Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Sarah Netburn
Nominee to be United States District Judge for the Southern District of New York

Instructions:

You must provide an answer specific to each question and sub-question. You may not group your answer to one question with other questions nor may you answer questions by cross-referencing other answers. Failure to follow these instructions will be interpreted as an intentional evasion of the question.

With respect to questions that ask for a yes or no answer, please start your response with a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to follow these instructions will be interpreted as an intentional evasion of the question.

1. **In the case of *JJS v. WL Pliler*, you recommended that a biological male, serial child sex abuser and rapist (with intact male genitalia) be transferred from a male prison to female prison because he identified as a woman. You concluded that it was unconstitutional keep the convicted rapist in a male prison because it constituted cruel and unusual punishment. Your recommendation was adopted over the objections of the Biden Administration's Bureau of Prisons and the inmate is currently housed in a women's prison.**

   a. **Do you stand by this decision today?**

      Response: Yes. I faithfully applied the law to the facts in reaching my recommendation. The district judge adopted my report and recommendation and concluded that it was "thorough, detailed, and well reasoned." I issued only a recommendation, pursuant to my authority under 28 U.S.C. § 636(b). I did not order the Bureau of Prisons to do anything. The district judge ordered the Bureau of Prisons to transfer the Petitioner to a female facility. The Bureau of Prisons did not move for a stay or otherwise challenge the district judge's order. In the approximately 18 months since the district judge ordered the Bureau of Prisons to transfer the Petitioner to a female facility, I have received regular status letters, none of which reports any disciplinary or safety issues. The Bureau of Prisons is in negotiations with the Petitioner to voluntarily settle the remaining claims.

   b. **Why did you conclude that the "right" of the biological male rapist to be in a women's prison overrode the right of women prisoners to be housed with members of their own sex?**

      Response: The BOP has a duty to protect all people in its custody. But the Supreme Court has cautioned that "in no world may a government entity's concerns about

phantom constitutional violations justify actual violations of an individual's [constitutional] rights." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022).

My recommendation was based on the evidence presented to me during a two-day hearing, at which the court received testimony from a member of the Transgender Executive Council (TEC), the Bureau of Prison's treating medical provider, and the Petitioner, as well as record evidence, including statements from the three wardens that supervised the Petitioner and the Petitioner's prison disciplinary record.

First, each of the three BOP wardens who supervised the Petitioner submitted memoranda supporting the Petitioner's transfer request. Those reports did not include any reports of violence or sexual assaults while incarcerated. It was my view that the wardens were in the best position to assess whether the Petitioner was at risk for committing future acts of violence. The wardens uniformly supported the transfer.

Second, in denying the Petitioner's transfer request, the TEC repeatedly mentioned that Petitioner could be reevaluated for transfer in the future. The TEC did not conclude the Petitioner's prior conviction precluded transfer to another facility. For example, in the January 4, 2021 denial, the TEC directed the warden to "contact TEC for reevaluation" once the "goals have been reached" of "mental health programming, compliance with all recommended programming and treatment, maintain clear conduct, continue to monitor and maximize hormone levels." These goals had already been met at that time, as affirmed by the warden. In February 2022, after briefing on the petition had been completed, the TEC denied the transfer request because the Petitioner had not completed a BOP Sex Offender Management Program (SOMP). The TEC witness testified at the hearing that she was unable to explain why the TEC suddenly added this requirement and stated that the only reason the new requirement was added was because of the 30-year-old convictions and not because of Petitioner's conduct or behavior in BOP custody.

Third, the criminal acts that the Petitioner committed 30 years were (and are) horrific. But since that time, the Petitioner had (i) not committed a contact offense since 1993; (ii) completed a state sex offender program; (iii) obtained sobriety; and (iv) undergone full hormonal therapy to the point that the Petitioner was "chemically castrated." In addition, (v) the BOP medical provider diagnosed the Petitioner's pedophilic disorder as in "remission." There were other relevant facts in the record before me, including that the State of Indiana had recognized the Petitioner's gender as female on or about May 15, 2017; that the Social Security Administration recognized her gender as female on or about May 5, 2018; and that the district judge who sentenced the Petitioner in 2017 recommended that the BOP place the Petitioner "in a medical facility with females." Judgment, *United States v. Shelby*, 17-cr-67 (S.D. Ind.).

2. **Please state the age that the inmate/petitioner in *JJS v. WL Pliler* began identifying as a woman.**

Response: The Petitioner testified that she remembered feeling disconnected from her biological sex (male) as early as age 5, but that she did not outwardly present as female until July 2015. The State of Indiana recognized her gender as female on or about May 15, 2017, and the Social Security Administration recognized her gender as female on or about May 5, 2018.

3. **In your Report & Recommendation, you open your "Factual Background" section by stating: "*At birth, people are typically assigned a gender*."**

   a. **What did you mean by this?**

      Response: Gender assignment correlates with genitalia, which is revealed at birth.

   b. **Who typically assigns a gender?**

      Response: Gender assignment correlates with genitalia, which is revealed at birth, usually by a medical provider.

   c. **You use the term "gender" extensively throughout your recommendation. Please define the term "gender."**

      Response: The Oxford English Dictionary defines "gender" as: "Males or females viewed as a group." *Gender*, Oxford English Dictionary Online (3d ed. 2011). In the context of psychology or sociology, that dictionary defines "gender" as: "The state of being male or female as expressed by social or cultural distinctions and differences, rather than biological ones; the collective attributes or traits associated with a particular sex, or determined as a result of one's sex." *Id*. The Bureau of Prisons' Transgender Offender Manual defines gender as "a construct used to classify a person as male, female, both, or neither. Gender encompasses aspects of social identity, psychological identity, and human behavior."

   d. **Are their only two genders? If the answer is no, how many genders are there? Give a precise number, or at the very least a numerical range.**

      Response: Yes.

   e. **Is it possible to objectively determine a person's gender?**

      Response: Gender assignment correlates with genitalia, which is revealed at birth. Whether gender can otherwise be determined depends on the definition of gender on which one relies. For example, BOP's Transgender Offender Manual defines gender as "a construct used to classify a person as male, female, both, or neither. Gender encompasses aspects of social identity, psychological identity, and human behavior."

f. **You use the term "woman" and "women's facilities" throughout your recommendation. Please define the term "woman."**

Response: The Oxford English Dictionary defines "woman" as: "An adult female human being. The counterpart of *man*." *Woman*, Oxford English Dictionary Online (3d ed. 2011).

g. **Are prisons segregated by sex? Or by "gender" (as you define the term)?**

Response: Generally, the Bureau of Prisons segregates federal prisoners based on their biological sex. However, the Bureau of Prisons' Transgender Offender Manual allows for consideration of a transgender inmate's "transfer to a different sex facility." Before considering a transfer request "the Warden will submit documentation to the TEC showing the inmate has met the minimum standards of compliance with programs, medications and mental health treatment, and meeting hormone goal levels."

h. **Is it possible to determine a person's sex by only analyzing their chromosomes?**

Response: I have never studied biology and therefore I am unqualified to answer this question.

i. **Is it possible for someone to change their sex?**

Response. I have not studied this issue and am therefore unqualified to answer. That being said, I am aware that a person can alter their hormones through hormone therapy and can alter their genitalia through gender affirming surgery. Additionally, a person can change their legal sex classification with the Social Security Administration or other government agencies. To my knowledge, however, a person cannot change their chromosomes.

4. **In your Report and Recommendation, you said "*The BOP also posits that permitting Petitioner to live among women will be traumatizing and possibly dangerous to them. This concern is overblown. Petitioner identifies as bisexual and her 1994 convictions were against both a male and female. She has not sexually assaulted anyone since 1993. Moreover, the hypothetical concern that Petitioner will hurt someone must be counter-balanced by the actual evidence that she has been assaulted and harassed in a men's facility. Finally, BOP has other measures to monitor prisoners and discipline inappropriate conduct short of exclusion from a housing designation that aligns with Petitioner's gender."***

a. **Please describe with specificity the inmate's 1994 convictions "*against both a male and a female*." Describe the crimes of conviction, the sentence, and the age of the**

victims. Please state explicitly, with respect to each conviction, whether someone was "*hurt*" by the crime.

Response: Petitioner was convicted by guilty plea in the Superior Court, State of Indiana of (i) one count of child molesting, a Class B felony, (ii) one count of rape, a Class B felony, and (iii) one count of criminal deviant conduct, a Class B felony. Petitioner was sentenced on count (i) to a term of 18 years, and on counts (ii) and (iii) to a term of 18 years, to run consecutive to the first prison term. It is my understanding based on the state court filings that the victim of the crime charged in count (i) was 8, and the victim of the crimes charged in counts (ii) and (iii) was 17. These crimes are abhorrent, and, by any definition, the victims were hurt.

b. **Please describe with specificity the inmate's subsequent conviction in 2017, including the crime of conviction, the sentence, and the age of the victims. Please state explicitly whether someone was "*hurt*" by the crime.**

Response: Petitioner was convicted by guilty plea in the United States District Court for the Southern District of Indiana of one count of distribution of visual depictions of minors engaging in sexually explicit conduct, a violation of 18 U.S.C. § 2252(a)(2). Petitioner was sentenced to a term of imprisonment of 180 months, which the district judge recommended be served "in a medical facility with females at either FMC Lexington in Kentucky, or FMC Carswell in Fort Worth, Texas, and continue treatment for gender dysphoria." The Petitioner was also sentenced to a 10-year term of supervised release following the prison term. Children who are sexually abused are, by any definition, hurt. They are further hurt by the creation and distribution of sexually explicit material in which they are depicted.

c. **Please explain, in light of the inmates multiple convictions for sex offenses, why you concluded that the "*concern that Petitioner will hurt someone"* was "*hypothetical*."**

Response: My recommendation was based on the evidence presented to me during a two-day hearing, at which the court received testimony from a member of the Transgender Executive Council (TEC), the Bureau of Prison's treating medical provider, and the Petitioner, as well as record evidence, including statements from the three wardens who supervised the Petitioner and the Petitioner's prison disciplinary record.

First, each of the three BOP wardens who supervised the Petitioner submitted memoranda supporting the Petitioner's transfer request. Those reports did not include any reports of violence or sexual assaults while incarcerated. It was my view that the wardens were in the best position to assess whether the Petitioner was at risk for committing future acts of violence. The wardens uniformly supported the transfer.

Second, in denying the Petitioner's transfer request, the TEC repeatedly mentioned that Petitioner could be reevaluated for transfer in the future. The TEC did not conclude the Petitioner's prior conviction precluded transfer to another facility. For example, in the January 4, 2021 denial, the TEC directed the warden to "contact TEC for reevaluation" once the "goals have been reached" of "mental health programming, compliance with all recommended programming and treatment, maintain clear conduct, continue to monitor and maximize hormone levels." These goals had already been met at that time, as affirmed by the warden. In February 2022, after briefing on the petition had been completed, the TEC denied the transfer request because the Petitioner had not completed a BOP Sex Offender Management Program (SOMP). The TEC witness testified at the hearing that she was unable to explain why the TEC suddenly added this requirement and stated that the only reason the new requirement was added was because of the 30-year-old convictions and not because of Petitioner's conduct or behavior while in BOP custody.

Third, the criminal acts that the Petitioner committed 30 years ago were (and are) horrific. But since that time, the Petitioner had (i) committed no other contact offenses; (ii) completed a state sex offender program; (iii) obtained sobriety; and (iv) undergone full hormonal therapy to the point that the Petitioner was "chemically castrated." In addition, (v) the BOP medical provider diagnosed the Petitioner's pedophilic disorder as in "remission." There were other relevant facts in the record before me, including that the State of Indiana had recognized the Petitioner's gender as female on or about May 15, 2017; that the Social Security Administration recognized her gender as female on or about May 5, 2018; and that the district judge who sentenced the Petitioner in 2017 recommended that the BOP place the Petitioner "in a medical facility with females." Judgment, *United States v. Shelby*, 17-cr-67 (S.D. Ind.).

d. **On average, are biological males (with XY chromosomes) physically stronger than biological females (with XX chromosomes)?**

Response: I have never studied this issue and am unqualified to answer it, beyond recognizing that, generally, biological males are stronger than biological females.

e. **Do biological males (with XY chromosomes) commit more violent crimes per capita than biological females (with XX chromosomes)?**

Response: I have never studied this issue and am unqualified to answer it.

f. **Do biological males (with XY chromosomes) commit more sex crimes per capita than biological females (with XX chromosomes)?**

Response: I have never studied this issue and am unqualified to answer it.

5. **During your hearing, you testified as follows:**

> **"*And the last thing I'll say is that the Transgender Executive Council, which is the body which makes decisions on behalf of transgender transfer requests within the Bureau of Prisons never said that the petitioner could not be transferred and never, ever said that she couldn't be transferred because of any risk of violence. What the Transgender Executive Council repeatedly said in denying the request was simply that she needed to maintain her hormone levels*."**

In your Report & Recommendation, however, you wrote the following:

> ***"In Petitioner's case, the TEC believed it was best for her to participate in SOMP in a men's facility given her previous "heinous" state crimes and for the safety of other prisoners in the women's facility."***
>
> **"*Second, until 2022, the TEC's denials were vague and arbitrary. Decisions were based on "security and care level" (2017) or "offense and conduct" (2018), and direction was given to "monitor and maximize hormones" (2018 and 2021) and comply with "all recommended programming and treatment" (2021).*"**
>
> **"*The claimed penological interest [of the BOP] is in protecting female prisoners from sexual violence and trauma… A theoretical risk of sexual assault by Petitioner, without more, cannot support the BOP's position*"**

Why did your testimony before the Committee conflict with your Report & Recommendation?

Response: There is no conflict between my hearing testimony and my report and recommendation. In November 2018, the TEC concluded that, based on the Petitioner's "offense and conduct, transfer to a female facility [was] not considered at this time." The TEC directed the Petitioner to: "Continue to monitor and maximize hormones. Psychology will consult with institution." At that time, the Petitioner's testosterone and estradiol levels were within the target range for transgender women.

The Petitioner renewed the transfer request, supported by the warden, in December 2020. The TEC's January 2021 minutes read in full: "Continue at a male facility, recommend mental health programming, compliance with all recommended programming and treatment, maintain clear conduct, continue to monitor and maximize hormone levels. Once these goals have been reached, have institution contact TEC for reevaluation." The inference from this decision was that Petitioner would be eligible for transfer once these goals were met. At that time, as reported by the warden, Petitioner was fully compliant

with all mental health programming and treatment, had no significant disciplinary issues with the facility, and had fully maximized hormone levels.

Finally, a third warden submitted a memorandum supporting the Petitioner's transfer on February 9, 2022. Again, the warden noted the Petitioner's compliance with treatment programming, stabilized hormones, "pervasive and consistent" gender dysphoria, and unremarkable infraction history ("good adjustment upon arrival at FCI Otisville considering all circumstances"). The TEC denied this request on February 28, 2022, just after litigation briefing in the case was complete. The transfer denial provided: "Continue at a male facility, recommend mental health programming to include Sex Offender Management Program, compliance with all recommended programming and treatment, maintain clear conduct, and continue to monitor and maximize hormone levels." This was the first time that Sex Offender Management Program (SOMP) was recommended since the Petitioner entered BOP custody. FCI Otisville does not offer SOMP. The TEC representative who testified at the hearing acknowledged that the TEC had never recommended that the Petitioner participate in SOMP before February 28, 2022, and she could not explain the sudden change.

Thus, the record supports my hearing testimony and is consistent with my report and recommendation. The TEC's decisions establish that, over the recommendations of the three facility wardens, it denied the Petitioner's transfer requests for vague reasons that were not based on a risk of reoffending, and it suggested that the Petitioner would be eligible for transfer after continuing programming and hormone therapy. Only when it aligned with the Bureau of Prisons' litigation position did the TEC deny the transfer request on the ground that the Petitioner required sex offender treatment. The TEC witness testified that the SOMP requirement had never been imposed before February 2022, that such programming was not available at Petitioner's facility, and that the only reason SOMP was being required at that time was because of the 30-year-old convictions, and not because of the Petitioner's behavior or conduct while in BOP custody.

6. **Please explain:**
   a. **The factual background that gave rise to the *Estelle v. Gamble case.***

      Response: A state prisoner was injured loading and unloading cotton bales from a truck. He complained about his injuries for three months but was not treated.

   b. **The holding of *Estelle v. Gamble*.**

      Response: The "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (cleaned up).

   c. **The factual background that gave rise to the *Turner v. Safley* case.**

Response: A group of prisoners filed a class action challenging the constitutionality of Missouri's prison mail and marriage regulations.

d. **The holding of *Turner v. Safley.***

Response: The Supreme Court began by noting, first, the valid constitutional claims of prisoners, and second, the appropriate deference afforded to prison officials in running a prison. The Court then aimed to "formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Turner v. Safley*, 482 U.S. 78, 85 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)). The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id*. at 89. In determining the reasonableness of the regulation, courts consider (1) if there is a "valid, rational connection" between the regulation and the legitimate governmental interest; (2) whether there are alternative means of exercising the asserted constitutional right; (3) the impact of the exercise of the right on guards and other inmates; and (4) whether there are ready alternatives to the regulation and if regulation is an "exaggerated response" to the prison concerns. *Id*. at 89-91.

e. **The factual background that gave rise to the *U.S. v. Bout* case.**

Response: A federal prisoner challenged his solitary confinement, pursuant to 28 U.S.C. § 2241.

f. **The holding of *U.S. v. Bout.***

Response: The district court held that continued solitary confinement violated the prisoner's Eighth Amendment rights. *United States v. Bout*, 860 F. Supp. 2d 303 (S.D.N.Y. 2012)

7. **Have you ever presided over another case involving the rights of a transgender person or any issue related to gender identity? If so, please provide the citations.**

Response: To the best of my recollection, I have not.

8. **With the exception of the *JJS v. WL Pliler* case, have you ever concluded that a prisoner suffered cruel and unusual punishment in violation of the Eighth Amendment? If yes, please cite the relevant cases.**

Response: To the best of my recollection, I have not.

9. **In a concurrence in the denial of rehearing en banc in *Al–Bihani v. Obama* then-Judge Kavanaugh wrote: "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms." Is this a correct statement of law?**

   Response: Yes. The Constitution and the laws enacted by the United States Congress are domestic laws.

10. **Please describe, with specific detail, the work, activities, projects and research that you accomplished while working / interning / serving on the board for each of the following organizations listed below:**

    a. **The Brennan Center for Justice at NYU School of Law**

       Response: I interned for The Brennan Center for Justice at NYU School of Law for part of the summer after my second year of law school and during my first semester of my third year of law school. I worked in the Poverty Program. To the best of my recollection, I researched state laws governing Interest on Lawyers' Trust Accounts.

    b. **The Center for Reproductive Law & Policy**

       Response: I interned for The Center for Reproductive Law & Policy, International Program, during the summer after my first year of law school. To the best of my recollection, I conducted research into the laws and practice of female genital mutilation in the country of Mali.

    c. **The Lawyers Committee for Human Rights**

       Response: I worked at the Lawyers Committee for Human Rights from 1996 to 1998, the years before I started law school. I was a program assistant for the International Refugee Program and the Asia Program. As an assistant, I performed administrative tasks like scheduling meetings, answering the phone, filing, and photocopying.

    d. **The Fortune Society**

       Response: I was a member of the Board of Directors of The Fortune Society from approximately 2009 to 2012. I resigned when I became a judge. For two summers, I recall organizing a volunteer day at The Fortune Society for summer associates (law students) working in New York City law firms.

11. **According to recent public reporting, you signed an order compelling Google to provide the contents of the personal email account of the investigative journalist who obtained Ashley Biden's diary.**

a. **Please explain the factual circumstances surrounding this order and the case in which it was issued.**

Response: This statement is not entirely accurate. The referenced order directed Google to comply with a pen register. A pen register authorizes the disclosure of non-content information upon a statement of "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). I signed this order in my capacity as a "duty magistrate judge." I cannot state with certainty which investigation or case this order was issued in. No case concerning these facts is assigned to me.

b. **Please explain the current status of the case.**

Response: I cannot state with certainty which investigation or case this order was issued in. I am aware, however, of the case *United States v. Harris and Kurlander*, 22-cr-457 (LTS). Based on my review of the public docket, it appears that defendants Aimee Harris and Robert Kurlander each pleaded guilty on August 25, 2022, to one count of conspiracy to commit interstate transportation of stolen property in violation of 18 U.S.C. § 371, and those guilty pleas were accepted by the district judge on August 29, 2022. Defendant Aimee Harris was sentenced to one month of imprisonment followed by three years of supervised release on April 9, 2024. Sentencing for defendant Robert Kurlander is scheduled for October 25, 2024.

c. **Have you ever discussed this case with anyone in or associated with the Biden Administration? If so, please identify who and when?**

Response: No.

12. **With the exception of the order above, have you signed any other order or be involved in any other case involving members of the Biden family? If yes, please provide the relevant citations and a brief description of the case.**

Response: To the best of my knowledge, no.

13. **Is this a correct statement of the law: *Journalists may lawfully receive materials from sources even if that material is illegally obtained by sources themselves*? Please explain why or why not.**

Response: If a case that raised this issue were presented to me, I would apply any relevant Supreme Court or Second Circuit precedent, including *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) ("a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"). *See also Democratic Nat'l Comm. v.*

Russian Fed'n, 392 F. Supp. 3d 410, 435 (S.D.N.Y. 2019) ("A person is entitled [to] publish stolen documents that the publisher requested from a source so long as the publisher did not participate in the theft.").

14. **How do you approach the decision to seal cases or docket entries?**

Response: "The common law right of public access to judicial documents is firmly rooted in our nation's history." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). This strong presumption of access "is based on the need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice." *Id*. (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)). Documents are considered "judicial documents" if they are "relevant to the performance of the judicial function and useful in the judicial process." *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019) (citation omitted).

After finding that documents are judicial documents to which the common law presumption of access attaches, courts must "balance competing considerations against" that presumption. *Lugosch*, 435 F.3d at 120 (citation omitted). The sealing of judicial documents "may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Id.* at 124. The interests in favor of non-disclosure can include "the privacy interests of those resisting disclosure." *Walker v. City of New York*, No. 15-cv-500, 2017 WL 2799159, at *6 (E.D.N.Y. June 27, 2017); *In re United States for Material Witness Warrant*, No. 19-cv-447, 2020 WL 3959208, at *3 (S.D.N.Y. July 13, 2020) (citations omitted). The moving party must make a "particular and specific demonstration of fact showing that disclosure would result in an injury sufficiently serious to warrant protection." *Ashmore v. CGI Grp. Inc.*, 138 F. Supp. 3d 329, 351 (S.D.N.Y. 2015), *aff'd*, 923 F.3d 260 (2d Cir. 2019).

a. **How many cases that you presided over remain sealed today?**

Response: I am unaware of any cases that I preside over that are currently sealed.

15. **Please define the term "prosecutorial discretion."**

Response. Prosecutorial discretion refers to a "public official's power or right to act in certain circumstances according to personal judgment and conscience, often in an official or representative capacity." *Discretion*, Black's Law Dictionary (11th ed. 2019). Under Supreme Court precedent, when deciding whether to charge an individual, a prosecutor may exercise discretion by considering "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayne v. United States*, 470 U.S. 598, 607 (1985).

16. **Are you a citizen of the United States?**

Response: Yes.

17. **Are you currently, or have you ever been, a citizen of another country?**

    Response: No.

    a. **If yes, list all countries of citizenship and dates of citizenship.**
    b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**
        i. **If not, please explain why.**

18. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant oral argument? If yes, please describe in which circumstances such consideration would be appropriate.**

    Response: No.

19. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant additional oral argument time? If yes, please describe in which circumstances such consideration would be appropriate.**

    Response: No.

20. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

    Response: As a general matter, foreign law should not be considered when interpreting a provision of the U.S. Constitution. In *Atkins v. Virginia*, 536 U.S. 304, 317, n.21 (2002), the Supreme Court considered, in part, foreign laws, when "[c]onstruing and applying the Eighth Amendment in light of our 'evolving standards of decency.'"

21. **Please explain whether you agree or disagree with the following statement: "The judgments about the Constitution are value judgments. Judges exercise their own independent value judgments. You reach the answer that essentially your values tell you to reach."**

    Response: I disagree. A judge is obligated to reach a decision by applying the law to the facts. As a United States magistrate judge, I apply Second Circuit and Supreme Court precedent to every case before me and, if confirmed, would continue to do so. A judge's "independent value judgments" should never affect the outcome of a case.

22. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's response was: "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

    Response: No. I am unfamiliar with this statement, but the inference is contrary to my judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

23. **Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be disqualifying for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

    Response: Yes. Anyone who endorses or praises a terrorist organization would be disqualified to serve as a law clerk in my chambers.

24. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

    Response: Yes. This statement would be disqualifying to serve as a law clerk in my chambers.

25. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

    Response: Except to the extent appellate rights were knowingly and voluntarily waived, a prisoner in federal custody may file an appeal from any sentence and judgment pursuant to 28 U.S.C. § 1291. A prisoner in federal custody may also file a motion under 28 U.S.C. § 2255 to "vacate, set aside or correct the sentence" on the grounds that it was imposed "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2241 also provides limited grounds on which a prisoner in federal custody may seek relief from a sentence, such as challenging the manner in which the Bureau of Prisons calculated the sentence or awarded good credit time. Finally, a prisoner in custody under sentence of a federal court may seek relief under the First Step Act for Compassionate Release on the grounds that "extraordinary and compelling reasons warrant" a modification of the "imposed term of imprisonment." 18 U.S.C. § 3582(c).

26. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

    Response: Plaintiffs in these cases filed constitutional and statutory challenges to the admissions policies at the University of North Carolina and Harvard College. Both educational institutions considered race as one factor in the final admissions decisions. The Supreme Court held that these policies violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied strict scrutiny analysis and concluded that the admissions policies "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

27. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

    a. **If yes, please list each job or role where you participated in hiring decisions.**

    Response: Yes. I hire new law clerks approximately every year. When I was a partner at my law firm, I was involved in hiring new attorneys and non-attorney staff. In addition, I have served on the District Court's hiring committees for the selection of a new Chief U.S. Probation Officer and Chief Counsel to the Office of Pro Se Litigation.

28. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, sex, sexuality, or gender identity?**

    Response: No.

29. **Have you ever solicited applications for employment on the basis of race, ethnicity, religion, sex, sexuality, or gender identity?**

    Response: No.

30. **Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, sex, sexuality, or gender identity?**
    a. **If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.**

Response: Not that I am aware of.

31. **What role should empathy play in sentencing defendants?**

Response: None. When sentencing a defendant, a judge is obligated to consider the sentencing factors set forth in 18 U.S.C. § 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available by statute; (4) the kinds of sentences and the sentencing range established by the Sentencing Guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records; and (7) the need to provide restitution to any victims. Empathy is not a statutory factor.

32. **Should a defendant's personal characteristics influence the sentence he or she receives?**

Response: When sentencing a defendant, a judge is obligated to consider the sentencing factors set forth in 18 U.S.C. § 3553(a). Among those factors are "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Judges are prohibited from considering race, sex, national origin, creed, religion, and socio-economic status in sentencing a defendant. U.S.S.G. § 5H1.10.

33. **Should felons be granted the right to vote?**

Response: This is a question primarily for policy makers. If a case raising this issue were presented to me, I would apply the law to the facts with faithful allegiance to all Supreme Court and Second Circuit precedent, including *Richardson v. Ramirez*, 418 U.S. 24 (1974) (convicted felons could be barred from voting after completing their sentence and parole without violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution).

34. **Do you believe mandatory minimums should be abolished? Why or why not?**

Response: This is a question primarily for policy makers. The Supreme Court has rejected constitutional challenges to mandatory minimum sentencing laws. *See*, *e.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). If confirmed, I would impose any sentence consistent with applicable mandatory minimums.

35. **You stated that "the Fortune Society is founded on the view that a person's worth should not be measured by their worst day. I keep that in mind when faced with the tough decisions I must make when presiding in criminal court."**

a. **You denied being a political activist during your hearing. Why did your testimony before the Committee conflict with the supra statement?**

Response: My hearing testimony does not conflict with this quote. The quote refers to the intrinsic worth of every person's life. I am humbled by my responsibilities as a federal judge and believe it is important to treat every person who comes before me with dignity and respect. In every case that comes before me, I adhere to my judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.SC. § 453.

b. **You worked at a number of activist organizations, including the Brennan Center for Justice, The Center for Reproductive Law & Policy and The Lawyers Committee for Human Rights. Given that the Fortune Society influenced your decisions on the bench, how do these three organizations influence your decisions on the bench?**

Response: I do not have a working definition of an "activist organization." Regardless, my experience interning or working with these organizations more than 20 years ago does not influence in any way the decisions I have issued over the last 12 years as a United States magistrate judge. If confirmed, I would continue to uphold my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

36. **Is requiring a voter to show personal identification to vote racist?**

Response. No. The Supreme Court upheld a law requiring voters to present government-issued photo identification in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

37. **Is it acceptable to discriminate against:**

a. **Individuals who participated in the events of January 6, 2021?**

Response: Consistent with my judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States," 28 U.S.C. § 453, I ensure that my courtroom is free of discrimination against anyone. If a case were presented to me that challenged a state action that discriminated on the basis of participation in the events of January 6, 2021, I would apply relevant Supreme Court and Second Circuit precedent. When a statute discriminates against a group, the court must first determine whether that group is a "suspect class," "quasi-suspect class," or "non-suspect class," or whether the statute infringes a fundamental right. Discrimination on the basis of a suspect class or state action that infringes a fundamental right is subject to strict scrutiny analysis and will survive review only if the government can show that the state action is necessary to achieve a compelling state interest and that the action is narrowly tailored to achieve that

interest. *United States v. Carolene Products Co.*, 304 U.S. 144, n.4. (1938). State action that discriminates on the basis of a quasi-suspect class is subject to intermediate analysis and will survive review only if the government can show that the state action is substantially related to an important state interest. *Craig v. Boren*, 429 U.S. 190 (1976); *United States v. Virginia*, 518 U.S. 515 (1996). State action that implicates non-fundamental rights or that discriminates on the basis of a non-suspect class will survive review only if the plaintiff can show that the state action is not rationally related to a legitimate state interest. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

b. **Individuals who pray outside of abortion clinics?**

Response: Consistent with my judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States," 28 U.S.C. § 453, I ensure that my courtroom is free of discrimination against anyone. If a case were presented to me that challenged a state action that discriminated against people who pray outside of abortion clinics, I would apply relevant Supreme Court and Second Circuit precedent. When a statute discriminates against a group, the court must first determine whether that group is a "suspect class," "quasi-suspect class," or "non-suspect class," or whether the statute infringes a fundamental right. Discrimination on the basis of a suspect class or state action that infringes a fundamental right is subject to strict scrutiny analysis and will survive review only if the government can show that the state action is necessary to achieve a compelling state interest and that the action is narrowly tailored to achieve that interest. *United States v. Carolene Products Co.*, 304 U.S. 144, n.4. (1938). State action that discriminates on the basis of a quasi-suspect class is subject to intermediate analysis and will survive review only if the government can show that the state action is substantially related to an important state interest. *Craig v. Boren*, 429 U.S. 190 (1976); *United States v. Virginia*, 518 U.S. 515 (1996). State action that implicates non-fundamental rights or that discriminates on the basis of a non-suspect class will survive review only if the plaintiff can show that the state action is not rationally related to a legitimate state interest. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

c. **Catholics who attend traditional, Latin Mass?**

Response: Consistent with my judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States," 28 U.S.C. § 453, I ensure that my courtroom is free of discrimination against anyone. If a case were presented to me that challenged a state action that discriminated against people who attend traditional, Latin Mass, I would apply relevant Supreme Court and Second Circuit precedent. When a statute discriminates against a group, the court must first determine whether that group is a "suspect class," "quasi-suspect class," or "non-suspect class," or whether the statute infringes a fundamental right. Discrimination on the basis of a suspect class or state action that infringes a

fundamental right is subject to strict scrutiny analysis and will survive review only if the government can show that the state action is necessary to achieve a compelling state interest and that the action is narrowly tailored to achieve that interest. *United States v. Carolene Products Co.*, 304 U.S. 144, n.4. (1938). State action that discriminates on the basis of a quasi-suspect class is subject to intermediate analysis and will survive review only if the government can show that the state action is substantially related to an important state interest. *Craig v. Boren*, 429 U.S. 190 (1976); *United States v. Virginia*, 518 U.S. 515 (1996). State action that implicates non-fundamental rights or that discriminates on the basis of a non-suspect class will survive review only if the plaintiff can show that the state action is not rationally related to a legitimate state interest. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

38. **Under current Supreme Court and Second Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?**

    Response: Yes.

39. **Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.**

    Response: In *303 Creative v. Elenis*, the Supreme Court held that the Government could not compel a web designer to create websites expressing a message that she "does not wish to provide." 600 U.S. 570, 588 (2023).

40. **In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."**
    a. **Is this a correct statement of the law?**

       Response: Yes. This quote expresses the principle that "[b]y allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation." *303 Creative v. Elenis*, 600 U.S. 570, 584 (2023).

41. **How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?**

    Response: A law regulating speech is content-based if the government adopted it "because of agreement or disagreement with the message it conveys." *Clementine Co., LLC v. Adams*, 74 F.4th 77, 87 (2d Cir. 2023) (quoting *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 155 (2d Cir. 2013)). A law is content-neutral if "it is justified without reference to the content of

the regulated speech," and if it regulates speech based on the "time, place, and manner" of the speech. *Id.* (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001)); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

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

Response: True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359 (2003). To establish that speech constitutes a true threat unprotected by the First Amendment, the government must show that the defendant "had some understanding of his statements' threatening character." *Counterman v. Colorado*, 600 U.S. 66, 73 (2023). The government, however, does need not "prove the defendant had any more specific intent to threaten the victim." *Id.*

43. **Please describe your work, responding to each subpart below:**

a. **Approximately what percentage of your practice as a lawyer involved securities matters or securities litigation?**

Response: To the best of my recollection, I did not handle any securities matter or securities litigation in private practice.

b. **Approximately what percentage of your cases on the bench have involved securities matters?**

Response: I have been a United States magistrate judge in the Southern District of New York for 12 years. My court has one of the busiest – if not the busiest – commercial dockets in the country. As such, I have handled dozens of cases that involve securities matters, including, for example, enforcement actions brought by the Securities and Exchange Commission, pursuant to its authority under § 5 of the Exchange Act, and class action securities fraud case, including those brought under Rule 10b-5.

c. **How many criminal matters have you handled as a magistrate judge?**

Response: I have been a United States magistrate judge for 12 years. I serve as the "duty magistrate judge" for one week approximately four times each year. In any given week, I might accept multiple guilty pleas, conduct initial presentments or arraign dozens of defendants, authorize dozens of warrants, and sign hundreds of orders under 18 U.S.C. § 2703 or § 2705. As a presiding magistrate judge, I have sentenced 16 defendants who were convicted of misdemeanors. In addition, I run the Court's Young Adult Opportunity Program along with District Judge Ronnie Abrams.

d. **How many criminal matters have you handled as a practicing attorney?**

Response: As a practicing attorney, I handled one criminal case through to jury trial and verdict. In addition, my civil rights practice included substantial Fourth Amendment litigation.

e. **Approximately what percentage of your docket does the multi-district 9/11 litigation take up?**

Response: It is difficult to determine the appropriate metric to answer this question. I have approximately 550 cases on my docket, and there are approximately 363 member cases in the 9/11 Multi-District Litigation (MDL). I have three fulltime law clerks, one of whom works fulltime on the 9/11 MDL.

44. **Do you have any federal trial experience from your time working as a practicing attorney?**

Response: Approximately 80% of my practice when I was working as an attorney was in federal court. I handled cases from beginning to end: I drafted pleadings, conducted discovery, and filed and opposed dispositive motions. Most federal cases are resolved before trial, and my experience was no different. I was a junior associate on one federal trial. As a United States magistrate judge, I have presided over two jury trials and four bench trials.

45. **Please list every case where you were overturned involving a discovery order where you refused to allow the parties to subpoena a witness?**

Response: To the best of my recollection, there is only one case where I quashed a deposition subpoena of a witness and the district judge overturned that decision. In *Roche Freedman v. Cyrulnik*, No. 21-cv-01746 (S.D.N.Y.), the defendant subpoenaed a non-party for deposition, and the plaintiff moved to quash the subpoena. I granted the motion, reasoning that the deposition of the non-party, who resided in London, would be burdensome, was not likely to provide evidence that would be relevant or admissible at trial, and that the subpoena appeared to be issued for an improper purpose. The district judge disagreed and sustained the defendant's objections. The witness failed to comply with the court's order and the deposition did not occur.

46. **When you became a magistrate judge, you stated that you were so happy your former boss and mentor, Judge Harry Pregerson "can now be also a model for me as a judge." Judge Pregerson was known for his judicial activism. Do you intend to approach the district bench, if confirmed, in the same manner?**

Response: When I clerked for Judge Pregerson from 2001 to 2002, I did not witness "judicial activism." As a United States magistrate judge for the last 12 years, I have a record and reputation for faithfully applying Second Circuit and Supreme Court precedent to the facts presented before me. I have issued more than 12,000 opinions, reports and recommendations, and orders. Using the most expansive definition of reversal, I have been reversed less than one-third of one percent of the time. If confirmed, I would continue to uphold my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

47. **Should affirmative action be abolished?**

Response: This is a question primarily for policy makers. If a case that raised this issue were presented to me, I would apply any relevant Supreme Court or Second Circuit precedent, including *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023), which held that race-conscious affirmative action programs in college admissions processes violate the Equal Protection Clause of the Fourteenth Amendment.

48. **You have provided information for prospective internships concerning your internship program online. In pertinent part, it states that you:**

> **Do[] not accept interns during the academic year. Judge Netburn accepts summer interns who are placed through the Sonia & Celina Sotomayor Judicial Internship Program or the ABA's Judicial Intern Opportunity Program. Interested applicants should apply to those programs**

a. **It appears that both of those programs appear to only accept diverse candidates. Please provide the gender, ethnic, and racial background of all of your current and former interns.**

Response: I am not familiar with the selection process for either the Sonia & Celina Sotomayor Judicial Internship Program or the ABA's Judicial Intern Opportunity Program. I do not ask my interns to report their ethnic or racial background. I can report that I have had a mix of male and female interns, that my interns come from diverse ethnic, racial, and socio-economic backgrounds, and are law students from a broad spectrum of law schools.

b. **Do you only accept "diverse" law clerk applications?**

Response: No.

c. **Please provide the gender, ethnic, and racial background of all of your current and former law clerks.**

Response: I do not ask my law clerks to report their ethnic or racial backgrounds. Accordingly, I do not have any records of that information. I can report that I have had a mix of male and female law clerks, that my law clerks come from diverse ethnic, racial, socio-economic, and professional backgrounds, and that they are graduates from a broad spectrum of law schools.

49. **Should children be allowed to receive hormone blockers without their parents express knowledge and consent?**

Response: As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges precludes me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the scope of parental rights may tend to suggest that I have a predetermined view about a matter than may come before me. If confirmed, I would apply the law to the facts in any particular case, with faithful allegiance to all Supreme Court and Second Circuit precedent.

50. **Do parents have a right to be notified if their teenage daughter (under the age of 18) seeks to obtain an abortion?**

Response: As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges precludes me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the scope of parental rights may tend to suggest that I have a predetermined view about a matter than may come before me. If confirmed, I would apply the law to the facts in any particular case, with faithful allegiance to all Supreme Court and Second Circuit precedent.

51. **Do parents have a right to be notified if their teenage daughter (under the age of 18) seeks to obtain birth control pills?**

Response: As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges precludes me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the scope of parental rights may tend to suggest that I have a predetermined view about a matter than

may come before me. If confirmed, I would apply the law to the facts in any particular case, with faithful allegiance to all Supreme Court and Second Circuit precedent.

52. **Please define the following term: "truth".**

    Response: Truth is defined as "[a]ccuracy in the recounting of events; conformity with actuality; factuality." *Truth*, Black's Law Dictionary (11th ed. 2019).

53. **As a matter of legal ethics, do you agree with the proposition that some clients do not deserve representation on account of their identity?**

    Response: No. The Sixth Amendment guarantees all criminal defendants the right to competent counsel.

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

    Response: No.

55. **Is racism a public-health crisis?**

    Response: No.

56. **Is the federal judiciary systemically racist?**

    Response. No.

57. **Is the federal judiciary impacted by implicit bias?**

    Response: As a lawyer and now as a judge, I have not witnessed actions or rulings in the judiciary that I believe are the product of bias. Rather, I have witnessed judges fairly and impartially applying the law.

58. **How has your implicit bias impacted the manner in which you carry out your role as a U.S. Magistrate Judge?**

    Response: In my 12 years as a United States magistrate judge, I have applied the law to the facts without favor or disfavor to any party and have explained my rulings in reasoned written decisions. If confirmed as a district judge, I will continue to faithfully apply the law.

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

Response: Freedom of religion is the "right to adhere to any form of religion or none, to practice or abstain from practicing religious beliefs, and to be free from governmental interference with or promotion of religion, as guaranteed by the First Amendment and Article VI, § 3 of the U.S. Constitution." *Freedom of Religion*, Black's Law Dictionary (11th ed. 2019). Worship is defined as "[a]ny form of religious devotion, ritual, or service showing reverence, especially for a divine being or supernatural power." *Worship*, Black's Law Dictionary (11th ed. 2019). Freedom of worship is the prohibition against the government "from interfering in people's religious practices or forms of worship." *Free Exercise Clause*, Black's Law Dictionary (11th ed. 2019). The Free Exercise Clause protects both freedom of religion and freedom of worship. *Emp't Div. v. Smith*, 494 U.S. 872, 893 (1990). If a case before me raised these issues, I would apply the Establishment Clause and the Free Exercise Clause of the First Amendment, and any relevant Second Circuit and Supreme Court precedent.

60. **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: The Supreme Court has recognized that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). Generally, a fact is "[s]omething that actually exists" and "include[s] not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions[.]" *Fact*, Black's Law Dictionary (11th ed. 2019). The Supreme Court has referred to "basic" or "historical" facts as "addressing questions of who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018). Significantly, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller*, 474 U.S. at 113 (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979)). Questions of law require the Court to elaborate on legal standards. *U.S. Bank Nat'l*, 583 U.S. at 396. In making the distinction, courts consider, among other things, whether the question involves "what happened," or the trial court's "appraisal of witness credibility and demeanor," in contrast to a "uniquely legal" issue. *Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995).

61. **Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?**

Response: 18 U.S.C. § 3553 requires the court to "impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing, as articulated by these four principles. The statute does not prioritize these factors. In sentencing a defendant, I would consider each of these primary purposes, as well as the other sentencing factors enumerated in the statue and the Federal Sentencing Guidelines.

62. **Please identify a Supreme Court decision from the last 50 years that you think is particularly well-reasoned and explain why.**

Response: As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges precludes me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the correctness of a particular decision may tend to suggest that I would not fairly or impartially apply all Supreme Court precedent. If confirmed, I would faithfully apply all Supreme Court precedent.

63. **Please identify a Second Circuit judicial opinion from the last 50 years that you think is particularly well-reasoned and explain why.**

Response: As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges precludes me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the correctness of a particular decision may tend to suggest that I would not fairly or impartially apply all Second Circuit precedent. If confirmed, I would faithfully apply all Second Circuit precedent.

64. **Do you think the Supreme Court should be expanded?**

Response: I have never taken that position. As a magistrate judge, I faithfully apply all Supreme Court precedent. I will continue to do so irrespective of how many justices sit on the Supreme Court. Decisions on the size of the Supreme Court belong to the policy-making branches.

65. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: Generally, 18 U.S.C. § 1507 makes it a federal crime to picket or parade near a United States courthouse or the residence of such judge, juror, witness, or court officer if committed "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer."

66. **Is 18 U.S.C. § 1507 constitutional?**

Response: I am not aware of any Second Circuit or Supreme Court decision interpreting the constitutionality of this statute. The Supreme Court, however, found a similar state law constitutional in *Cox v. Louisiana*, 379 U.S. 559 (1965).

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

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

Response: Yes. As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges would generally preclude me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the correctness of a particular decision may tend to suggest that I would not fairly or impartially apply all Supreme Court precedent. Notwithstanding this obligation, there are certain foundational decisions that are so unlikely to be relitigated or are so firmly a part of our constitutional framework that their validity cannot be reasonably challenged. Because I believe that *Brown v. Board of Education* falls within this limited exception to the general principles set forth in the Canons, I can state that it was correctly decided.

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

Response: Yes. As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges would generally preclude me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the correctness of a particular decision may tend to suggest that I would not fairly or impartially apply all Supreme Court precedent. Notwithstanding this obligation, there are certain foundational decisions that are so unlikely to be relitigated or are so firmly a part of our constitutional framework that their validity cannot be reasonably challenged. Because I believe that *Loving v. Virginia* falls within this limited exception to the general principles set forth in the Canons, I can state that it was correctly decided.

c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**
m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response as to cases (c) through (m): As a United States magistrate judge, and as a nominee for a district judge position, the Code of Conduct for United States Judges precludes me from answering this question. Canon 2A provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(6) provides that a "judge should not make public comment on the merits of a matter pending or impending in any court." Answering a question about the correctness of a particular decision may tend to suggest that I would not fairly or impartially apply all Supreme Court precedent. Because *Roe v. Wade* and *Planned Parenthood v. Casey* were overruled by *Dobbs v. Jackson Women's Health*, I would not follow those cases, and I would instead faithfully apply the *Dobbs* decision in cases before me. Otherwise, I would faithfully apply the other listed cases, just as I would apply all binding Supreme Court precedent.

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

Response: In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court set forth the test to apply when considering the constitutionality of a gun regulation. The test requires courts to determine whether a challenged firearms regulation is "consistent with this Nation's historical tradition of firearm regulation." 597 U.S. 1, 17 (2022). In conducting this analysis, courts should consider two "central considerations": first, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense," and second, "whether that burden is comparably justified." *Id*. at 29.

69. **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, including Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond, 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, Jen Dansereau, and/or Becky Bond? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond? If so, who?**

Response: No.

70. **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, including, but not limited to, Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris, 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, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

    Response: No.

71. **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?**
        i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund.**

    Response: No.

b. **Are you currently in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**
   i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

   Response: No.

c. **Have you ever been in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**
   i. **Please include in this answer anyone associated with Arabella's subsidiaries, such as the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

   Response: No.

72. **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, including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

      Response: No.

   c. **Have you ever been in contact with anyone associated with the Open Society Foundations including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

      Response: No.

   d. **Have you ever received any funding, or participated in any fellowship or similar program affiliated with the Open Society network?**

      Response: Not to my knowledge.

73. **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, and/or Josh Cohen? If so, who?**
       Response: No.

    c. **Have you ever been in contact with anyone associated with Fix the Court including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

       Response: No.

74. **The Raben Group is a lobbying group that "champions diversity, equity, and justice as core values that ignite our mission for impactful change in corporate, nonprofit, government and foundation work." The group prioritizes judicial nominations and its list of clients have included the Open Society Foundations, the American Civil Liberties Union, the New Venture Fund, the Sixteen Thirty Fund, and the Hopewell Fund. It staffs the Committee for a Fair Judiciary.**
    a. **Has anyone associated with The Raben Group 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 Raben Group, including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff and/or Katherine Huffman? If so, who?**

       Response: No.

    c. **Have you ever been in contact with anyone associated with The Raben Group including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff, and/or Katherine Huffman? If so, who?**

Response: No.

d. **Has anyone associated with the Raben Group offered to assist you with your nomination, including but not limited to organizing letters of support?**

Response: No.

75. **The Committee for a Fair Judiciary "fights to confirm diverse and progressive federal judges to counter illegitimate right-wing dominated courts" and is staffed by founder Robert Raben.**
    a. **Has anyone associated with the Committee for a Fair Judiciary requested that you provide 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 Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

    Response: No.

    Have you ever been in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?

    Response: No.

76. **The American Constitution Society is "the nation's foremost progressive legal organization" that seeks to "support and advocate for laws and legal systems that redress the founding failures of our Constitution, strengthen our democratic legitimacy, uphold the role of law, and realize the promise of equality for all, including people of color, women, LGBTQ+ people, people with disabilities, and other historically excluded communities."**
    a. **Has anyone associated with the American Constitution Society, 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 American Constitution Society including, but not limited to Russ Feingold? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

Response: I attended a virtual judicial candidate training organized by the American Constitution Society in August 2020 about the judicial nominee selection process. I listened but did not speak or otherwise participate.

77. **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: In approximately January 2021, I submitted an application to Senator Charles Schumer's Judicial Selection Screening Committee. On March 23, 2021, I interviewed with the Committee. On April 22, 2023, I interviewed with Senator Schumer and members of his staff. On March 22, 2024, I was informed by Senator Schumer's staff that he would be recommending me to the White House for nomination for a position on the District Court for the Southern District of New York. That same day, I interviewed with attorneys from the White House Counsel's Office. Since March 26, 2024, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On April 24, 2024, the President announced his intent to nominate me.

78. **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.

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

Response: No.

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

Response: No.

81. **During or leading up to 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.

82. **During or leading up to 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.

83. **During or leading up to your selection process, did you talk with any officials from or anyone directly associated with The Raben Group or the Committee for a Fair Judiciary, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: No.

84. **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.

85. **Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?**
    a. **If yes,**
        i. **Who?**
        ii. **What advice did they give?**
        iii. **Did they suggest that you omit or include any particular case or type of case in your questionnaire?**

    Response: While preparing the Senate Judiciary Questionnaire, I was provided limited feedback from officials from the Office of Legal Policy. Some of the feedback suggested I select cases to emphasize the breadth of my practice as an attorney. I chose all the cases listed on my Senate Judiciary Committee questionnaire.

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

Response: On March 22, 2024, an attorney from the White House Counsel's Office contacted me to set up an interview, which occurred later that day with attorneys from that office. Since March 26, 2024, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On April 24, 2024, the President announced his intent to nominate me for a district judge position on the U.S. District Court for the Southern District of New York.

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

Response: I received these questions on May 29, 2024. I wrote my responses on my own and provided a completed draft to an attorney with the Office of Legal Policy. I had one conversation providing limited feedback about my responses. I submitted my final answers to the Office of Legal Policy for transmission to the Senate Judiciary Committee.

Senator Mike Lee
Questions for the Record
Sarah Netburn, Nominee for District Court Judge for the Southern District of New York

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

   Response: During my 12 years on the bench, I have developed a methodology through which I rigorously review the factual record, study the law with adherence to binding Supreme Court and Second Circuit authority, and apply the law to the facts. I approach every case with an open mind and seek to reach the correct decision consistent with my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

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

   Response: I would first apply any Supreme Court or Second Circuit precedent interpreting the statute at issue. Assuming there is none, I would interpret the provision consistent with its plain meaning. *United States v. Bedi,* 15 F.4th 222, 226 (2d Cir. 2021). Dictionaries are the key source here. If there is ambiguity in the text, I would "look to traditional canons of statutory construction, the broader statutory context, and the provision's history to help resolve the ambiguity." *MSP Recovery Claims, Series LLC v. Hereford Ins. Co.*, 66 F.4th 77, 86 (2d Cir. 2023). This might include cases that have interpreted similar text in a different statutory context, or a consideration of the legislative history to see if Congress expressed its intent there.

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

   Response: I would first apply any Supreme Court or Second Circuit precedent interpreting the provision at issue. Assuming there is none, I would seek to interpret the provision by examination of its plain text, its location in the structure of the document, cases addressing analogous provisions, and historical sources elucidating its original meaning. I would also consider persuasive authority from other courts.

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

   Response: The Supreme Court has held that constitutional provisions are to be interpreted consistent with their text and original meaning. *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) ("The Constitution's text does not alone resolve this case . . . We must therefore turn to the historical background of the Clause to understand its meaning."); *D.C. v. Heller*, 554 U.S. 570, 592 (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.

6. 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 stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton County*, 590 U.S. 644, 654-55 (2020).

7. What are the constitutional requirements for standing?

Response: The requirement for a plaintiff to have standing comes from art. III, § 2, cl. 1, which limits a federal court's jurisdiction to "cases and controversies." "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The three requirements for standing are: (1) that the plaintiff has suffered, or will imminently suffer, a concrete and particularized injury-in-fact; (2) the plaintiff's injury is traceable to the defendant's conduct; and (3) a decision favorable to the plaintiff would be likely to redress the injury. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Los Angeles v. Lyons*, 461 U.S. 95, 102–03 (1983).

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

Response: In *McCulloch v. Maryland*, the Supreme Court defined the scope of Congress's power. 17 U.S. 316, 411-412 (1819). The Court held that the Necessary and Proper Clause in art. I, § 8 authorizes Congress to make all laws that are necessary to exercise its enumerated powers. In that case, the Court held that the enumerated power to tax and spend included the necessary power to establish a national bank.

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

Response: The Supreme Court has stated that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2018) (citing *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). If a case

presented a challenge to the constitutionality of an act of Congress, I would apply relevant Supreme Court and Second Circuit authority on the extent and limits of congressional power.

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

Response: Yes. In *Washington v. Glucksberg*, the Supreme Court recognized that rights not mentioned in the Constitution, must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." 521 U.S. 702, 721 (1997). The Supreme Court has also held that the Due Process Clauses of the Fifth and Fourteenth Amendments provide "heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720. Examples of unenumerated rights that are fundamental include the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)), 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)).

11. What rights are protected under substantive due process?

Response: Please see my answer to Question 10.

12. If you believe substantive due process protects some personal rights such as a right to contraceptives, 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: *Lochner v. New York* was overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If presented with a case that raised substantive due process arguments, I would apply Supreme Court and Second Circuit precedent interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments.

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

Response: "[T]here are three categories of activity that Congress may regulate under its commerce power: (1) 'the use of the channels of interstate commerce'; (2) 'the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities'; and (3) 'those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.'" *Taylor v. United States*, 579 U.S. 301, 306 (2016) (quoting *United States v. Lopez*, 514 U.S. 549, 558-559 (1995)).

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

Response: The Supreme Court has identified race, national origin, religion, and alienage as suspect classes. The Court has concluded that these "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

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

Response: The Constitution divides government responsibility into three branches of government: the executive, legislative, and judicial branches. Each branch exercises certain authority to limit the other branches to their constitutional authority. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court established the principle of judicial review, holding that the court has the power to strike down unconstitutional statutes. The holding in *Marbury v. Madiso*n underscores the separate powers between the branches of government.

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

Response: If a case were presented to me that challenged the constitutional authority of an act by a branch of government, I would follow Supreme Court and Second Circuit precedent to determine whether the branch of government acted outside the constitutional authority granted to that branch. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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

Response: None.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: They are equally improper and inconsistent with my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

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

Response: I have not studied the trends in judicial review and therefore cannot answer what might account for any fluctuation. If confirmed, I would continue to uphold my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

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

Response: Judicial review refers to "a court's power to review the actions of other branches or levels of government, especially the courts' power to invalidate legislative and executive actions as being unconstitutional." *Judicial Review*, Black's Law Dictionary (11th ed. 2019) (cleaned up). Judicial supremacy is "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Id.*

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

Response: Under Article VI, all elected officials must take an oath or affirmation to support the Constitution. U.S. Const. art. VI. cl. 3. No elected official is above the law. If confirmed, if I were faced with litigation in which a party asserted that an elected official failed to follow the Constitution or duly rendered judicial decisions, I would faithfully apply all relevant Supreme Court and Second Circuit precedent in resolving the case.

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

Response: I understand this statement to reflect the limited role of a judge to apply the law to the facts of the case faithfully and impartially, and without consideration of personal opinion or result.

23. As a federal judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a federal 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 federal judge extend the

precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: A federal district judge is required to follow precedent of the Supreme Court and the Court of Appeals, regardless of whether that judge agrees with the decision or reasoning. The federal judge must apply the precedent as is.

24. 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 judge's sentencing analysis?

Response: When sentencing a defendant, a judge is obligated to consider the sentencing factors set forth in 18 U.S.C. § 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available by statute; (4) the kinds of sentences and the sentencing range established by the Sentencing Guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records; and (7) the need to provide restitution to any victims. The defendant's group identity is not a factor that should be considered.

25. 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 unfamiliar with this quote. I would define equity to encompass what is fair and just.

26. Without citing a dictionary definition, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: I would define equity to encompass what is fair and just. I would define equality to encompass equal treatment regardless of other factors.

27. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 25)?

Response: The Fourteenth Amendment provides, in part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., am. XIV. If confirmed, and if presented with a case that raised whether there is a

guarantee of "equity" under the Equal Protection Clause, I would apply Supreme Court and Second Circuit precedent.

28. According to your current understanding, and without citing a dictionary definition, how do you define "systemic racism?"

Response: I have been a United States magistrate judge for 12 years and in no case has a party advanced any argument on the basis of "systemic racism." As such, I have had no occasion to define the term. I understand the term to refer to patterns or practices that disproportionately affect people based on race, as opposed to individual instances of discrimination.

29. According to your current understanding, and without citing a dictionary definition, how do you define "Critical Race Theory?"

Response: I have been a United States magistrate judge for 12 years and in no case has a party advanced any argument on the basis of "critical race theory." As such, I have had no occasion to define the term. I understand the term to refer to academic writings and scholarship about the intersection between race and law.

30. Do you distinguish "Critical Race Theory" from "systemic racism," and if so, how?

Response: Please see my responses to Questions 28 and 29.

31. During your confirmation hearing you made the following statement under oath: "And the last thing I'll say is that the Transgender Executive Council, which is the body which makes decisions on behalf of transgender transfer requests within the Bureau of Prisons never said that the petitioner could not be transferred and NEVER, EVER said that she couldn't be transferred because of any risk of violence. What the Transgender Executive Council repeatedly said in denying the request was simply that she needed to maintain her hormone levels." In your Report and Recommendation in *JJS v. W.S. Pliler* you said, "In Petitioner's case, the TEC believed it was best for her to participate in SOMP in a men's facility given her previous 'heinous' state crimes and for the safety of other prisoners in the women's facility." How is your hearing testimony not a misrepresentation of your findings in the Report and Recommendation?

Response: There is no conflict between my hearing testimony and my report and recommendation. In November 2018, the TEC concluded that, based on the Petitioner's "offense and conduct, transfer to a female facility [was] not considered at this time." The TEC directed the Petitioner to: "Continue to monitor and maximize hormones. Psychology will consult with institution." At that time, the Petitioner's testosterone and estradiol levels were within the target range for transgender women.

The Petitioner renewed the transfer request, supported by the warden, in December 2020. The TEC's January 2021 minutes read in full: "Continue at a male facility,

recommend mental health programming, compliance with all recommended programming and treatment, maintain clear conduct, continue to monitor and maximize hormone levels. Once these goals have been reached, have institution contact TEC for reevaluation." The inference from this decision was that Petitioner would be eligible for transfer once these goals were met. At that time, as reported by the warden, Petitioner was fully compliant with all mental health programming and treatment, had no significant disciplinary issues within the facility, and had fully maximized hormone levels.

Finally, a third warden submitted a memorandum supporting the Petitioner's transfer on February 9, 2022. Again, the warden noted the Petitioner's compliance with treatment programming, stabilized hormones, "pervasive and consistent" gender dysphoria, and unremarkable infraction history ("good adjustment upon arrival at FCI Otisville considering all circumstances"). The TEC denied this request on February 28, 2022, just after litigation briefing in the case was complete. The transfer denial provided: "Continue at a male facility, recommend mental health programming to include Sex Offender Management Program, compliance with all recommended programming and treatment, maintain clear conduct, and continue to monitor and maximize hormone levels." This was the first time that Sex Offender Management Program (SOMP) was recommended since the Petitioner entered BOP custody. FCI Otisville does not offer SOMP. The TEC representative who testified at the hearing acknowledged that the TEC had never recommended that the Petitioner participate in SOMP before February 28, 2022, and she could not explain the sudden change.

Thus, the record supports my hearing testimony and is consistent with my report and recommendation. The TEC's decisions establish that, over the recommendations of the facility wardens, it denied the Petitioner's transfer requests for vague reasons that were not based on a risk of reoffending, but rather a suggestion that the Petitioner should continue programming and hormone therapy and then re-apply. The TEC denied the transfer request on the grounds that the Petitioner required sex offender treatment only when it aligned with the BOP's litigation position. The TEC witness testified that the SOMP requirement had never been imposed before February 2022, and that the only reason SOMP was being required at that time was because of the 30-year-old convictions, and not because of the Petitioner's behavior or conduct in BOP custody.

32. In your Report and Recommendation in *JJS v. W.S. Pliler*, you stated "Second, until 2022, the TEC's denials were vague and arbitrary. Decisions were based on 'security and care level' (2017) or 'offense and conduct' (2018), and direction was given to 'monitor and maximize hormones' (2018 and 2021) and comply with 'all recommended programming and treatment' (2021)." This finding acknowledging that the TEC cited security and the violent, sexual nature of the inmate's offense as their reasons for denial in 2017 and 2018 directly contradicts the statement you made under oath at your confirmation hearing. Keeping in mind that lying under oath in a congressional hearing and in subsequent written responses to questions for the record constitutes perjury, please explain.

Response: There is no conflict between my hearing testimony and my report and recommendation. Until February 2022, the position of the TEC was that the Petitioner would be eligible for transfer under the BOP's Transgender Offender Manual once the "goals have been reached" of "mental health programming, compliance with all recommended programming and treatment, maintain clear conduct, continue to monitor and maximize hormone levels." These goals had already been met, as affirmed by each of the three wardens who supported Petitioner's transfer and by the BOP medical provider. Although the TEC did reference Petitioner's convictions generally in 2017 (at the initial designation determination) and 2018 (in response to the first transfer request), the fact that the TEC expressly encouraged Petitioner to "contact the TEC for reevaluation" once "these goals have been reached" indicated that the nature of the Petitioner's criminal history was not, in itself, a ground to deny the transfer request.

33. In your Report and Recommendation in *JJS v. W.S. Pliler*, you made the following statement: "The claimed penological interest [of the BOP] is in protecting female prisoners from sexual violence and trauma… A theoretical risk of sexual assault by Petitioner, without more, cannot support the BOP's position." What would the BOP need to do to prove there was more than a theoretical risk of sexual assault to female inmates by a six foot two inch tall biological male inmate convicted of the rape of a 17-year-old girl, sexual assault of a 9-year-old boy, and who reoffended the two times JJS was released from prison? Does the BOP have a duty to protect female prisoners from sexual violence and trauma?

Response: The BOP has a duty to protect all people in its custody. But the Supreme Court has cautioned that "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's [constitutional] rights." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). In the approximately 18 months since the district judge ordered the Bureau of Prisons to transfer the Petitioner to a female facility, I have received regular status letters, none of which reports any disciplinary or safety issues. The Bureau of Prisons is in negotiations with the Petitioner to voluntarily settle the remaining claims.

My recommendation was based on the evidence presented to me during a two-day hearing, at which the court received testimony from a member of the Transgender Executive Council (TEC), the Bureau of Prison's treating medical provider, and the Petitioner, as well as record evidence, including statements from the three wardens that supervised the Petitioner and the Petitioner's prison disciplinary record.

First, each of the three BOP wardens who supervised the Petitioner submitted memoranda supporting the Petitioner's transfer request. Those reports did not include any reports of violence or sexual assaults while incarcerated. It was my view that the wardens were in the best position to assess whether the Petitioner was at risk for committing future acts of violence. The wardens uniformly supported the transfer.

Second, in denying the Petitioner's transfer request, the TEC repeatedly mentioned that Petitioner could be reevaluated for transfer in the future. The TEC did not conclude the Petitioner's prior conviction precluded transfer to another facility. For example, in the January 4, 2021 denial, the TEC directed the warden to "contact TEC for reevaluation" once the "goals have been reached" of "mental health programming, compliance with all recommended programming and treatment, maintain clear conduct, continue to monitor and maximize hormone levels." These goals had already been met at that time, as affirmed by the warden. In February 2022, after briefing on the petition had been completed, the TEC denied the transfer request because the Petitioner had not completed a BOP Sex Offender Management Program (SOMP). The TEC witness testified at the hearing that she was unable to explain why the TEC suddenly added this requirement and stated that the only reason the new requirement was added was because of the 30-year-old convictions and not because of Petitioner's conduct or behavior in BOP custody.

Third, the criminal acts that the Petitioner committed 30 years were (and are) horrific. But since that time, the Petitioner had (i) not committed a contact offense since 1993; (ii) completed a state sex offender program; (iii) obtained sobriety; and (iv) undergone full hormonal therapy to the point that the Petitioner was "chemically castrated." In addition, (v) the BOP medical provider diagnosed the Petitioner's pedophilic disorder as in "remission." There were other relevant facts in the record before me, including that the State of Indiana had recognized the Petitioner's gender as female on or about May 15, 2017; that the Social Security Administration recognized her gender as female on or about May 5, 2018; and that the district judge who sentenced the Petitioner in 2017 recommended that the BOP place the Petitioner "in a medical facility with females." Judgment, *United States v. Shelby*, 17-cr-67 (S.D. Ind.).

34. In your hearing, you stated, "my recommendation was that the petitioner's serious medical needs were being denied by keeping her in a men's facility." Does JJS's desire to be housed in a women's prison as a biological male trump BOP's duty to keep the female prisoners physically safe from a convicted rapist?

Response: No. The BOP has a duty to protect all people in its custody at all times.

35. In evaluating BOP's refusal to transfer JJS, you relied on *Turner* v. *Safely,* where the court found that a prison regulation is constitutionally "valid if it is reasonably related to legitimate penological interests," and you even admitted applying *Turner* is a "rough fit" since it deals with regulations applicable to all inmates, not a specific prisoner's confinement. When faced facts at hand that are a "rough fit" with Supreme Court or other controlling precedent, when is it appropriate to force your desired outcome through tangentially-relevant case law?

Response: *Turner v. Safley*, 482 U.S. 78 (1987), is binding Supreme Court authority, which must be applied when a court concludes that a prison regulation or decision

violates a prisoner's constitutional rights. In *Turner*, the Supreme Court recognized the valid constitutional claims of prisoners, and the appropriate deference afforded to prison officials in running a prison. The Court then aimed to "formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Turner*, 482 U.S. at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)).

I faithfully applied this law in reaching my recommendation. The Bureau of Prisons did not object to my recommendation on the grounds that *Turner* was inapplicable. The district judge adopted my report and recommendation and concluded that it was "thorough, detailed, and well reasoned." I issued only a recommendation, pursuant to my authority under 28 U.S.C. § 636(b). I did not order the Bureau of Prisons to do anything. The district judge ordered the Bureau of Prisons to transfer the Petitioner to a female facility. The Bureau of Prisons did not move for a stay or otherwise challenge the district judge's order.

36. During your investiture speech, you spoke of your former boss Judge Pregerson by saying "[he] has always been a model for me as a person; he is deeply committed to social justice and the self-worth of all people. I am so happy that he can now be also a model for me as a judge." How specifically do you intend to express your commitment to "social justice" as a federal judge?

Response: "Social justice" plays no role in the cases before me and, in all cases, I uphold my oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

37. You provide a document regarding applicants to your summer internship program on the Southern District of New York's website that states "Judge Netburn accepts summer interns who are placed through the Sonia & Celina Sotomayor Judicial Internship Program or the ABA's Judicial Intern Opportunity Program." Both of those programs exclusively recruit "diverse" or "underserved" law students. In the fourteen years you have served as a magistrate judge, what percentage of your summer interns have not been "diverse," as defined by the two placement programs from which you recruit?

Response: I am not familiar with the selection process for either the Sonia & Celina Sotomayor Judicial Internship Program or the ABA's Judicial Intern Opportunity Program. I do not ask my interns to report their ethnic, racial, or socio-economic background. I can report that I have had a mix of male and female interns, that my interns come from diverse ethnic, racial, and socio-economic backgrounds, and are law students from a broad spectrum of law schools.

Senator John Kennedy
Questions for the Record

Sarah Netburn

1. **Are there any circumstances under which it is justifiable to sentence a criminal defendant to death? Please explain.**

   Response: In federal court, a judge may sentence a defendant to death, *see Gregg v. Georgia*, 428 U.S. 153 (1976), following (1) receipt of a jury's determination that the defendant is guilty of violating 18 U.S.C. § 794, 18 U.S.C. § 2381, or "any other offence for which" death is a penalty, if the jury also has determined one of the provisions of 18 U.S.C. § 3591(a)(2) has been proven beyond a reasonable doubt; and (2) receipt of a jury's determination that a death sentence is "justified," under the factors set forth in 18 U.S.C. § 3592.

2. **Should a judge's opinions on the morality of the death penalty factor into the judge's decision to sentence a criminal defendant to death in accordance with the laws prescribed by Congress and the Eighth Amendment?**

   Response: No.

3. **Is the U.S. Supreme Court a legitimate institution?**

   Response: Yes.

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

   Response: Yes.

5. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: During my 12 years on the bench, I have developed a methodology through which I rigorously review the factual record, study the law with adherence to binding Supreme Court and Second Circuit authority, and apply the law to the facts. I approach every case with an open mind and seek to reach the correct decision consistent with my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

6. **Is originalism a legitimate method of constitutional interpretation?**

   Response: Yes. My understanding is that originalism is a mode of interpretation of the law that looks to the original public meaning of the text when the law was written. Originalism is most commonly used to interpret the U.S. Constitution, but it can also apply to interpreting statutes. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 576

(2008) ("In interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." (internal quotations and alterations omitted)).

7. **If called on to resolve a constitutional question of first impression with no applicable precedents from either the U.S. Supreme Court or the U.S. Courts of Appeals, to what sources of law would you look for guidance?**

   Response: In the absence of any precedent from the Supreme Court or the Court of Appeals, I would identify methods of interpretation that those courts have used in analogous cases and apply those methods to the plain text of the provision, its position in the structure of the document, and historical sources elucidating its original meaning. *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) ("The Constitution's text does not alone resolve this case . . . We must therefore turn to the historical background of the Clause to understand its meaning."). I would also consider persuasive authority from other courts.

8. **Is textualism a legitimate method of statutory interpretation?**

   Response: Yes. Over my years on the bench, I have had several cases that required me to interpret a statute, and my first line of reasoning is always the plain text. Dictionaries are the key source here. If there is ambiguity, I next look to other statutes with similar or identical language to determine whether there have been decisions interpreting the same words in a different context. Third, I look to the legislative history to see if Congress expressed its intent there.

9. **When is it appropriate for a judge to look beyond textual sources when determining the meaning of a statute or provision?**

   Response: "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." *United States v. Bedi*, 15 F.4th 222, 226 (2d Cir. 2021) (*quoting Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

10. **Does the meaning (rather than the applications) of the U.S. Constitution change over time? If yes, please explain the circumstances under which the U.S. Constitution's meaning changes over time and the relevant constitutional provisions.**

    Response: No. The Constitution is an enduring document that sets forth the principles that govern our nation. The Constitution is amended pursuant to Article V.

11. **Please describe the legal rule employed in *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021), and explain why the U.S. Supreme Court sided with the Petitioner.**

Response: The legal rule applied in *Rivas-Villegas* is the doctrine of qualified immunity. Qualified immunity protects government officials from liability unless they violated clearly established law that a reasonable official would have known about. In this case, the Supreme Court held that the officer's conduct in placing his knee on the suspect's back for a short period of time while effecting an arrest did not violate clearly established precedent against excessive force.

12. When is it appropriate for a district judge to issue a nationwide injunction? Please also explain the legal basis for issuing nationwide injunctions and the relevant factors a district judge should consider before issuing one.

Response: Injunctive relief is governed by Federal Rule of Civil Procedure 65, as interpreted by Supreme Court and Court of Appeals precedent. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). It is my understanding that neither the Supreme Court nor the Court of Appeals for the Second Circuit has issued any precedential opinions outlining the standards for nationwide injunctions, which are currently the subject of debate in courts, including the Supreme Court. *See, e.g., Dep't of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.").

13. Is there ever a circumstance in which a district judge may seek to circumvent a published precedent of the U.S. Court of Appeals under which it sits or the U.S. Supreme Court?

Response: No. My oath requires me to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

14. Will you faithfully apply all precedents of the U.S. Supreme Court and the U.S. Court of Appeals for the Second Circuit?

Response: Yes.

15. If confirmed, please describe what role U.S. Supreme Court dicta would play in your decisions.

Response: Dicta refers to comments or observations that are not necessary to resolve a case. The Court of Appeals directs lower courts in the Second Circuit to give deference to "language in Supreme Court opinions that contributes to the Court's reasoning, even if it does not incorporate a precise holding." *Janese v. Fay*, 692 F.3d 221, 225-26 (2d Cir. 2012). At the same time, lower courts should also be careful not to "establish new constitutional rights in circumstances where that reasoning plays no role whatsoever in the disposition of the action." *Horne v. Coughlin*, 191 F.3d 244, 246 (2d Cir. 1999). If confirmed, I would carefully consider Supreme Court dicta consistent with the Second Circuit's guidance.

16. When reviewing applications from persons seeking to serve as a law clerk in your chambers, what role if any would the race, sex, or religion of the applicants play in your consideration?

Response: None.