisions must be consistent with the law and public safety of the broader community.

12. Are there any circumstances under which you would sentence a criminal defendant to death?

Response: Yes. It would be my duty if confirmed to faithfully apply the law—including the sentencing schemes established by Congress—and I would do so without reservation.

a. If yes, please explain when a sentence of death is appropriate or justifiable.

Response: A district court judge is required to impose a sentence of death in a case where a defendant has been convicted of a death-eligible offense and a jury returns a recommendation of death after deliberations following the penalty hearing in the case. *See* 18 U.S.C. § 3594. To recommend a sentence of death, the jury must unanimously agree that the aggravating factor or factors it has found sufficiently outweighs any mitigating factors. *Id.* § 3593. Aggravating factors are specifically defined and must be found by the jury unanimously. Various procedural requirements apply to the penalty hearing. *Id.* Where the penalty hearing has been held in compliance with the statute and the jury has made the required findings, the jury is entitled to determine that a sentence of death is justified. *Id.*

13. Are there any circumstances under which it is justifiable to sentence a criminal defendant to death?

Response: Please see my response to Question 12 and 12(a).

14. Except when a statutory maximum controls, when is it appropriate for a sentencing judge to impose a sentence below the range provided by the Sentencing Guidelines?

Response: Under 18 U.S.C. 3553(a), the sentencing court must impose a sentence that is “sufficient, but not greater than necessary to comply with the purposes” of sentencing set forth in the statute. In making this determination, the court must consider the sentencing range provided by the Sentencing Guidelines but is not required to impose a sentence within that range. *See United States v. Booker*, 543 U.S. 220, 260 (2005); *see also Gall v. United States*, 552 U.S. 38, 49-50 (2007) (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented.”) (citations omitted). The court should impose a sentence below the Guideline range if the court determines that a sentence within the range is greater than necessary to satisfy the purposes of sentencing after consideration of the § 3553(a) factors.

15. Is the U.S. Supreme Court a legitimate institution?

Response: Yes.

16. Is the current composition of the U.S. Supreme Court legitimate?

Response: Yes.

17. Would you faithfully apply all precedents of the U.S. Supreme Court?

Response: Yes.

18. Please describe your judicial philosophy. Be as specific as possible.

Response: If I am fortunate to be confirmed, I would approach each case impartially and with an open mind. I would carefully consider the arguments of the parties and decide only the issues that are properly before me. I would closely examine the text of the relevant statutes, regulations, and constitutional provisions at issue and faithfully follow binding precedent from the Supreme Court and Second Circuit. I would ensure that all parties have an opportunity to be heard and are treated fairly and with respect. Finally, I would communicate decisions in a timely manner, ensuring that the court’s holding and rationale are clearly expressed.

19. Is originalism a legitimate method of constitutional interpretation?

Response: Yes.

20. Is textualism a legitimate method of statutory interpretation?

Response: Yes.

21. Do you believe the meaning of the Constitution is immutable or does it evolve over time?

Response: The Supreme Court has stated that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (internal quotation marks omitted). That said, the Supreme Court has explained that the Constitution is an enduring document that applies to factual circumstances the Founders may not have anticipated. *See id.* at 2132 (“the Founders created a Constitution . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.”) (internal quotation marks and citations omitted). For example, the Fourth Amendment protects individuals from searches made possible only through advances in technology. *See Kyllo v. United States*, 533 U.S. 27 (2001).

22. Should a judge look beyond a law’s text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?

Response: No. Where the text is clear, the text answers the question and there should be no further inquiry. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020) (“This Court has explained many times over many years that, when the meaning of the statute’s terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”).

23. Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?

Response: If confirmed as a district judge, my approach in interpreting statutes would be to first determine if there are binding Supreme Court or Second Circuit decisions already interpreting the provision. If not, I would examine the text of the statute, including relevant statutory definitions. If the language is ambiguous, I would look to see how terms have been used elsewhere in the statute and examine dictionaries from the time the statute was enacted. Where the Supreme Court has instructed it is appropriate to do so, I would use canons of statutory interpretation. Finally, if ambiguities remain, I would look to legislative history, but only to the extent the Supreme Court and Second Circuit allows it. The Supreme Court has cautioned that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). Extrinsic materials “have a role in statutory interpretation only to the extent they shed a reliable light on the enacting

Legislature’s understanding of otherwise ambiguous terms” and “[n]ot all extrinsic materials are reliable sources of insight into legislative understandings.” *Id.* Indeed, “legislative history is itself often murky, ambiguous, and contradictory.” *Id.* I am aware of one Second Circuit case relying on a presidential signing statement in a narrow circumstance. *See United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989) (considering signing statement where text was unclear and materials from House and Senate conflicted, and where presidential staff participated in the negotiation of the compromise between House and Senate versions of the bill).

24. What First Amendment restrictions can the owner of a shopping center place on private property?

Response: The Free Speech Clause constrains government actors. Under the “state-action doctrine,” constraints on government actors can apply to private actors where they “exercise[] a function traditionally exclusively reserved to the State.” *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). The Supreme Court in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), held that a shopping center with a general “no handbills” policy could prohibit specific handbill distribution. The Court reasoned that the accessibility of private property to the public for the purpose of shopping did not convert the property to public property under the First Amendment. *See id.* at 569 (stating that property does not “lose its private character merely because the public is generally invited to use it for designated purposes”). If I am confirmed and a case involving restrictions placed by a shopping center owner on its private property were to come before me, I would faithfully apply binding Supreme Court and Second Circuit precedent.

25. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: The Supreme Court has held that constitutional rights apply to non-citizens unlawfully present in the United States under some circumstances. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that the Due Process Clause applies to “all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* at 693. The scope of constitutional rights for non-citizens unlawfully present in the United States depends on the constitutional right at issue and the particular factual circumstances of the case. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment did not apply to the search and seizure by federal agents of property located in a foreign country where owner was arrested in Mexico and brought to the United States to be detained and had no previous significant voluntary connection with the United States).

26. Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?

Response: The Supreme Court recognizes an exception to the Fourth Amendment for routine searches and seizures at the border. Such searches may be conducted without

probable cause or a warrant. *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004). The Second Circuit has held that non-citizens unlawfully present in the United States have Fourth Amendment rights in their interactions with law enforcement. *See, e.g., Millan-Hernandez v. Barr*, 965 F.3d 140 (2d Cir. 2020). If I am confirmed and a case presenting these issues came before me, I would faithfully apply binding Supreme Court and Second Circuit precedent to the facts of the case.

27. At what point is a human life entitled to equal protection of the law under the Constitution?

Response: The Supreme Court returned the issue of abortion to the people and their elected representatives in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). In *Dobbs*, the Court stated that its "opinion [was] not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.* at 2261. As a district court nominee, I am precluded from expressing any personal views regarding issues that could come before me if I am confirmed. I would not want any litigants to think that I have prejudged an issue. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). If confirmed, I would fully and faithfully apply binding Supreme Court and Second Circuit precedent to any case relating to equal protection that came before me.

28. A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

a. Do you agree?

Response: I have not heard previously about this case. As a district court nominee, I am precluded from expressing any personal views regarding issues that could come before me if I am confirmed. I would not want any litigants to think that I have prejudged an issue. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). If confirmed, I would fully and faithfully apply binding Supreme Court and Second Circuit precedent to any case that came before me.

b. Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?

Response: No. Lower courts must apply binding precedent of the Supreme Court and the circuit in which they sit.

29. Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?

Response: No. District court judges must follow binding precedent.

30. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: The Supreme Court has held that states may require voters to present identification to cast their ballots. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld Indiana’s law requiring voters to present identification and rejected a Fourteenth Amendment challenge. If confirmed, I would decide any case involving voter identification requirements by reference to the relevant statutes, the U.S. Constitution, and binding precedent from the Supreme Court and Second Circuit.

31. Please describe the analysis you will use, if confirmed, to evaluate whether a law or regulation infringes on an individual’s rights under the Second Amendment in light of the Supreme Court’s opinion in *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

Response: In evaluating whether a provision infringes on Second Amendment rights, I would apply the legal standard set forth by the Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In *Bruen*, the Court rejected means-end scrutiny, stating that “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *Id.* at 2126. To justify a regulation, the government “must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.*

32. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

a. How many factors are necessary to provide a special justification for overturning precedent?

Response: In determining whether to overturn prior precedent, the Supreme Court considers the following factors: (1) nature of the error in the prior decision; (2) quality of the reasoning in the prior decision; (3) the workability of the rule adopted in the prior decision; (4) the effect of the prior decision on other areas of law (i.e., its consistency with related decisions and developments since the prior decision); and (5) reliance interests. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022); *Janus v. AFSCME*, 138 S. Ct. 2448, 2478-79 (2018). I do not believe the Supreme Court has said how many factors are necessary to overturn a decision. In *Dobbs* and *Janus*, the Court considered the factors in combination.

b. Is one factor alone ever sufficient?

Response: Please see my response to Question 32(a).

33. Please explain the difference between judicial review and judicial supremacy.

Response: Black's Law Dictionary defines "judicial review" as a court's power "to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary (11th ed. 2019). "Judicial supremacy" is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id. Marbury v. Madison*, 5 U.S. 137 (1803) establishes the principle of judicial review.

34. Do you believe the meaning of the Ninth Amendment is fixed or evolving?

Response: The Supreme Court has stated that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (internal quotation marks omitted). That said, the Supreme Court has explained that the Constitution is an enduring document that applies to factual circumstances the Founders may not have anticipated. *See id.* at 2132 ("[T]he Founders created a Constitution . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.") (internal quotation marks and citations omitted). I am not aware of any precedent from the Supreme Court that treats the Ninth Amendment differently from these general principles.

35. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

Response: The Second Circuit has held that "[t]he Ninth Amendment is not an independent source of individual rights." *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015) (internal quotation marks omitted). In his concurrence in *McDonald v. Chicago*, 561 U.S. 742 (2010), Justice Thomas referenced the Ninth Amendment in a list of constitutional provisions that do not protect individual rights but rather provide structural protections in the federal-state relationship. *Id.* at 851 n.20.

36. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

Response: The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, the Ninth Amendment references enumerated rights in the Constitution, which includes rights included in the Bill of Rights.

37. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

Response: With respect to other amendments, the Supreme Court has stressed the significance of the original public meaning of the provisions. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2411 (2022) (Free Exercise Clause); *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2136-37 (2022) (Second Amendment). I am not familiar with Supreme Court cases addressing the significance of founding-era history in understanding the Ninth Amendment.

38. The First, Second, Fourth, Ninth, and Tenth Amendments reference “the people.”

a. Who is included within the meaning of “the people”?

Response: *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), considered the use of the phrase “the people” in different amendments to the Constitution and concluded its analysis “suggests that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265. In *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), the Court held that “the people” referred to “all members of the political community.” *Id.* at 580.

b. Is the term’s meaning consistent in each amendment?

Response: Please see my response to Question 38(a).

39. Does “the people” capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: Please see my responses to Questions 25 and 26.

40. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: The Supreme Court has held that certain unenumerated rights are protected under the Due Process Clauses of the Fifth and Fourteenth Amendments. To be protected under substantive due process, rights must be “deeply rooted in this country’s history and tradition” and “implicit in the concept of ordered liberty” “such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702,

720-21 (1997). The government may infringe on these fundamental rights only if the infringement is narrowly tailored to serve a compelling state interest. The Supreme Court has stressed that the Constitution’s meaning is fixed but nonetheless applies to factual situations the Framers would not have anticipated. *See New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022). If I am confirmed and presented with a case involving an issue of unenumerated rights under the Due Process Clause, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

41. Could the Privileges or Immunities Clause within the Fourteenth Amendment be a source of unenumerated rights?

Response: In the *Slaughter-House Cases*, 83 U.S. 36 (1872), the Supreme Court held that the Privileges or Immunities Clause of the Fourteenth Amendment is limited in scope. *See id.* 79-80 (holding that the Clause protects such things as the right “to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions . . . [and to] become a citizen of any State of the Union by a bonafide residence therein, with the same rights as other citizens of that State”). In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Supreme Court considered revisiting the holding of the *Slaughter-House Cases* but decided to keep in place that precedent. *Id.* at 754-58. If I am confirmed and presented with a case involving an issue of unenumerated rights under the Privileges or Immunities Clause, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

42. Is the right to terminate a pregnancy among the ‘privileges or immunities’ of citizenship?

Response: Please see my response to Question 41.

43. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

Response: *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), set forth a two-part test to determine when to give deference to an agency’s interpretation of a statute. First, if the text is unambiguous, the inquiry ends there. Second, if there is ambiguity, the court should defer to an agency’s reasonable construction of an ambiguous statute that it administers. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court explained that *Chevron* deference is limited to instances where the agency has exercised its authority to make binding law. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court held that “there are extraordinary cases that call for a different approach—cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.” *Id.* at 2608 (internal quotation marks omitted; alteration in original). In such cases, the Court

presumes that “Congress intends to make major policy decisions itself, not leave those decisions to agencies” and thus there must be “clear congressional authorization” for the agency’s action. *Id.* at 2609; *see also Biden v. Nebraska*, 143 S. Ct. 2355 (2023). The Court’s approach in *West Virginia v. EPA* is referred to as the “major questions doctrine.”

44. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

Response: In addition to applying the analysis set forth above in response to Question 43, courts should also assess whether the agency has engaged in rulemaking consistent with the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

45. How does the Constitution limit the powers of Congress? Please provide examples.

Response: Article I, Section 8 of the Constitution grants Congress enumerated powers and the authority to “make all laws which shall be necessary and proper for carrying into execution the foregoing power, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (interpreting the scope of the Necessary and Proper Clause). Article I, Section 9 of the Constitution prohibits Congress from taking certain actions including, *inter alia*, suspending habeas corpus (except in response to rebellion or invasion), passing ex post facto laws, imposing taxes or duties on goods moving interstate, and granting titles of nobility. Amendments to the Constitution limit Congress’s ability to enact various forms of laws, including, *inter alia*, laws that infringe on the free exercise of religion or the right to keep and bear arms. Finally, the Tenth Amendment makes clear that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (stating that Congress may not compel state governments to take enforcement or regulatory actions or require state officers to carry out federal programs directly).

46. Please describe the modern understanding and limits of the Commerce Clause.

Response: Congress’s Commerce Clause powers are located in Article I, Section 8, Clause 3 of the Constitution. Under the Commerce Clause, Congress may “regulate the use of the channels of interstate commerce,” “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and “regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act, concluding that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567. The Court rejected the Government’s argument that gun possession in a school zone could increase crime and the cost of crime affects the national economy, concluding: “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional

authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 567.

47. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

Response: Please see my response to Question 46.

48. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

Response: In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Supreme Court reaffirmed that the equal protection obligations imposed by the Fourteenth and Fifth Amendments “are indistinguishable.” *Id.* at 217. The Supreme Court has also treated as identical the “shock the conscience” test for a substantive due process rights under the Fifth and Fourteenth Amendments. *See, e.g., Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). In *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255 (2017), the Supreme Court addressed the due process limits on the exercise of specific jurisdiction by a state but left “open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” *Id.* at 269. If I am confirmed and presented with a case involving due process rights under either the Fifth or Fourteenth Amendment, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

49. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), justices in dissent indicated willingness to revisit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. The doctrine is based on Article I of the Constitution, which provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” § 1. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Supreme Court held that the Sex Offender Registration and Notification Act’s requirement that the Attorney General apply the Act’s registration requirements as soon as feasible to offenders convicted before the statute’s enactment did not violate the nondelegation doctrine. Statements contained in dissenting opinions are not binding precedent for lower courts unless later adopted by a majority opinion of the higher court. If I am confirmed and presented with a case involving an issue of the nondelegation doctrine, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

50. Please describe how courts determine whether an agency’s action violated the Major Questions Doctrine.

Response: Please see my answer to Question 43.

51. Please describe your understanding and limits of the anti-commandeering doctrine.

Response: The Supreme Court has held that Congress may not use its Commerce Clause powers to compel state governments to take enforcement or regulatory actions, or to require state officers to carry out federal programs directly. This principle is called the anti-commandeering doctrine. *See, e.g., Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”); *see also New York v. United States*, 505 U.S. 144 (1992). In *Reno v. Condon*, 528 U.S. 141 (2000), the Court distinguished *Printz* and *New York* and upheld a federal law that restricted the disclosure and resale of personal information contained in the records of state motor vehicles departments, concluding that the law regulated the states as owners of databases and did not require states in their sovereign capacities to regulate their own citizens. Finally, in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), the Court held that a federal law prohibiting states from authorizing sports gambling violated the anti-commandeering doctrine by putting state legislatures under “the direct control of Congress.”

52. Does the meaning of the Eighth Amendment change over time? Why or why not?

Response: The Supreme Court has held that courts must consider, in determining whether a punishment violates the Eighth Amendment’s prohibition on cruel and unusual punishment, “the evolving standards of decency that mark the progress of a maturing society.” *Moore v. Texas*, 581 U.S. 1, 12 (2017) (internal quotation marks omitted); *see also Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (stating that the Eighth Amendment “standard itself remains the same, but its applicability must change as the basic mores of society change”) (internal quotation marks omitted), *as modified* (Oct. 1, 2008), *opinion modified on denial of reh’g*, 554 U.S. 945 (2008).

53. Is the death penalty constitutional?

Response: The Supreme Court has held that the death penalty can be imposed consistent with the Constitution. *See, e.g., Kansas v. Marsh*, 548 U.S. 163 (2006).

54. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

Response: I am not aware of any Supreme Court or Second Circuit case addressing this question. As a district court nominee, I am precluded from expressing any views regarding issues that could come before me if I am confirmed. I would not want any

litigants to think that I have prejudged an issue. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). If I am confirmed and presented with a case involving this issue, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

55. Please describe which presidential aides, if any, are entitled to “absolute immunity” from congressional subpoenas.

Response: I am not aware of cases holding that presidential aides are entitled to absolute immunity from congressional subpoenas. There are lower court decisions denying such claims of immunity. *See, e.g., Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008). If I am confirmed and presented with a case involving an issue of absolute immunity, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

56. What restrictions on First Amendment activities can owners of a private shopping center put on their property?

Response: Please see my response to Question 24.

57. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

Response: As a district court nominee, I am precluded from expressing any views regarding issues that could come before me if I am confirmed. I would not want any litigants to think that I have prejudged an issue. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). If I am confirmed and presented with a case involving the First Amendment’s applicability to social media platforms, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

58. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

Response: The Adequate and Independent State grounds doctrine governs state court decisions coming before the U.S. Supreme Court that rest on both a state and a federal ground. In instances where there is an independent and adequate state ground for the decision, the Supreme Court will not entertain the case because the Court would be, in essence, issuing an advisory opinion. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). The doctrine applies as long as the state-law ground is not counter to federal law or the Constitution. The Supremacy Clause, found in Article VI of the Constitution, provides that the Constitution and federal laws take priority over state constitutions and state laws. Under the Supremacy Clause, federal courts may invalidate state laws and the actions of state officials on the ground that they conflict with federal law or the Constitution. Thus, pursuant to the Supremacy Clause and the Adequate and Independent State grounds doctrine, the Supreme Court can overrule state decisions that conflict with federal law but leave in place decisions that rest on state law grounds.

59. Please explain why the Fifth Amendment’s Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

Response: Some circuits have held that individuals do not have a right to notice and a hearing before being placed on a no-fly list. *See, e.g., Basic v. Transp. Sec. Admin.*, 62 F.4th 547, 550 (D.C. Cir. 2023) (holding, in considering due process claim, that “[t]he TSA’s compelling interest in protecting national security outweighs Basic’s individual travel preferences”); *Kashem v. Barr*, 941 F.3d 358, 389 (9th Cir. 2019) (holding, based on its review of materials in the particular cases, that the “the value of providing these plaintiffs a live hearing was outweighed by legitimate national security concerns”). I am not aware of Supreme Court or Second Circuit precedent on this issue. If I am confirmed and presented with a case involving an issue relating to the no-fly list, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

60. What’s the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

Response: In determining whether state laws or regulations violate constitutional rights, the Supreme Court has provided different standards of review including rational basis, intermediate/heightened scrutiny, and strict scrutiny. With respect to some rights such as rights under the Second Amendment, the Supreme Court has rejected means-ends analysis, instead focusing on whether regulations are consistent with the nation’s historical tradition of firearm regulation. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). These standards are set forth in case law rather than in the text of the Constitution.

61. Please describe the legal basis that allows federal courts to issue universal injunctions.

Response: Federal courts are authorized to issue injunctions pursuant to Federal Rule of Civil Procedure 65. Generally, a party seeking a preliminary injunction must show “a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in the party’s favor, and that an injunction is in the public interest.” *American Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). Injunctions are “a drastic and extraordinary remedy, which should not be granted as a matter of course.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). When an injunction is issued against the federal government that prohibits enforcement of a specific law, it can have nationwide effect. The Second Circuit has recognized that nationwide or universal injunctions may be appropriate in the context of the Administrative Procedure Act in some circumstances such as “where only a single case challenges the action or where multiple courts have spoken unanimously on the issue.” *New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020). However, the Second Circuit has cautioned against nationwide/universal

injunctions in instances such as where “numerous challenges to the same agency action are being litigated simultaneously in district and circuit courts across the country,” observing that “it is not clear to us that, where contrary views could be or have been taken by courts of parallel or superior authority, entitled to determine the law within their own geographical jurisdictions, the court that imposes the most sweeping injunction should control the nationwide legal landscape.” *Id.* (limiting national injunction imposed by district court to states within the Second Circuit). If confirmed as a district judge, I would follow all binding Supreme Court and Second Circuit precedent when addressing a case involving a potential nationwide or universal injunction.

62. Please identify one federal judge or justice, current or former, whose service on the bench most inspires you and explain why you will seek to emulate it if confirmed.

Response: In my years of practice, I have had the opportunity to appear in front of many outstanding judges who have scrupulously examined the facts, faithfully applied the law, and approached cases impartially. I continue to be most inspired, however, by the judges for whom I clerked at the start of my legal career. Following law school, I clerked for the Honorable Michael B. Mukasey, then Chief Judge of the U.S. District Court for the Southern District of New York. I saw Judge Mukasey approach each case with an open mind, making his decisions only after fully understanding the factual circumstances of the case and carefully studying the relevant binding precedent. The facts and the law led Judge Mukasey to his decisions in each case. Judge Mukasey’s love for this country and total commitment to uphold the rule of law, at great personal sacrifice, continue to inspire me. I also had the honor of clerking for the Honorable Chester J. Straub of the U.S. Court of Appeals for the Second Circuit, who is the model of impartiality and collegiality. From Judge Straub, I learned the importance of judges reaching only those issues properly before them and gained an invaluable perspective on how trial court decisions are reviewed. Both Judge Mukasey and Judge Straub approached their work with humility and treated all they encountered with the utmost respect. They are the judges I would seek to emulate.