Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Alison Nathan
Nominee to the Court of Appeals for the Second Circuit
December 22, 2021

1. **At your hearing, you were asked about death penalty-eligible cases that have been before you as a district court judge and about academic materials you previously authored that discussed the death penalty.**

   Is there anything you would like to add to your responses to questions on these topics?

   Response: More than fifteen years ago, as an advocate, I represented a few individuals on death row and made arguments on their behalf regarding aspects of the death penalty. Moreover, more than thirteen years ago, as an academic, I wrote articles or gave other commentary regarding cases involving the death penalty, including on challenges to the method of execution. My prior advocacy and writings on any topic have played no role in any decision I have made since becoming a federal judge. However, I would note that in those prior roles I never expressed any categorical view that the death penalty was unconstitutional nor inappropriate in all circumstances.

   Since becoming a federal judge a decade ago, I have had several cases in which defendants were charged with death-eligible crimes. *See, e.g.*, *United States v. Ralph Berry and Frank Lopez*, No. 20-cr-84 (AJN), Dkt. Nos. 2, 71; *United States v. Burrell*, No. 15-cr-95 (AJN), Dkt. No. 97. The decision whether to seek the death penalty in a particular federal case that is death eligible is a decision that only the U.S. Department of Justice (DOJ) can make. DOJ did not seek the death penalty in any of the death-eligible cases over which I have presided. In all cases over which I have presided, I have been fully prepared to implement congressional law, including the federal death penalty had it been sought.

2. **As a sitting district court judge and a nominee to the Second Circuit Court of Appeals, is it appropriate for you to publicly share your views on matters that could reasonably come before you?**

   Response: As a sitting District Court Judge and a nominee to the Second Circuit, under the Code of Conduct for United States Judges, it is not appropriate for me to share personal views on matters that could reasonably come before me. Questions that are phrased as seeking my views prior to becoming a judge implicate the same ethical issue because my answer would permit the inference that my prior views are my current views unless I indicated to the contrary. In any event, I have not allowed and would not allow my personal views to play any part in my decision-making as a judge.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Alison J. Nathan
Nominee to be United States Circuit Judge for the Second Circuit

1. **During your hearing before the Senate Judiciary Committee, you were asked about your decisions to grant several convicted criminals "compassionate release" during the COVID-19 pandemic.**

   a. **Please describe your understanding of Second Circuit case law and the relevant factors to consider in determining whether to grant a felon compassionate release.**

   Response: Under 18 U.S.C. § 3582(c)(1)(A)(i), a court may "reduce" a term of imprisonment, after considering the factors set forth in 18 U.S.C. § 3553(a), if "it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The § 3553(a) factors are: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense.

   The Second Circuit has held that district courts have broad discretion to consider "the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). In the context of the COVID-19 pandemic, courts consider, for example, whether the defendant has health conditions that make them vulnerable to COVID-19, whether the defendant is housed at a facility that is controlling the spread of COVID-19, whether vaccines are available, and whether the defendant has already recovered from COVID-19. *See United States v. Jones*, 17 F.4th 371, 375 (2d Cir. 2021).

   b. **Please explain the legal basis for reducing the sentence of an inmate who has been fully vaccinated and has already contracted and recovered from COVID-19.**

   Response: Any sentencing decision is a fact-specific inquiry cabined by laws duly passed by Congress and binding precedent from the Supreme Court or the circuit in which a federal district judge sits.

To the extent this question is asking about my decision in *United States v. Tucker*, No. 13-CR-378 (AJN), 2021 WL 3722750 (S.D.N.Y. Aug. 23, 2021), about which I was questioned at the hearing, I had previously sentenced Mr. Tucker, along with two codefendants, to 176 months' imprisonment for conspiracy to commit Hobbs Act robbery. Although I denied his request for release, I partially granted Mr. Tucker's motion to reduce his sentence under 18 U.S.C. § 3582(a)(1)(C) by one year. First, Mr. Tucker's medical records demonstrated that his health had "deteriorated" significantly, rendering him "particularly vulnerable to the risks of COVID-19." *Tucker*, 2021 WL 3722750, at *2. Though he had been vaccinated and previously recovered from COVID-19, the record before me demonstrated that the "risk of re-infection and of more serious complications [was] significant." *Id.* at *3. Second, the record before me demonstrated that Mr. Tucker "had a spotless disciplinary record while incarcerated" and had "used his time in custody productively," by earning an education and acquiring skills to work as a chef upon release. *Id.* Third, under 18 U.S.C. § 3553(a)(6), I was required to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Mr. Tucker's two codefendants who had pled guilty to the same conduct had previously been released, which favored a reduction of Mr. Tucker's sentence. *Id.* at *4. Finally, given the "seriousness of Mr. Tucker's offense," I concluded that release was not appropriate, but that a "modest reduction" of one year in his sentence was warranted based on the requirements of 18 U.S.C. § 3582(a)(1)(C) and the factors listed in 18 U.S.C. § 3553(a). *Id.*

2. **In *Doe v. United States Immigrations & Customs Enforcement*, you concluded that the plaintiffs had properly pleaded violations of the common law privilege against civil arrest.**

   a. **Please describe the Supreme Court and Second Circuit case law addressing the federal government's plenary power over the nation's immigration laws.**

   Response: The Supreme Court has long held that "[t]he authority to control immigration . . . is vested solely in the Federal government." *Truax v. Raich*, 239 U.S. 33, 42 (1915). The Second Circuit has also recognized the federal government's plenary power over immigration. *See, e.g.*, *Padavan v. United States*, 82 F.3d 23, 26 (2d Cir. 1996).

   b. **Why doesn't 8 U.S.C. § 1229 demonstrate Congress's intent to abrogate any common law privilege against civil arrest that illegal immigrants may otherwise enjoy?**

   Response: I can only speak to my opinion in this case, as the matter is still pending before me. In my opinion denying the motion to dismiss, I discussed 8 U.S.C. § 1229(e)(1), "which . . .expressly addresses immigration and enforcement actions against aliens at courthouses," and considered the defendant's argument

that the provision displaces the common law privilege. *Doe v. Immigration & Customs Enforcement*, 490 F. Supp. 3d 672, 693 (S.D.N.Y. 2020). However, I concluded that the provision "falls short of providing the clear and manifest congressional purpose necessary to supplant the common law privilege" against civil courthouse arrests. *Id.* at 692–93 ("[W]hen considering whether federal law pre-empts *state* common law, the Court is admonished to 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a *clear and manifest purpose of Congress*.'" (quoting *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316 (1981))). Persuaded by the reasoning of another district court that had considered the same question, I found that the "Section amounts to an acknowledgment that courthouse arrests were occurring and an attempt to provide those subjects to arrest with protections . . . —a far cry from the 'unmistakably clear' language necessary to abrogate the common law privilege." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Applying the Supreme Court's decision in *City of Milwaukee v. Illinois & Michigan*, I held that to read Section 1229 to override the common law protection would "turn this statutory provision . . . on its head to find in it a *clear and manifest* congressional purpose to abrogate the common law privilege against civil courthouse arrests." *Id.* at 693.

3. **During your hearing before the Senate Judiciary Committee, you were asked about a book chapter you wrote on lethal injections and the Supreme Court's decision in *Roper v. Simmons*.**

   a. **Please describe your understanding of Supreme Court and Second Circuit case law concerning the appropriateness of using international law to interpret the U.S. Constitution and federal statutes.**

   Response: In *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), Justice Scalia, writing for a majority of the Supreme Court, said that "[w]e emphasize that it is *American* conceptions of decency that are dispositive." Writing for a majority of the Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 575 (2005), Justice Kennedy stated: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility." In his dissent in *Roper*, Justice Scalia, repeating what he had said in *Stanford*, voiced strong disapproval of Justice Kennedy's reference to foreign law. Justice Scalia said: "The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. 'Acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today." 543 U.S. at 628 (Scalia, J., dissenting).

After *Roper*, Justice Kennedy acknowledged international law in two other Eighth Amendment cases, each time clarifying that international law is not "dispositive" to an interpretation of the Eighth Amendment. *See Graham v. Florida*, 560 U.S. 48, 80 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). To my knowledge, the Supreme Court has not cited international law in support of an interpretation of any provision of the U.S. Constitution or a federal statute since 2010.

To my knowledge, the Second Circuit has never cited international law in support of an interpretation of the U.S. Constitution or a federal statute, at least since the Supreme Court's decision in *Roper*.

As a United States District Judge, I follow binding Supreme Court and Second Circuit precedent in this and all areas. If I were confirmed to the Second Circuit, international law would continue to have no relevance to my interpretation of the United States Constitution.

b. In your view, under what circumstances can international norms influence the interpretation of U.S. law?

Response: As a United States District Court Judge, international norms have no relevance to my interpretation of the United States Constitution or laws. In this area, as in all others, I follow binding Supreme Court and Second Circuit precedent.

4. Before the Supreme Court's decision in *District of Columbia v. Heller*, you wrote that "nearly all federal and state courts agree that the Second Amendment does not guarantee an individual private right to bear arms, unrelated to a state's right to maintain a militia."

a. In addition to *Heller*, please summarize the Supreme Court and Second Circuit precedent you would rely upon in addressing a question about the scope of the Second Amendment right to bear arms.

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court considered the text, structure, and history of the Second Amendment, concluding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." On that basis, the Court held that "the District's ban on handgun possession in the home violates the Second Amendment." *Id.* at 635. The Supreme Court in *Heller* did not establish a standard applicable to all Second Amendment cases except to rule out rational basis review. *Id.* at 628 n.27; *see Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 88–89 (2d Cir. 2012).

In applying *Heller*, the Second Circuit employs a "two-step framework to determine the constitutionality of a restriction on firearms." *United States v.*

Perez, 6 F.4th 448, 451 (2d Cir. 2021). It first assesses whether the law burdens conduct protected by the Second Amendment. *Id.* Second, it determines and applies the appropriate level of scrutiny. *Id.* In the first step, the Second Circuit asks whether the restricted weapon is "commonly used" and whether it is "typically possessed by law-abiding citizens for lawful purposes." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255–57 (2d Cir. 2015). In the second step, the Second Circuit determines "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *Perez*, 6 F.4th at 454. In *Heller*, the Supreme Court defined the core of the Second Amendment as "'the right of law-abiding, responsible citizens to use arms' in self-defense in the home." *Id.* (quoting *Heller*, 554 U.S. at 635). "Only restrictions that substantially burden core rights trigger strict scrutiny." *Id.* Other laws that burden the Second Amendment are subject to intermediate scrutiny. *Id.*

The Supreme Court granted certiorari and heard oral argument in *New York State Rifle & Pistol Association Inc. v. Bruen*, 141 S. Ct. 2566 (2021). As a District Court Judge, and should I be confirmed as a Second Circuit Judge, I am bound to follow the Supreme Court's decision in this case and all others.

b. What level of scrutiny should an impingement on the individual right to bear arms receive?

Response: Under the binding precedent of the Second Circuit, firearm "restrictions that substantially burden core rights trigger strict scrutiny." *United States v. Perez*, 6 F.4th 448, 454 (2d Cir. 2021). All other laws that impinge on the individual right to bear arms are subject to intermediate scrutiny. *Id.*

5. Please describe your understanding of Supreme Court and Second Circuit precedents concerning the procedural and substantive rights of detainees at Guantanamo Bay.

Response: The Supreme Court has held that Guantanamo Bay detainees "are entitled to the privilege of habeas corpus to challenge the legality of their detention." *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). The Second Circuit utilizes this case law mostly as it pertains to domestic immigration. For example, in *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020), the Second Circuit held that a non-citizen could not be detained indefinitely pending a removal hearing without showing dangerousness or a flight risk. The Court relied on *Boumediene*'s principle that non-citizens are "entitled to challenge through habeas corpus the legality of their ongoing detention." *Id.* at 850. I believe that neither the Supreme Court nor the Second Circuit have weighed in on the substantive rights granted to Guantanamo Bay detainees.

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

Response: As a District Court Judge, I am bound to follow binding Supreme Court and

Second Circuit precedent. It is my general understanding that the Supreme Court has instructed that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and that any such relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Second Circuit has instructed: "We have no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree that such injunctions may be an appropriate remedy in certain circumstances." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1370 (2021), and *cert. dismissed*, 141 S. Ct. 1292 (2021). However, the Second Circuit cautioned against issuing an injunction with nationwide scope except when circumstances necessitate it. *Id.*

7. **What Second Circuit and Supreme Court precedent would you apply in evaluating a claimed religious exemption to a vaccine mandate imposed by a state or local government?**

   Response: Legal challenges to vaccine mandates imposed by state and local governments are currently being considered in the Second Circuit and several other courts across the country. If presented with a case that involved a claimed religious exemption to a vaccine mandate, I would carefully research the applicable Second Circuit and Supreme Court precedent.

   In *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 552 (2021), the Second Circuit considered religious claims of healthcare workers that sought exemptions from New York State's vaccine mandate for healthcare workers. The Second Circuit affirmed the district court's denial of a request to preliminarily enjoin the mandate, concluding that the plaintiffs had not shown a sufficient likelihood of success on the merits of their claim because the law was a neutral law of general applicability that, under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), satisfied rational basis review. The Second Circuit cited, in support, its prior decision in *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), and the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

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

   Response: My role as a judge is to fulfill my judicial oath, which requires me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. My goal and process is to approach every case with an open mind, evaluate the facts before me, understand the parties' arguments, and consider the laws at issue. Scrupulously following this process in every

case is, in my view, the best way to ensure that personal preferences do not shape my view of the law.

9. 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 with the statement. A judge's personal views and values are irrelevant when it comes to interpreting and applying the law.

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

Response: In *Meyer v. Nebraska*, the Supreme Court held that parents have the right to direct the education of their children. 262 U.S. 390, 400 (1923) ("[The plaintiff's] right thus to teach and the right of parents to engage [the plaintiff] so to instruct their children, we think, are within the liberty of the [Fourteenth Amendment]".); *accord Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting the right "to direct the education and upbringing of one's children").

11. Is whether a specific substance causes cancer in humans a scientific question?

Response: I understand this question to ask about the role of expert testimony and causation in toxic tort cases. In order to prevail in a toxic tort case, a plaintiff must establish both that "the epidemiological or other scientific evidence establishes a causal link" between the specific substance and cancer, and that the "plaintiff is within the class of persons to which inferences from the general causation evidence should be applied." *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1131 (2d Cir. 1995). As the Second Circuit has explained, causation is a factual question for the jury. *Id.* Under Federal Rule of Evidence 702, district courts play a gate-keeping role to ensure that "all scientific testimony or evidence admitted is not only relevant, but reliable," to determine the question of causation. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

12. Is when a "fetus is viable" a scientific question?

Response: The Supreme Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992), that "advances in neonatal care have advanced viability to a point somewhat earlier" than in the year the Court decided *Roe v. Wade*, 410 U.S. 113 (1973). As the Court further instructed, the point of viability may occur "at some moment even slightly earlier in pregnancy" than 23 to 24 weeks—as was usual at the time of *Casey*—if it were the case that "fetal respiratory capacity can somehow be enhanced in the future." *Id.*

13. Is when a human life begins a scientific question?

Response: Some people likely view this as a scientific question. Others, as a religious, moral, or philosophical question. Still others may view it as a combination of those categories. If I were to face this question in any case that comes before me, I would apply relevant Supreme Court and Second Circuit precedent.

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

a. Was *Brown v. Board of Education* correctly decided?
b. Was *Loving v. Virginia* correctly decided?
c. Was *Griswold v. Connecticut* correctly decided?
d. Was *Roe v. Wade* correctly decided?
e. Was *Planned Parenthood v. Casey* correctly decided?
f. Was *Gonzales v. Carhart* correctly decided?
g. Was *District of Columbia v. Heller* correctly decided?
h. Was *McDonald v. City of Chicago* correctly decided?
i. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?

Response: I have a duty to faithfully follow all Supreme Court precedents. As a District Court Judge, it is inappropriate for me to comment on the merits of demerits of any cases that may come before me. Refraining from such comments is consistent both with the positions of prior judicial nominees and with the Code of Conduct for United States Judges. Prior judicial nominees have, however, identified cases that are so foundational to our judicial system and so unlikely to be the subject of controversy that a sitting judge may comment on them without risking the appearance of prejudging a future case. I will therefore state that *Brown v. Board of Education* and *Loving v. Virginia* were rightly decided.

15. Please describe the selection process that led to your nomination to be a United States Circuit Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: I was contacted by a member of Senator Schumer's Judicial Selection Committee on January 26, 2021, inquiring as to my interest in being considered for the Second Circuit and requesting the submission of materials. I was also contacted by White House Chief of Staff Ron Klain on February 14, 2021, and asked if I was interested in being considered for nomination to the Second Circuit. I interviewed with Senator Schumer on March 14, 2021. I was contacted by a lawyer from the White House Counsel's Office on March 30, 2021. On March 31, 2021, I was interviewed by several lawyers from the White House Counsel's Office. Since March 31, 2021, I have been in contact with lawyers from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. In that time period, I spoke with the White House Chief of Staff, Ron Klain, on October 5, 2021, and I spoke with the White House Counsel,

Dana Remus, on June 14, 2021, October 8, 2021, and November 16, 2021. On November 17, 2021, the President announced his intent to nominate me.

16. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: I have not been in contact with anyone associated with Demand Justice related to my current nomination. I was in contact with Chris Kang when I worked in the White House Counsel's Office in 2009 and 2010. I was also in contact with him in his role in the White House when I was nominated to the District Court in 2011. I have not been in contact with him since that time.

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

       Response: No.

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

       Response: No.

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

Response: Please see my answer above to 16(c). Otherwise, no.

18. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**

    Response: No.

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

    Response: No.

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

    Response: No.

19. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

21. Please describe the selection process that led to your nomination to be a United States Circuit Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: I was contacted by a member of Senator Schumer's Judicial Selection Committee on January 26, 2021, inquiring as to my interest in being considered for the Second Circuit and requesting the submission of materials. I was also contacted by White House Chief of Staff Ron Klain on February 14, 2021, and asked if I was interested in being considered for nomination to the Second Circuit. I interviewed with Senator Schumer on March 14, 2021. I was contacted by a lawyer from the White House Counsel's Office on March 30, 2021. On March 31, 2021, I was interviewed by several lawyers from the White House Counsel's Office. Since March 31, 2021, I have been in contact with lawyers from the Office of Legal Policy at the Department of Justice and the

White House Counsel's Office. In that time period, I spoke with the White House Chief of Staff, Ron Klain, on October 5, 2021, and I spoke with the White House Counsel, Dana Remus, on June 14, 2021, October 8, 2021, and November 16, 2021. On November 17, 2021, the President announced his intent to nominate me.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I was contacted by White House Chief of Staff Ron Klain on February 14, 2021, and asked if I was interested in being considered for nomination to the Second Circuit. I was contacted by a lawyer from the White House Counsel's Office on March 30, 2021. On March 31, 2021, I was interviewed by several lawyers from the White

House Counsel's Office. Since March 31, 2021, I have been in contact with lawyers from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. In that time period, I spoke with the White House Chief of Staff, Ron Klain, on October 5, 2021, and I spoke with the White House Counsel, Dana Remus, on June 14, 2021, October 8, 2021, and November 16, 2021. On November 17, 2021, the President announced his intent to nominate me. Since I was nominated, I was in contact with lawyers from the Office of Legal Policy and the White House Counsel's Office regarding preparations for my confirmation hearing.

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

Response: I received the questions on December 22, 2021. I drafted answers to each question based on my own knowledge and research, with support from my law clerks. I submitted draft answers to the Office of Legal Policy for feedback, and after receiving feedback I finalized my answers for submission on January 3, 2022.

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

Questions for the Record for Alison J. Nathan, Nominee for the Second Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Now that you have spent nearly ten years on the federal bench, how would you characterize your judicial philosophy thus far? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: My role as a judge is to fulfill my judicial oath, which requires me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. My goal is to approach every case with an open mind, evaluate the facts before me, understand the parties' arguments, and consider the laws at issue. Because the functions of a Supreme Court Justice are much different

from those of a district or circuit judge, I cannot compare any Justice's particular judicial philosophy to mine.

a. Please describe with specificity how your judicial philosophy is similar to or distinct from that of Justice John Paul Stevens, for whom you clerked?

Response: Please see my answer to question 1 above. In addition, upon his death, I wrote the following regarding what judicial lessons I learned from Justice Stevens: "But perhaps the most important judicial lessons I learned from Justice Stevens involved his fundamental approach to cases. Focus first and foremost on the facts. Faithfully apply precedent. Be intellectually honest and analytically rigorous. Think through the practical consequences of a holding. And, most importantly, decide cases independently and impartially." *Memoriam: Justice John Paul Stevens*, 133 HARV. L. REV. 752, 755 (2020).

b. How did clerking for Justice Stevens inform your approach to considering constitutional questions and questions of first impression?

Response: Please see my answer above to Question 1(a).

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." *Originalism*, Black's Law Dictionary (11th ed. 2019). This definition is consistent with my general understanding that originalism means that the Constitution or a statutory provision should be interpreted in the way that the relevant text would have been understood at the time it was adopted. In other words, text should be interpreted according to its original, public meaning.

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

Response: Black's Law Dictionary defines living constitutionalism as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I would not characterize myself as a "living constitutionalist."

4. If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?

Response: Yes. As a Court of Appeals judge, I would be bound by the tests and frameworks considered by the Supreme Court in considering constitutional issues—even those of first impression. Although the Supreme Court has not decided every constitutional question, it has provided guidance for most constitutional provisions, relying on the original public meaning of the Constitution for some. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). When considering the provisions in which the Court has previously relied on the original public meaning, I would be bound to similarly resolve the issue based on that precedent.

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

Response: In some cases, the Supreme Court has held that while core constitutional principles do not change, the application of certain provisions may be impacted based on contemporary values and understanding. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (identifying contemporary community standards as a relevant factor for evaluating free speech defense in obscenity prosecution). As a federal district judge, and if confirmed to the Second Circuit, I am obligated to apply binding Supreme Court precedent.

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

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

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

Response: The applicable limits would depend on the facts of the case presented. If such a case were presented, I would thoroughly research binding authorities and any relevant constitutional, statutory, or regulatory provisions, and apply that law to the record before me.

In the absence of specific facts, I can identify two primary sources of authority that may be relevant if such a case were presented to me. First, the Religious Freedom Restoration Act (RFRA) provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA limits only actions of the federal government, not state governments. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The Supreme Court has applied RFRA to religious organizations like the Little Sisters of the Poor and to small businesses operated by

observant owners. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 689 (2014).

Second, when RFRA does not apply, the Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). If a law is either not neutral or is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The Supreme Court has provided significant guidance on whether a law is neutral and generally applicable. For example, a law that appears neutral on its face is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Id.* at 533. Similarly, a law may not be neutral if it is enforced in a selective manner that discriminates against religious views or if statements made by officials at a public meeting show that the law's enforcement was motivated by hostility to religion. *E.g.*, *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has held that a law may not be generally applicable if it provides a mechanism for individual exemptions or if the law prohibits certain religious conduct while permitting secular conduct that implicates the same governmental interests. *E.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Additionally, the Supreme Court has held that the Free Exercise Clause prohibits enforcement of certain employment laws in a manner that would interfere with a religious institution's employment of individuals involved in religious training. *E.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

I would faithfully apply these precedents to any case that comes before me.

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

Response: No. Moreover, a law that is not neutral to religion "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

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

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020), the Supreme Court held that the religious-entity applicants were entitled to a preliminary injunction. First, the Court concluded that the applicants "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* Applying "strict scrutiny," the Court concluded that it was "hard to see how the challenged regulations [could] be regarded as 'narrowly tailored.'" *Id.* 66–67. Next, the Court determined that the challenged restrictions would cause irreparable harm and that it had "not been shown that granting the applications [would] harm the public." *Id.* at 68. Accordingly, the Court held that "enforcement of the [New York] Governor's severe restrictions on the applicants' religious services must be enjoined." *Id.* at 69.

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

Response: The Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), held that restrictions imposed by California on at-home religious gatherings were not neutral and generally applicable because the State treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. The Supreme Court concluded that California's restrictions did not satisfy strict scrutiny because it was not narrowly tailored, as it permitted gatherings at, among other places, "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* at 1297. The Court further held that the petitioners' challenge was not moot because they "remain[ed] under a constant threat" that California would reinstate the challenged restrictions. *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the decision and issuance of a cease-and-desist order by the Colorado Civil Rights Commission arising from a shop's refusal to sell a wedding cake to a same-sex couple did not comply "with the religious neutrality that the [Free Exercise Clause of the] Constitution requires." *Id.* at 1724. As the Court explained: "The neutral and respectful consideration to which [the plaintiff] was entitled was compromised here . . . . The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729.

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

Response: The Supreme Court has held that an individual's religious belief is protected even if the belief does not represent a tenet of a religious organization of which the individual is a member so long as the religious belief is sincerely held. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834–35 (1989). As a consequence, an individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *Id.* at 833–34.

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

Response: If presented with a case in which the issue of a party's sincerely held religious belief were at issue, I would follow binding precedent of the Supreme Court and the Second Circuit. A sincerely held religious belief must be "rooted in religion" rather than "[p]urely secular." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). The Second Circuit has held that whether a religious belief is sincerely held is a subjective test and a court is not permitted to look beyond that question to determine whether an individual's interpretation of religious doctrine is correct. *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003).

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

Response: Please see my answer to Question 13(a).

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

Response: As a sitting judge and nominee to the Second Circuit, it would not be appropriate for me to comment on what is or is not the official position of any religion.

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

Response: The Supreme Court in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), held that two teachers' employment-discrimination claims against religious schools under the Age Discrimination in Employment Act and the Americans with Disabilities Act were barred by the ministerial exception, which is grounded in the First Amendment. This holding followed the Court's decision in *Hosanna-Tabor*

Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 191 (2012), which applied the ministerial exception to a teacher that was formally commissioned as a minister. In *Our Lady of Guadalupe*, the Supreme Court clarified that the application of the ministerial exception did not turn on an employee's formal title but instead on "what an employee does." 140 S. Ct. at 2064. Namely, an employee is subject to the ministerial exception if they perform "vital religious duties," including "[e]ducating and forming students in the [religious institution's] faith." *Id.* at 2066.

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

Response: As noted in the question, the Supreme Court in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), considered a challenge to the City of Philadelphia's decision not to refer foster children to Catholic Social Services (CSS). The City of Philadelphia justified its decision by reference to section 3.21 of its standard foster care contract, which states that a provider may not reject a child or foster family based upon their sexual orientation unless the Commissioner grants an exception. *Id.* at 1878. The Supreme Court concluded that because "section 3.21 incorporates a system of individual exemptions," it was not a law of general applicability and so not subject to the Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Fulton*, 141 S. Ct. at 1878. The Supreme Court then held that because Philadelphia offered "no compelling reason why it has a particular interest in denying an exception to CSS," Philadelphia's decision did not satisfy strict scrutiny and violated the First Amendment. *Id.* at 1882.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), members of the Swartzentruber Amish community in Minnesota claimed that compliance with a county ordinance that required they install a modern subsurface septic system for the disposal of gray water impinged on their sincerely held religious beliefs in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Supreme Court granted the petitioners' petition for a writ of certiorari, vacated the judgment below, and remanded to the Court of Appeals of Minnesota for consideration in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

In a concurrence, Justice Gorsuch identified several errors in the state court's application of RLUIPA. First, the court wrongly concluded that the county had a "compelling" interest in sanitation rather than considering whether the county had a compelling interest in denying the petitioners an exemption from the regulation, as required by *Fulton*. *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring). Second, the court "erred by failing to give

due weight to exemptions other groups enjoy," such as those that live in "rustic cabins." *Id.* Third, the court failed to consider the efficacy of the petitioners' alternative mulch-basin method that is permitted by several other states. *Id.* at 2433. And fourth, the court failed to hold the county to its burden of "prov[ing] with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." *Id.*

17. May the federal government legally withhold federal grant funding from local or state governments that refuse to implement or enforce federal immigration law?

Response: If presented with such a case, I would consider the binding case law of the Supreme Court and the Second Circuit as well as any applicable constitutional, statutory, or regulatory provisions and decide the case based on the record presented. Other courts presented with this question have considered primarily whether the President has the authority to withhold funds unilaterally. *See, e.g.*, *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018); *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020).

The Supreme Court has held that Congress has broad powers to condition states' and local governments' receipt of federal funds on their compliance with federal law, but that "spending power is of course not unlimited." *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012). In *South Dakota v. Dole*, the Supreme Court identified four limits on Congress's spending power. First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" *Dole*, 483 U.S. at 207. Second, a condition on the states' receipt of federal funds must be unambiguous. *Id.* Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* And fourth, a conditional grant of federal funds must not violate any "other constitutional provisions." *Id.* at 208.

18. As you may know, in 2012, the Supreme Court issued a decision in *Arizona v. United States* that made it substantially more difficult for states to enforce federal immigration law. Basically, the decision said, the federal government has control and the states don't have room to act—their efforts to enact policy in this area is preempted. At the same time as states are handicapped in actually enforcing this country's immigration laws, you held in 2020, that New York's common law still stands, even when it hinders ICE's ability to enforce the law. Specifically, you declined to dismiss a case filed by illegal immigrants and immigration services organizations against ICE challenging "ICE's policy of carrying out federal immigration arrests of noncitizens in and around New York state courthouses without judicial warrants." What role does state law have to play in limiting or supplementing federal immigration enforcement?

Response: "The authority to control immigration is . . . vested solely in the Federal government." *Traux v. Raich*, 239 U.S. 33, 42 (1915). State law may supplement federal immigration enforcement so long as it is consistent with federal law, but when state and

federal immigration law conflict, the Supremacy Clause provides that federal law shall govern. U.S. Const. art. VI, cl. 2.

19. In 2020, you granted a temporary restraining order (TRO) in favor of four illegal aliens who were in custody of the United States Immigration & Customs Enforcement. They requested to be released because they alleged that remaining in custody during the COVID-19 pandemic might subject them to unique harms because of various comorbidities.

a. Please explain the factual predicate for each plaintiff's custody with ICE.

Response: I understand this question to be asking about my opinion in *Coronel et al. v. Decker*, 449 F. Supp. 3d 274 (S.D.N.Y. 2020). In that case, the four plaintiffs were all in discretionary civil immigration custody pending removal proceedings pursuant to 8 U.S.C. § 1226(a). Following a hearing on the TRO request, I found that "Petitioners, who [were] detained pursuant to [8 U.S.C.] § 1226(a), at most [had] relatively limited criminal histories, with only two convictions for disorderly conduct, a noncriminal violation, between them." *Id.* at 288. In my opinion, I further described the specific criminal histories of the four plaintiffs being held in civil detention as follows: "Arrests of Petitioners Madrid and Otero resulted in non-criminal convictions for disorderly conduct. Another arrest of Petitioner Otero resulted in an adjournment in contemplation of dismissal. All charges arising from an arrest of Petitioner Miranda were dismissed and sealed just three months after arrest. Misdemeanor menacing charges remain pending against Petitioner Sumba." *Id.* at 288 n.4.

b. Did you consider whether any plaintiff presented a risk that he might not appear for future immigration proceedings? Please explain your reasoning and the factual basis for granting release.

Response: Yes. I found that "the Government [had] offered no evidence that Petitioners pose[d] a risk of flight." *Coronel v. Decker*, 449 F. Supp. 3d 274, 288 (S.D.N.Y. 2020).

I granted release after considering the parties' arguments under the temporary restraining order legal standard. First, I found that petitioners established irreparable harm because they "[f]aced imminent risk to their health, safety, and lives." *Id.* at 281. Second, I found that petitioners had a likelihood of success on the merits of their substantive due process claims because they each had serious, unmet medical needs, and the government had shown deliberate indifference to those medical needs. *Id.* at 282-85. I found petitioners also had a likelihood of success on their procedural due process claims because they "put forth evidence that immigration courts [were], due to the COVID-19 pandemic, struggling to manage their caseload, hold timely hearings, and consider relevant evidence." *Id.* at 287. Third, I found that petitioners had "demonstrated that the balance of equities and the public interest clearly weigh in their favor," because public health and safety is a significant public interest. *Id.* I

also considered that "[t]he Government concede[d] that the record [did] not contain any evidence that Petitioners pose[d] a risk of flight." *Id.* at 288.

c. Have any of these individual plaintiffs had immigration court proceedings scheduled since you granted their release? If so, please state whether each of those individuals has appeared or failed to appear for those immigration proceedings.

Response: There has been no indication in the record before me as to this question. The parties largely agreed to the conditions of release. Where they differed, I granted the Government's request to require electronic monitoring. Dkt. No. 28.

20. Can non-citizens, including lawful permanent residents, legally vote in federal elections?

Response: Only citizens are permitted to vote in federal elections. 18 U.S.C. § 611(a).

21. In 2020, you considered a lawsuit in which plaintiffs alleged that New York's voting laws unconstitutionally burden voting by removing voters from the active status list if the state believed that the voter had moved, and by requiring inactive voters to use an affidavit ballot to vote. You concluded that "the former practice violates the Equal Protection Clause because it burdens all New York voters but serves no legitimate state interest. The latter practice does not violate the Constitution, however, because it advances several legitimate interests." You ordered the defendants "to provide the names of inactive voters registered to vote in a particular election district to the poll workers of that election district."

a. Please explain your reasoning for the conclusion that removing voters who had moved from the active voter list is an Equal Protection Clause violation.

Response: I did not conclude that removing voters who had moved from the active voter list is an Equal Protection Clause violation.

Following a bench trial, in *Common Cause/New York v. Brehm*, I found that tens of thousands of New Yorkers were wrongly placed on the inactive voter list. 432 F. Supp. 3d 285 (2020). I further found that by not providing inactive voter lists to polling locations, many individuals were not provided the opportunity to cast an affidavit ballot at the proper location. I held that New York's refusal to provide the inactive list at polling locations burdened voters and advanced no state interest and therefore violated the Fourteenth Amendment. *Id.* at 310–11. The narrow remedy for the violation was that individual polling places were required to maintain both active and inactive voter lists. *Id.* at 314–15. Consistent with federal law, if someone attempted to vote at a polling location where they were on the inactive voter list, they would be offered an affidavit ballot and would not be permitted to vote by regular ballot. *Id.* at 315. I rejected the plaintiffs' claim that requiring the use of affidavit

ballots for voters on the inactive voter list constituted a constitutional violation. *Id.* at 315–16.

b. Under your reasoning, under what circumstances can a state government remove the names of individuals who no longer live in that state from its active voter list?

Response: The issue posed in this question—under what circumstances can a state government remove the names of individuals who no longer live in that state from its active voter list—was not presented to me in this case. As I held in the Opinion following the bench trial in this case, "[t]hough states enact vastly different rules governing elections, one thread is common: all states require voters to vote in the election district in which they reside. Our system of representative democracy is predicated on this rule; only those who reside in a geographic area should be able to choose its representatives." 432 F. Supp. 3d 285, 287 (2020). If this question came before me in the future, I would faithfully and impartially apply Supreme Court and Second Circuit precedent.

22. Is it be appropriate for the court to provide its employees trainings which include the following:

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

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

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

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

Response: No. Nor am I aware of any trainings of the nature described. To my knowledge, the judges of the Second Circuit are not involved in evaluating or selecting training programs for court employees. If I am confirmed to the Second Circuit and am asked to participate in evaluating training programs, I would assess the program's teachings based on its constitutionality based on binding precedent of the Supreme Court and the Second Circuit.

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

Response: Yes. Please see my answer to Question 22.

24. Is the criminal justice system systemically racist?

Response: This question implicates policy questions for policy makers. As a sitting judge and nominee to the Second Circuit, it is my duty to adjudicate individual claims, some of which include claims of race discrimination. When I do so, I consider Supreme Court and Second Circuit precedent as well as the established facts of a particular case.

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

Response: The President has the power, with the advice and consent of the Senate, to make certain political appointments in the federal government. U.S. Const. art. II, § 2, cl. 2. The Supreme Court has generally held that under the Due Process Clause of the Fifth Amendment, the federal government is subject to the same antidiscrimination provisions of the Equal Protection Clause of the Fourteenth Amendment that apply to state actors. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). As to your specific question, if this issue were to be presented in a case before me, I would faithfully apply Supreme Court and Second Circuit precedent.

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

Response: As a District Court Judge, it would be inappropriate for me to comment on whether the size of the Court should be expanded. I am bound by the Supreme Court's precedent regardless of its size.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms."

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

Response: To my knowledge, neither the Supreme Court nor the Second Circuit has concluded that the right to own a firearm receives any less protection than another individual right specifically enumerated in the Constitution. As a judge, I must faithfully apply the right on its own terms and follow any binding authority.

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

Response: Please see my answer to Question 28.

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

Response: The Constitution vests the President with the "executive Power" and states that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. As a general matter, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). Further, "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). If presented with a case that challenges the executive's refusal to enforce a law, I would apply these and other binding authorities to the record presented.

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

Response: The Supreme Court has found that "'substantive rule' is not defined in the [Administrative Procedure Act]," and that "a substantive rule" is one that "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). Courts are still interpreting what administrative conduct falls into the definition of substantive rulemaking. *See, e.g.*, *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). Because the distinction between an act of "prosecutorial discretion" and that of a substantive administrative rule change is currently pending in federal courts, it is inappropriate for me, as an active judge, to comment on this issue.

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

Response: Congress passed the Federal Death Penalty Act, which states that a defendant found guilty of a death-eligible offense "shall be sentenced to death if, after consideration of the factors set forth in" the Act, "it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense." 18 U.S.C. § 3591(a). The Second Circuit has held that the Federal Death Penalty Act was within Congress's Article I powers under the Constitution. *United States v. Aquart*, 912 F.3d 1 (2d Cir. 2018). The Constitution does not confer on the President the authority to unilaterally abolish legislation duly passed by Congress.

33. Does a federal judge have authority to not apply the death penalty if it appropriately requested by a prosecutor?

Response: No. The ultimate question of whether to impose the death penalty would be decided by a jury in the penalty phase. 18 U.S.C. §§ 3593–94.

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated the District Court for the District of Columbia's stay of its judgment vacating a nationwide eviction moratorium for certain residential rental properties imposed by the Director of the Centers for Disease

Control and Prevention (CDC) in response to the COVID-19 pandemic. In other words, the Court rendered the district court's judgment enforceable. The Court determined that the statute on which the CDC relied—Section 361(a) of the Public Health Service Act, 58 Stat. 703, as amended, 42 U.S.C. § 264(a)—did not grant it authority to impose the moratorium. *Id.* at 2486.

Senator Josh Hawley
Questions for the Record

Alison Nathan
Nominee, U.S. Court of Appeals for the Second Circuit

1. **Last year, the Supreme Court in *Roman Catholic Diocese* v. *Cuomo* enjoined what it described as a "very severe" regulation that was "targeting" specific religions—namely, Catholics and Orthodox Jews. The regulation prohibited religious gatherings of more than 10 people in a place of worship with a capacity of 1,000 people but allowed individuals to congregate together for secular purposes. When evaluating future claims under the Free Exercise Clause, how will the fact that New York has a pattern of discrimination against Catholic and Jewish Americans factor into your decision?**

   Response: As a District Court Judge, it is inappropriate for me to comment on how I may rule on an issue that could come before me. If the issue were to be presented in a case before me, I would faithfully apply Supreme Court and Second Circuit precedent, including *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

   I understand that in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court held that the religious entity-applicants were entitled to a preliminary injunction. The Court first concluded that the applicants "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* Applying "strict scrutiny," the Court concluded that it was "hard to see how the challenged regulations [could] be regarded as 'narrowly tailored.'" *Id.* at 66–67. Next, the Court determined that the challenged restrictions would cause irreparable harm and that it had "not been shown that granting the applications [would] harm the public." *Id.* at 68. Accordingly, the Court held that "enforcement of the [New York] Governor's severe restrictions on the applicants' religious services must be enjoined." *Id.* at 69.

2. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**
   a. **Do you agree with that philosophy?**

      Response: No. A judge's role is not to do what they personally think is right but to faithfully and impartially apply the law.

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

      Response: The judicial oath requires judges to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States."

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

Response: The *Pullman* abstention doctrine addresses the situation in which a state action is challenged in federal court as contrary to the U.S. Constitution. When such a case presents an unsettled issue of state law that would be dispositive, and thus would avoid the need for deciding the federal constitutional question presented, the federal court should refrain from deciding the case. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–501 (1941). The Second Circuit has instructed that abstention under this doctrine is appropriate "when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)). The Second Circuit has cautioned, however, that abstention is "not required," and "to the contrary, 'important federal rights can outweigh the interests underlying the *Pullman* doctrine.'" *Id.* The court of appeals reviews a district court's decision to abstain under the *Pullman* doctrine "for abuse of discretion, although the abuse of discretion inquiry is somewhat more searching in the abstention context." *Id.* at 90.

The *Burford* abstention doctrine instructs that:

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

Liberty Mut. Ins. Co. v. Hurlbut, 585 F.3d 639, 649–50 (2d Cir. 2009) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 361 (1989)); *see also Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). The Second Circuit has identified three factors for courts "to consider in connection with the determination of whether federal court review would work a disruption of a state's purpose to establish a coherent public policy on a matter involving substantial concern to the public": "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co.*, 585 F.3d at 650. Like abstention pursuant to the *Pullman* doctrine, the court of appeals reviews a district court's invocation of *Burford* for abuse of discretion. *Hartford Courant Co.*, 380 F.3d at 90.

The *Younger* doctrine "forbids federal courts from enjoining ongoing state proceedings." *Id.* at 100 (citing *Younger v. Harris,* 401 U.S. 37, 91 (1971)). The Second Circuit has

explained that abstention is "mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Id.* at 100–01 (quoting *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003). Abstention pursuant to this doctrine is reviewed *de novo,* "because it implicates the court's subject matter jurisdiction." *Id.* at 90.

The *Colorado River* abstention doctrine "comprises a few 'extraordinary and narrow exception[s]' to a federal court's duty to exercise its jurisdiction" when there is concurrent action in state court. *Woodford v. Cmty. Action Agency of Greene Cty.*, *Inc.*, 239 F.3d 517, 521–22 (2d Cir. 2001) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). The Second Circuit has instructed courts to consider:

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

Id. at 522 (internal citations omitted). The court of appeals reviews such abstention for abuse of discretion since "*Colorado River* abstention requires an *ad hoc* balancing of a number of factors, and the district court generally has a better seat for an overview of whether the exercise of federal jurisdiction should be postponed until after the state court litigation is completed." *De Cisneros v. Younger*, 871 F.2d 305, 307 (2d Cir. 1989).

The *Brillhart/Wilton* abstention doctrine applies when a plaintiff seeks "purely declaratory relief" and there is a parallel, pending state-court action. *Kanciper v. Suffolk Cty. Soc. for the Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013); *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995). The Second Circuit has enumerated five factors to consider: "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; "(2) whether a judgment would finalize the controversy and offer relief from uncertainty"; (3) "whether the proposed remedy is being used merely for procedural fencing or a race to res judicata," (4) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court," and (5) "whether there is a better or more effective remedy." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 105 (2d Cir. 2012) (internal quotation marks omitted). Abstention pursuant to this doctrine is reviewed for abuse of discretion. *Id.* at 104.

Finally, the *Rooker-Feldman* doctrine prohibits federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments

rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The Second Circuit

> has articulated four requirements that must be met for *Rooker-Feldman* to apply: (1) the federal-court plaintiff must have lost in state court[;] (2) the plaintiff must complain of injuries caused by a state-court judgment[;] (3) the plaintiff must invite district court review and rejection of that judgment[;] and (4) the state-court judgment must have been rendered before the district court proceedings commenced.

Dorce v. City of New York, 2 F.4th 82, 101 (2d Cir. 2021) (internal quotation marks omitted). Like the *Younger* abstention doctrine, the Second Circuit reviews a district court's determination not to abstain under this doctrine *de novo,* "because it implicates the court's subject matter jurisdiction." *Hartford Courant Co.*, 380 F.3d at 90.

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

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

a. If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.

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

Response: As a judge, I am bound by the tests and frameworks directed by the Supreme Court in considering constitutional issues—even those of first impression. Although the Supreme Court has not decided every constitutional question, it has provided guidance for most constitutional provisions, relying on the original public meaning of the Constitution for some. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). When considering the provisions in which the Court has previously relied on the original public meaning, I would be bound to similarly resolve the issue based on that precedent.

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

Response: If a federal statutory provision had been previously interpreted by the United States Supreme Court or the Second Circuit, that interpretation would be binding precedent. If there is no binding precedent, I first consider the text of the statute, because it is "the authoritative statement . . . , not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If the text is ambiguous or the statutory scheme is incoherent or

inconsistent, I would then employ other tools of statutory construction, such as the canons of construction. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Only if the first steps don't resolve the issue would I "resort to other interpretive aids (like legislative history)." *Id.*

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The Supreme Court has held that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984). On the other hand, the Supreme Court has cautioned against reliance on other forms of legislative history. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

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

Response: Never.

7. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court held that a successful challenge to an execution protocol under the Eighth Amendment follows several steps. First, the petitioner must show "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n. 9 (1994)). Second, the petitioner must proffer an alternative procedure that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 51. Last, "[i]f a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* That framework controls in all cases that challenge an execution protocol. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019).

8. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available

alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?

Response: The Supreme Court held in *Glossip v. Gross*, 576 U.S. 863, 878–79 (2015), that a petitioner is required to establish a "known and available alternative method of execution" and that the alternative method presents less risk of "severe pain and suffering." The Supreme Court reaffirmed these requirements of an Eighth Amendment challenge to an execution protocol in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125–26 (2019).

9. **Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

Response: The Supreme Court in *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009), held that the Due Process Clause does not confer a right to access DNA evidence for testing to a habeas corpus petitioner. The Second Circuit is bound to follow *Osborne*, including its holding that there is "no freestanding substantive due process right to DNA evidence." *Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015).

10. **Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

Response: I have no doubt.

11. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

Response: I understand this question to be asking about state, rather than federal, governmental action. The Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment)). If a law is either not neutral or is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The Supreme Court has provided significant guidance on whether a law is neutral and generally applicable. For example, a law that appears neutral on its face

is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Id.* at 533. A law also may not be neutral if it is enforced in a selective manner that discriminates against religious views. *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951). Similarly, a law may not be neutral if statements made by officials at a public meeting demonstrate that the law's enforcement was motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has held that a law may not be generally applicable if it provides a mechanism for individual exemptions or if the law prohibits certain religious conduct while permitting secular conduct that implicates the same governmental interests. *E.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Additionally, the Supreme Court has held that the Free Exercise Clause prohibits enforcement of certain employment laws in a manner that would interfere with a religious institution's employment of individuals involved in religious training. *E.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

12. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my above answer to Question 11, which discusses binding authorities to determine whether a law is not neutral but instead discriminates against a religious group or religious belief.

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

Response: The Supreme Court has stated that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). As a consequence, an individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–34 (1989). Following the Supreme Court, the Second Circuit has held that a district court errs if it looks beyond whether an individual's religious belief is sincerely held to consider whether the individual's interpretation of religious doctrine is correct. *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003).

14. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. **What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." Based on that interpretation of the right, the Court further held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

b. **Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.**

Response: No.

15. **Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).**
    a. **What do you believe Justice Holmes meant by that statement, and do you agree with it?**

    Response: I believe this statement supported Justice Holmes's argument that the Fourteenth Amendment did not adopt the particular economic theory endorsed by the majority opinion. As Justice Holmes noted in his dissenting opinion, "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

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

    Response: As a United States District Judge, I am bound to follow binding United States Supreme Court precedent. I understand the Supreme Court abrogated much of *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded."

16. **Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?**
    a. **If so, what are they?**
    b. **With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?**

Response: I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court but that are no longer good law. I commit to faithfully apply all Supreme Court precedents as decided. Only the Supreme Court may overrule one of its prior cases.

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

a. Do you agree with Judge Learned Hand?

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

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

Response: A decision of the Second Circuit is binding on courts in that circuit until it is overruled by the Supreme Court or an en banc panel of the Second Circuit. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). To my knowledge, *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), has not been overruled and I am therefore bound to apply its holding regardless of my personal views. If presented with such a case, I would also consider relevant decisions of the Supreme Court. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), for example, the Supreme Court stated that Kodak's control of "80% to 95% of the service market, with no readily available substitutes, is . . . sufficient to survive summary judgment under the more stringent monopoly standard of § 2" of the Sherman Act. The Court cited in support of this statement two of its prior cases, which held that "87% of the market is a monopoly" and that "over two-thirds of the market is a monopoly." *Id.* (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), and *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

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

Response: The Supreme Court has explained that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). Indeed, the Supreme Court has stated, "there is 'no federal general common law.'" *Id.* (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Accordingly, there are "only limited areas . . . in which federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." *Id.* In these areas, the Court has explained, "federal common law often plays an important role." *Id.* The Court has cautioned that claiming a new area to federal common law is subject to "strict conditions," such as

whether it is "necessary to protect uniquely federal interests." *Id.* (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

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

Response: The Supreme Court has instructed that federal courts must defer to the decisions of the highest court in the state whose constitution the federal court is interpreting. *See Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938). Accordingly, I would consider decisions of the highest court in the state whose constitution I am interpreting in determining the scope of the state constitutional right at issue.

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

Response: Federal constitutional provisions must be interpreted in accordance with Supreme Court and Second Circuit precedent and consistent with Supreme Court and Second Circuit interpretive precedent. With respect to state constitutional provisions, "the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: The United States Constitution is "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. An important feature of our federalist system of government is that states may provide greater protections than those enshrined in the federal Constitution, but all states are bound by the provisions of the U.S. Constitution.

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

Response: I have a duty to faithfully follow all Supreme Court precedents. As a District Court Judge, it is inappropriate for me to comment on the merits or demerits of any cases that may come before me. Refraining from such comments is consistent both with the positions of prior judicial nominees and with the Code of Conduct for United States Judges. Prior judicial nominees have, however, identified cases that are so foundational to our judicial system and so unlikely to be the subject of controversy that a sitting judge may comment on them without risking the appearance of prejudging a future case. I will therefore state that *Brown v. Board of Education* was rightly decided.

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

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

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

Response: As a United States District Judge, I am bound to follow binding Supreme Court and Second Circuit precedent. Generally, the Supreme Court has instructed that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and that any such relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). As the Second Circuit has observed, "[t]he issuance of nationwide injunctions has been the subject of increasing scrutiny in recent years." *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 87 (2d Cir. 2020), *cert. granted sub nom.*, 141 S. Ct. 1370 (2021), *and cert. dismissed sub nom.*, 141 S. Ct. 1292 (2021). The Second Circuit has instructed: "We have no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree that such injunctions may be an appropriate remedy in certain circumstances." *Id.* at 88. In some cases, a court's authority to issue an injunction with nationwide scope may derive from a specific statute like the Administrative Procedure Act. *Id.* at 87 (citing *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). However, the Second Circuit cautioned against issuing an injunction with nationwide scope except when circumstances necessitate it. *Id.* at 88.

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

Response: Please see my answer to Question 21.

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

Response: Federalism is based upon the principle of sharing governing power between national and state governments. It is a bedrock principle of our constitutional system designed to protect individuals. *See New York v. United States*, 505 U.S. 144, 181 (1992). Like the separation of powers within the federal government, "a healthy balance of power between the States and the Federal Government . . . reduce[s] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

Response: Please see my answer to Question 3.

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

Response: Whether a party is entitled to monetary damages or injunctive relief is a highly fact specific determination that is made based on the applicable law and the facts of the case. As a very general matter, the Supreme Court has described injunctive relief as an "extraordinary remedy." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Whether an injunction is warranted in any particular case depends on a variety of factors, including "irreparable injury and inadequacy of legal remedies." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987).

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

Response: The Supreme Court has held that the Constitution protects rights that are not expressly enumerated in the Constitution. In particular, the Court has held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted). The Court has determined that the "'liberty' specially protected by the Due Process Clause," *id.* at 720, includes the rights to marry, *see Loving v. Virginia,* 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy and use of contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to terminate a pregnancy under certain circumstances, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and a right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999). If confirmed as a Circuit Judge, I must follow this and other Supreme Court precedent articulating rights not expressly enumerated in the Constitution.

27. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: In *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020), the Supreme Court recognized that the First Amendment's free exercise "guarantee lies at the heart of our pluralistic society."

The Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment)). If a law is either not neutral or is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). The Supreme Court has provided significant guidance on whether a law is neutral and generally applicable. For example, a law that appears neutral on its face is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Id.* at 533. A law also may not be neutral if it is enforced in a selective manner that discriminates against religious views. *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951). Similarly, a law may not be neutral if statements made by officials at a public meeting demonstrate that the law's enforcement was motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has held that a law may not be generally applicable if it provides a mechanism for individual exemptions or if the law prohibits certain religious conduct while permitting secular conduct that implicates the same governmental interests. *E.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Additionally, the Supreme Court has held that the Free Exercise Clause prohibits enforcement of certain employment laws in a manner that would interfere with a religious institution's employment of individuals involved in religious training. *E.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

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

Response: The Supreme Court has explained that "freedom of worship" is one aspect of the right to free exercise, which also includes a "freedom of conscience." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: The Second Circuit has held that "a substantial burden exists where the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Newdow v. Peterson*, 753 F.3d 105, 109

(2d Cir. 2014) (per curiam) (brackets and quotations omitted); *see also Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) ("Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'" (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))). As one prominent example, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691–92 (2014), held that a contraceptive mandate imposed a substantial burden on the defendant business owners because it required they choose between complying with the law in violation of their religious beliefs or pay a "very heavy" financial price if they did not comply.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: A sincerely held religious belief must be "rooted in religion" rather than "[p]urely secular." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). The Supreme Court has stated that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). As a consequence, an individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *Frazee.*, 489 U.S. at 833–34. Following the Supreme Court, the Second Circuit has held that a district court errs if it looks beyond whether an individual's religious belief is sincerely held to consider whether the individual's interpretation of religious doctrine is correct. *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003).

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

Response: The Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). For example, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), held that a contraceptive mandate imposed a substantial burden on the defendant business owners' free exercise of religion and therefore violated RFRA. "RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: I conducted a search on Westlaw that returned the following opinions that appear to be responsive to this question.

Jackson v. Stanford, No. 16-CV-9702, 2019 WL 4735353, (S.D.N.Y. Sept. 27, 2019), *reconsideration denied*, No. 16-CV-9702, 2020 WL 6822984 (S.D.N.Y. Nov. 20, 2020) (Free Exercise Clause claim)

Jackson v. Stanford, No. 16-CV-9702, 2021 WL 3781837 (S.D.N.Y. Aug. 19, 2021) (Free Exercise Clause claim)

Adam v. Barr, No. 18-CV-2106, 2019 WL 1426991 (S.D.N.Y. Mar. 29, 2019), *aff'd*, 792 F. App'x 20 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1119 (2020) (Religious Freedom Restoration Act and Free Exercise Clause claims)

Hamilton v. Dep't of Corr., No. 15-CV-4031, 2018 WL 10322880 (S.D.N.Y. Nov. 14, 2018) (Religious Land Use and Institutionalized Persons Act)

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges should separate their personal opinions about a case from the correct legal outcome based on binding precedent when the two conflict. In other words, judges should set aside their personal opinions when deciding cases.

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

Response: Yes. I have done my best to locate from my time as a practicing lawyer and academic any brief or publication in which I arguably took the position that a federal or state statue was unconstitutional or unconstitutional as applied in a particular circumstance. Citations are provided below.

a. If yes, please provide appropriate citations.

Litigation:

United States v. Meno, ARMY 2000733 (A.C.C.A. 2003).

United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

Clark v. Arizona, No. 05-5966, Brief Amicus Curiae for the American Psychological Association, the American Psychiatric Association, and the American Academy of Psychiatry and the Law Supporting Petitioner, 2006 WL 247277.

Hill v. McDonough, No. 05-8794, Brief for Amicus Curiae Walker in Support of Petitioner, 2006 WL 558286.

Baze v. Rees, No. 07-5439, Brief for the Fordham School of Law Stein Center as Amicus Curiae in Support of Petitioner, 2007 WL 3407041.

Publications (copies supplied with SJQ):

Supreme Court Preview: Baze v. Rees: What Is and Is Not at Stake in the Lethal Injection Litigation, ACSblog (Jan. 7, 2008).

Letter to the Editor, *The Truth Is That Executions Go Wrong*, Legal Times (Jan. 21, 2008).

Baze-d and Confused: What's the Deal With Lethal Injection?, 156 U. Pa. L. Rev. Pennumbra 312 (Jan. 2008) (debate with Douglas A. Berman).

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

Response: No.

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

Response: The phrase "systemically racist" likely means different things to different people. The question implicates policy questions for policy makers. As a judge, it is my duty to adjudicate individual claims, some of which include claims of race discrimination. When I do so, I consider Supreme Court and Second Circuit precedent as well as the established facts of a particular case.

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

Response: Yes.

33. How did you handle the situation?

Response: As a lawyer, my obligation was to zealously represent the interests of my client. I did not find it difficult to do so even if it required me to take a position in litigation that conflicted with my personal views.

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: As a United States District Judge, it is not appropriate for me to express my personal opinion on this question, which implicates legal, ethical, religious, and public policy matters. As a sitting judge and nominee to the Circuit, my role is to decide individual cases by faithfully applying Supreme Court and Second Circuit precedent to the facts established in a case. I would do so if any matter that comes before me were to involve this question.

37. Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.

Response: To the best of my knowledge, I have testified under oath one other time at my June 8, 2011, confirmation hearing on my nomination to the United States District Court for the Southern District of New York.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?
b. Amazon?
c. Google?
d. Facebook?
e. Twitter?

Response: The only individual shares of stock that I (or my spouse) hold are in Apple. All other assets we hold are in diversified index funds. My assets are set forth in my Financial Disclosure Report and Net Worth Statement submitted to the Committee.

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

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

Response: I never authored a brief that was filed in court without my name on it. While a practicing lawyer, I believe that I provided some comments or feedback on briefs for colleagues, but I cannot recall any specific brief that I edited that was filed in court without my name on it.

41. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: Not that I can think of.

42. Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.

Response: I understand it is my responsibility to answer all questions posed to me honestly and to the best of my ability and consistent with the Code of Conduct for Judges.

Senator Mike Lee
Questions for the Record
Alison Nathan, Nominee for the U.S. Court of Appeals for the Second Circuit

1. **During your hearing, I asked about your decision in *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms and Explosives* and why you decided to depart from the Supreme Court's finding in *Tennessee Wine and Spirits Retailers Association v. Thomas*[1], which stated that it is the "established rule" that "a later adopted provision takes precedence over an earlier, conflicting provision of equal stature." Would you please explain why you found that a later enacted statutory provision, the 2012 Tiahart Amendment, did not take precedence over the earlier, conflicting 2009 OPEN FOIA Act?**

   Response: The argument made to me by ATF was that the versions of the Tiahrt Amendment passed prior to the 2009 OPEN FOIA Act remained in effect. I concluded that this was not the case and that the earlier versions of the Tiahrt Amendment had been impliedly repealed by complete revision. The Second Circuit agreed with me. 984 F.3d 30, 37 (2d Cir. 2020) ("The district court correctly concluded that Congress impliedly repealed the Tiahrt Riders predating the OPEN FOIA Act 'by comprehensive revision.'"). Nevertheless, the Second Circuit exercised its discretion to consider an argument that ATF had not made below. *Id.* at 38 n.4 (noting that the court was permitted but not required to consider waived arguments). Namely, the Second Circuit considered the argument that the later enacted statutory provision, the 2012 Tiahrt Amendment, took precedence over the earlier, conflicting 2009 OPEN FOIA Act. Because this argument was not presented to me, I did not consider it. Instead, having rejected ATF's argument that the earlier provisions of the Tiahrt Amendment remained in effect, I found that the 2012 Tiahrt Amendment could not qualify as an Exemption 3 statute because pursuant to 5 U.S.C. § 552(b)(3)(B), "any effort by Congress after 2009 to enact legislation statutorily exempting matters from FOIA disclosure *must* include express citation" to that section. 403 F. Supp. 3d 343, 351 (S.D.N.Y. 2019). The Tiahrt Amendment, passed three years after the 2009 OPEN FOIA Act, "contains no specific citation to section 552(b)(3)," so I concluded that it did not take precedence over the 2009 OPEN FOIA Act. *Id.*

2. **Judge Menashi writing for the Second Circuit reversed your grant of summary judgment in *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms and Explosives* based on this clearly established precedent. Why did you not rely on the Supreme Court precedent in this case? Did the fact that the plaintiff was a gun control organization have any bearing on your decision?**

   Response: Please see my answer above to Question 1. Like in all cases that come before me, I did my best to faithfully and impartially apply the facts to the relevant laws and precedent as presented by the parties in the adversarial process. If the argument that was presented to the Second Circuit had been presented to me, I would have had the

[1] 139 S. Ct. 2449, 2462 (2019).

opportunity to consider it. The fact that the plaintiff was a gun control organization did not have any bearing on my decision whatsoever. On remand from the Second Circuit, I implemented the Second Circuit mandate and dismissed the case.

3. **In *Doe v. Immigration & Customs Enforcement* you held that a state common law privilege against civil courthouse arrests could be incorporated into the INA because "[the statute] provides no indication that Congress intended to abrogate the common law privilege. . . let alone an 'unmistakably clear' one." You reached this conclusion in spite of 8 U.S.C. 1229, which clearly dictates procedure for courthouse arrests. Why?**

   Response: I can only speak to my opinion in this case, as the matter is still pending before me. In my opinion denying the motion to dismiss, I discussed 8 U.S.C. § 1229(e)(1), "which . . .expressly addresses immigration and enforcement actions against aliens at courthouses," and considered the defendant's argument that the provision displaces the common law privilege. *Doe v. Immigration & Customs Enforcement*, 490 F. Supp. 3d 672, 693 (S.D.N.Y. 2020). However, I concluded that the provision "falls short of providing the clear and manifest congressional purpose necessary to supplant the common law privilege" against civil courthouse arrests. *Id.* at 692–93 ("[W]hen considering whether federal law pre-empts *state* common law, the Court is admonished to 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a *clear and manifest purpose of Congress*.'" (quoting *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316 (1981))). Persuaded by the reasoning of another district court that had considered the same question, I found that the "Section amounts to an acknowledgment that courthouse arrests were occurring and an attempt to provide those subjects to arrest with protections . . . —a far cry from the 'unmistakably clear' language necessary to abrogate the common law privilege." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Applying the Supreme Court's decision in *City of Milwaukee v. Illinois & Michigan*, I held that to read Section 1229 to override the common law protection would "turn this statutory provision . . . on its head to find in it a *clear and manifest* congressional purpose to abrogate the common law privilege against civil courthouse arrests." *Id.* at 693.

4. **How does your conclusion in *Doe v. Immigration & Customs Enforcement* compare to your approach to reading statutes?**

   Response: In all cases that come before me I do my best to carefully analyze relevant statutory text and faithfully apply relevant Supreme Court and Second Circuit precedent. In *Doe,* I applied the Supreme Court's decision in *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316 (1981), which held that in order to abrogate a common law privilege, Congress must express a clear and manifest congressional purpose.

5. **In *Doe v. Immigration & Customs Enforcement*, you seem to have ignored precedent that clearly affirms the federal government's plenary power over immigration by holding that a state common law privilege could bar federal officials from enforcing**

immigration law. What assurance can you give me that as a federal circuit judge you would uphold our nation's immigration laws?

Response: If confirmed to the Second Circuit, I will adhere to my oath: to "administer justice without respect to persons" and "faithfully and impartially discharge and perform all the duties incumbent upon me," which includes faithfully and impartially interpreting and applying our nation's immigration laws.

6. **Do states have a legitimate interest in ensuring the integrity of their voter rolls?**

Response: The Supreme Court in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2340 (2021), stated that states have a "strong and entirely legitimate . . . interest" in "the prevention of fraud" because fraudulently cast votes "dilute the right of citizens to cast ballots" and "can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."

7. **Should illegal immigrants be allowed to cast votes in state and local elections? What about federal elections?**

Response: It is prohibited for noncitizens, including immigrants that unlawfully entered or reside in the United States, to vote in federal elections. 18 U.S.C. § 611(a). I am not aware of any federal law or precedent that prohibits noncitizens from voting in state or local elections. If a case was presented to me that raised this issue, I would carefully research binding decisions of the Supreme Court and the Second Circuit, as well as consider any relevant constitutional or statutory provisions and apply that law to the record before me.

8. **It appears that during the outset of the COVID-19 pandemic you released a number of violent offenders from prisons where not a single instance of COVID-19 had been reported. Were these releases based on the "compassionate release" program or were they based on the policy issued by Attorney General Barr directing the transfer of non-violent offenders to home confinement? In either instance, did you consider the violent nature of the offense for which the inmate had been convicted before releasing him or her?**

Response: To the best of my knowledge, I have issued 35 orders resolving motions to reduce a sentence under 18 U.S.C. § 3582(a)(1)(C), which are commonly referred to as "compassionate release" motions. In 23 of those orders I denied the defendant relief entirely, in 10 I granted immediate release, and in 2 I granted the motion in part by reducing the defendant's sentence by 12 months. Under 18 U.S.C. § 3582(a)(1)(C), I am required to consider the factors listed in 18 U.S.C. § 3553(a), which include the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; and "to protect the public from further crimes of the defendant," among other factors. Therefore, whether the defendant committed a violent offense was a primary consideration in my decisions to grant or deny relief.

9. Did the inmate's vaccination status and or previous COVID-19 infection play any part in your analysis?

Response: In addition to the factors listed in 18 U.S.C. § 3553(a), a court may grant relief under 18 U.S.C. § 3582(a)(1)(C) only if the court finds that "extraordinary and compelling reasons warrant" a reduction in sentence. The Second Circuit has held that the risk of infection and serious complications resulting from COVID-19 can present such reasons. *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). Whether a defendant has been vaccinated against, or has previously been infected by COVID-19, are both important considerations in determining a defendant's vulnerability to COVID-19. *See United States v. Jones*, 17 F.4th 371 (2d Cir. 2021).

10. Did the prevalence of COVID-19 in the facility in which the inmate was imprisoned play any part in your analysis?

Response: As explained in my answer to Question 9, the Second Circuit has held that district courts may consider a variety of factors in determining whether extraordinary and compelling reasons warrant a reduction in a defendant's sentence. *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). One such factor that courts have considered in this context and under 18 U.S.C. § 3582(a)(1)(C) is the prevalence of COVID-19 in the defendant's facility. *See United States v. Jones*, 17 F.4th 371 (2d Cir. 2021).

11. In making determinations regarding violent offenders, did you consider the burden on public safety that you would be creating by releasing violent offenders from facilities where COVID-19 was essentially non-existent?

Response: As explained in my answer to Question 8, a court is required to consider the sentencing factors in 18 U.S.C. § 3553(a) in determining whether to grant or deny a motion filed under 18 U.S.C. § 3582(a)(1)(C). One factor that a court is required to consider is the need "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). As noted in my response to Question 8, whether the defendant was a danger to the public was a primary consideration in my decisions to grant or deny relief.

12. How would you describe your judicial philosophy?

Response: My role as a judge is to fulfill my judicial oath, which requires me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. My goal is to approach every case with an open mind, evaluate the facts before me, understand the parties' arguments, and consider the laws at issue in light of binding Supreme Court and Second Circuit precedent.

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

Response: As a sitting District Court Judge, I am bound by the methods of constitutional and statutory interpretation adopted by the Supreme Court and Second Circuit. If binding precedent does not resolve the question in issue, I begin with a careful analysis of the text of the provision. *Melendez v. City of New York*, 16 F.4th 992, 1011 (2d Cir. 2021) ("As always, in construing a challenged statute, we start with its text."). And "[w]here a term is undefined in a statute, 'we normally construe it [in] accord with its ordinary or natural meaning.'" *Lozano v. Alvarez*, 697 F.3d 41, 56 (2d Cir. 2012), *aff'd*, 572 U.S. 1 (2014) (quoting *Smith v. United States,* 508 U.S. 223, 228 (1993)); *see also Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). If there were ambiguity or a gap in the provision in issue, I would look to additional canons of statutory construction.

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

Response: With respect to constitutional questions, I am similarly bound by Supreme Court and Second Circuit precedent. The Supreme Court has had occasion to provide in-depth guidance on most constitutional provisions, including the applicable frameworks and tests to apply to future issues that may arise. In particular, I am mindful of the Supreme Court's originalism methodology of constitutional interpretation where it has applied it. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: I would interpret any constitutional provision applying precedent from the Supreme Court and the Second Circuit. If the provision has never been interpreted by those courts, I would look to the most analogous precedent. The Supreme Court provides guidance on how to interpret various constitutional provisions—such as by evaluating the original meaning of the words as understood by the public at the time of the founding, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (interpreting the Second Amendment), and the original intent of the Framers, *see Crawford v. Washington*, 541 U.S. 36, 53–54, 59, 61 (2004) (interpreting the Confrontation Clause).

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

Response: As a District Court Judge, I start with the statutory text. If the plain language of the statute resolves the question at hand, that it is the end of the matter.

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

Response: The Supreme Court has instructed that the "plain meaning" of a statute or constitutional provision refers to the public understanding of the relevant language at the time of enactment. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *see also McDonald v. City of Chicago*, 561 U.S. 742 (2010).

17. What are the constitutional requirements for standing?

Response: The constitutional requirements for standing derive from Article III, which states that "[t]he judicial Power of the United States" extends only to "Cases" and "Controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (quoting U.S. Const. art. III, §§ 1, 2). Standing requires that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 338.

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

Response: The scope of Congress's authority under the Constitution is the subject of significant precedent of the Supreme Court and of ongoing debate. Congress's authorities are enumerated throughout the Articles of the Constitution and in its Amendments. Article I, Section 8 lists many of Congress's powers, including the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. In interpreting that clause, the Supreme Court in *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819), stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Following this statement in *M'Culloch*, the Supreme Court has identified a number of implied powers of Congress. These include, but are not limited to, the power to create a national bank, *id.* at 425; the power to enact criminal laws, *United States v. Fox*, 95 U.S. 670, 672 (1877); the power to imprison, *United States v. Comstock*, 560 U.S. 126, 129–30, 146 (2010); the power to designate treasury notes as legal tender, *The Legal Tender Cases*, 110 U.S. 421, 450 (1884); the "power to enact legislation for the effective regulation of foreign affairs," *Perez v. Brownell*, 356 U.S. 44, 57 (1958), *overruled in part on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967), and the power to require the registration of military sex offenders, *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013).

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

Response: I would first look to the evaluative methods employed by the Supreme Court and Second Circuit, and whether those courts have analyzed Congress's ability to enact the same or a substantially similar law. As a starting point, the Supreme Court has instructed 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 of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). Thus, a court must analyze whether a law is within the scope of Congress's enumerated powers, regardless of whether the law fails to reference a specific enumerated power for the basis of the law. *Id.* A court must also consider whether the law is inconsistent with any other provisions of the Constitution or binding precedent.

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

Response: The Supreme Court has held that the Constitution protects rights that are not expressly enumerated in the Constitution. In particular, the Court has held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted). The Court has determined that the "'liberty' specially protected by the Due Process Clause," *id.* at 720, includes the rights to marry, *see Loving v. Virginia,* 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters,* 268 U.S. 510 (1925); to marital privacy and use of contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952); to terminate a pregnancy under certain circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); and to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999). If confirmed as a Circuit Judge, I must follow these and other Supreme Court precedents articulating rights not expressly enumerated in the Constitution.

21. What rights are protected under substantive due process?

Response: Please see my answer to Question 20.

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

Response: The Supreme Court has recognized a distinction between these types of rights. I understand that in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated much of *Lochner v. New York*. The Court has subsequently stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). On the other hand, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992),

constitute binding Supreme Court precedent. As a District Court Judge and a pending judicial nominee, I am bound to apply binding Supreme Court precedent regarding these rights.

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

Response: The Supreme Court has read the Commerce Clause of Article I to grant Congress the power to regulate "three broad categories of activity": (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). This does not include the power to regulate "inaction," that is, the power to "compel[] individuals to *become* active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: The Supreme Court has looked to the "traditional indicia of suspectedness" in determining whether a group of people is a "suspect class." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). These "traditional indicia" include whether the group has an "immutable characteristic determined solely by the accident of birth," or if the group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*; *see also Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (considering whether the members of the class constitute a "discrete and insular minority"). The Supreme Court has concluded, for example, that race, national origin, religion, and alienage are suspect classifications. *See Graham*, 403 U.S. at 371–72; *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

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

Response: Checks and balances and separation of powers prevent the concentration of power to any single branch of government and therefore secure liberty. *See Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that . . . structural protections against abuse of power were critical to preserving liberty. Their solution to governmental power and its perils was simple: divide it." (internal quotations omitted)). The Supreme Court has also described these structures as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

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

Response: I would analyze the constitutional text and Supreme Court and Second Circuit precedent to determine whether the disputed action overstepped the constitutional boundaries of that branch. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

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

Response: Assuming that empathy as used here means any kind of feelings, or sympathies, or biases, then empathy can play no role in a judge's consideration of a case. In all cases, a judge must objectively apply binding law to the established facts of a case.

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

Response: Both are equally undesirable outcomes that judges should do their best to avoid.

29. 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: Because my role as a District Court Judge has been to consider the facts and arguments that are presented in each case before me, I have not formed any opinions about this trend or similar trends in the Supreme Court's practices.

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

Response: Judicial review is the power of the judicial branch to review the constitutionality of legislative and executive actions in the course of deciding cases and controversies. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Judicial supremacy, as I understand it, refers to the Supreme Court's position as the final arbiter on the meaning of constitutional provisions. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that although Congress has the authority to determine what legislation should be enacted, the courts "retain the power . . . to determine if Congress has exceeded its authority under the Constitution").

31. 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: Article VI of the Constitution provides that federal and state legislators, just like judicial officers, are bound by an oath to support the Constitution. Lawmakers are also bound to follow decisions of the United States Supreme Court when interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Based on these principles, elected officials should respect this judicial supremacy and enact laws that are consistent with the United States Constitution and the Supreme Court's interpretation thereof.

32. 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: This sentiment is important for me to keep in mind when judging because it is a reminder that my role within the three branches of government is limited to interpreting and deciding what the law is—not making policy or enforcing laws.

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

Response: Regardless of my personal views or beliefs of the precedent, I have always done my best to faithfully apply the Supreme Court and Second Circuit precedent that govern cases before me, and I would continue to do so if confirmed. If the precedent is not applicable to the case before me, I would refer to analogous precedent to extrapolate principles to reach an outcome. I have done this numerous times as a District Court Judge—drawing on similar cases and also distinguishing analogous cases to apply the correct legal principle to the facts.

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

Response: None.

35. 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 do not have a personal definition of "equity." I understand the Biden Administration definition quoted in the question as relating to policy issues for policy makers. As a judge, it is not my role to make policy. Instead, the judicial function is to decide individual cases by fully and fairly applying the law to the facts as established in the record.

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

Response: Black's Law Dictionary has two distinct definitions for these terms. It defines equity as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." *Equity*, Black's Law Dictionary (11th ed. 2019). It defines equality as "[t]he quality, state, or condition of being equal." *Equality*, Black's Law Dictionary (11th ed. 2019).

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

Response: The text of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Although the question references Question 24, I believe it is referring to Question 35. Please see my response to Question 35

38. How do you define "systemic racism?"

Response: I have not formulated a personal definition of this term. If any cases come before me involving allegations of discrimination on the basis of race, I apply relevant Supreme Court and Second Circuit law.

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

Response: Black's Law Dictionary defines critical race theory as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Critical Race Theory*, Black's Law Dictionary (11th ed. 2019)

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

Response: I do not have a definition of systemic racism and am therefore unable to distinguish the two terms.

Questions from Senator Thom Tillis for Alison Julie Nathan
Nominee to be United Stated Circuit Judge for the Second Circuit

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

   Response: Yes, a judge's personal views are irrelevant when it comes to interpreting and applying the law.

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

   Response: Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." *Judicial Activism*, Black's Law Dictionary (11th ed. 2019). Judicial activism is not appropriate and is contrary to the rule of law. Judges are required to faithfully and impartially apply the law regardless of their personal views.

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

   Response: An expectation.

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

   Response: No.

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

   Response: Yes, faithfully interpreting the law can sometimes result in an outcome that conflicts with a judge's personal views. However, the judge must set her personal views aside and faithfully and impartially apply the law in every case that comes before her.

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

   Response: No.

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

   Response: If confirmed, I would faithfully apply binding authority, including the text of the Second Amendment, the Supreme Court's decisions in *District of Columbia v. Heller*,

554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the decisions of the Second Circuit, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

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

   Response: If presented with a case that raised this question, I would carefully consider the arguments made and authorities cited by both sides to the litigation. I would of course consider binding authority from the Supreme Court and the Second Circuit, as well as applicable constitutional and statutory provisions, and apply that law to the record presented.

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

   Response: When a defendant raises a defense of qualified immunity, the court must consider (1) whether the defendant violated a statutory or constitutional right, and (2) whether that right was clearly established at the time of the challenged conduct. *Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020). "If a plaintiff fails at either step, the official is entitled to qualified immunity." *Vega v. Semple*, 963 F.3d 259, 273 (2d Cir. 2020). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)). There does not need to be "a case directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 7–8 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)).

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

    Response: As a judge, my role is to faithfully apply the qualified immunity standard as articulated in Question 9. That standard can be changed only by an act of Congress or by superseding precedent of the Supreme Court.

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

Response: Please see my answer to Question 10.

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

a. What experience do you have with copyright law?

Response: As a District Court Judge, I have presided over a wide variety of civil copyright cases. I conducted a Westlaw search that returned 73 orders that related to copyright infringement. A list of those orders is attached.

I am technically an Advisor to the American Law Institute Restatement on the Law of Copyright. However, due to the demands of my schedule as a District Court Judge, I have not yet participated in the project.

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

Response: I performed a Westlaw search, which produced the following cases that appear to respond to your request regarding the Digital Millennium Copyright Act (DMCA). *McDermott v. NYFirestore.com, Inc.*, No. 18-CV-10853 (AJN), 2020 WL 2765045 (S.D.N.Y. May 28, 2020) (denying plaintiff default judgment on its DMCA claim because it failed to allege copyright management information); *Bass v. Diversity Inc. Media*, No. 19-CV-2261 (AJN), 2020 WL 2765093 (S.D.N.Y. May 28, 2020) (granting plaintiff default judgment and damages for her DMCA claim); *Myeress v. Elite Travel Grp. USA*, No. 18-CV-340 (AJN), 2018 WL 5961424 (S.D.N.Y. Nov. 14, 2018) (granting plaintiff default judgment and damages for his DMCA claim); *Mantel v. Microsoft Corp.*, No. 16-CV-5277 (AJN), 2018 WL 1602863 (S.D.N.Y. Mar. 29, 2018) (granting defendant summary judgment on plaintiff's DMCA claim because plaintiff could not prove a valid copyright); *Aaberg v. Francesca's Collections, Inc.*, No. 17-CV-115 (AJN), 2018 WL 1583037 (S.D.N.Y. Mar. 27, 2018) (holding that plaintiffs adequately stated claims under the DMCA); *Capitol Recs., LLC v. Escape Media Grp., Inc.*, No. 12-CV-6646 (AJN), 2015 WL 1402049 (S.D.N.Y. Mar. 25, 2015) (granting plaintiff summary judgment on its DMCA claim); *Agence France Presse v. Morel*, No. 10-CV-2730 (AJN), 2015 WL 13021413 (S.D.N.Y. Mar. 23, 2015), *aff'd*, 645 F. App'x 86 (2d Cir. 2016) (awarding photographer's counsel attorneys' fees after jury award on DMCA claims exceeded $1.2 million); *Agence France Presse v. Morel*, No. 10-CV-2730 (AJN), 2014 WL 3963124 (S.D.N.Y. Aug. 13, 2014) (affirming jury verdict against defendants for over $1.2 million on DMCA claims); *Agence France Presse v. Morel*,

934 F. Supp. 2d 547 (S.D.N.Y. 2013) (granting photographer summary judgment on DMCA claims against news agencies).

c. What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?

Response: To the best of my knowledge, and after conducting a search on Westlaw, I have identified one case that I believe is responsive to this question. In *Agence France Presse v. Morel*, 934 F. Supp. 2d 547, 565 (S.D.N.Y. 2013), defendant Getty argued that it was protected from liability for copyright infringement by a safe-harbor provision for internet service providers. I concluded that under the relevant statute, an internet service provider is "an entity that, in broad terms, facilitates, supports, or enables online access or the activities of users of the internet," and that there was a genuine dispute of fact whether Getty's role of hosting images online satisfied that definition. *Id.* at 566–68. I therefore denied Getty's motion for summary judgment on that basis.

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

Response: I conducted a Westlaw search that returned 28 orders involving the First Amendment and free speech issues. A list of those orders is attached. It appears that one of these cases involved an overlap between free speech and intellectual property issues. In *Malibu Media, LLC v. Doe*, No. 15-CV-3147 (AJN), 2016 WL 5478433 (S.D.N.Y. Sept. 29, 2016), I denied a motion to quash a subpoena to identify an anonymous copyright infringer. In doing so, I observed that while the alleged infringer had not raised a First Amendment objection to the subpoena, courts in the Southern District of New York in similar cases "have held that an alleged copyright infringer's identity is not protected from disclosure" by the First Amendment. *Id.* at *2 n.2.

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

a. In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated

in the legislative history, have when deciding how to apply the law to the facts in a particular case?

Response: If presented with a case involving the Digital Millennium Copyright Act (DMCA), I would be bound Second Circuit precedent interpreting the Act. The Second Circuit has issued several opinions that interpret the DMCA's red-flag provision and the standard for willful blindness in copyright cases. *E.g.*, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *Capitol Recs., LLC v. Vimeo*, LLC, 826 F.3d 78 (2d Cir. 2016); *EMI Christian Music Grp., Inc. v. MP3tunes*, LLC, 844 F.3d 79 (2d Cir. 2016). In *Viacom*, the Second Circuit expressly considered legislative history and the traditional common law standard in its interpretation of the DMCA. 676 F.3d at 36–37. As a District Court Judge, I am bound by these decisions.

As a more general matter, in any case presenting a question of statutory interpretation, I begin with a careful analysis of the text of the provision. If the text provides an answer to the question in issue, that would be the end of the matter, and I would faithfully apply the text. If there were ambiguity or a gap in the provision in issue, I would look to additional canons of statutory construction. The Supreme Court has stated that legislative history may "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

Response: I understand this question to be asked in the context of the U.S. Copyright Office's report dated May 2020 in which the agency put forward an interpretation of the Digital Millennium Copyright Act. To my knowledge, that report was not the product of a formal adjudication or notice-and-comment rulemaking. The Supreme Court has held that agency interpretations of a statute contained in opinion letters, "policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference" when a court interprets the statute. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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

Response: The Second Circuit has stated that under the Digital Millennium Copyright Act, "actual knowledge of infringing material, awareness of facts or circumstances that make infringing activity apparent, or receipt of a takedown notice will each trigger an obligation to expeditiously remove the infringing material." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27–28 (2d Cir. 2012). If presented with a case of copyright infringement that raised the question of whether an online service provider had adequate notice to require remedial action, I would apply binding precedent of the Supreme Court and the Second Circuit.

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

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

    Response: If presented with a case that implicates the Digital Millennium Copyright Act, I would apply the statute by its terms, consistent with the binding precedent of the Supreme Court and the Second Circuit. The Supreme Court has instructed courts to interpret a statute "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

    b. **How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?**

    Response: If presented with a case that implicates copyright-infringing material online, I would apply any relevant statutory or regulatory provision by their terms, consistent with the binding precedent of the Supreme Court and the Second Circuit. Those precedents remain binding unless they are overruled by the Supreme Court or an en banc panel of the Second Circuit. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). The Supreme Court has previously considered changed factual circumstances, including an observation that the "Internet's prevalence and power have changed the dynamics of the national economy," in overruling one of its prior decisions. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

15. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual**

judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: As a United States District Judge and Circuit Judge nominee, it would not be appropriate for me to opine on this issue. As a District Court Judge, I faithfully apply Supreme Court and Second Circuit precedent. The Second Circuit has instructed that:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. . . . On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands . . . .

Iragorri v. United Techs. Corp., 274 F.3d 65, 71–72 (2d Cir. 2001). I would continue to faithfully apply Supreme Court and Second Circuit precedent if confirmed as a Circuit Judge.

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

Response: As a District Court Judge and Circuit Judge nominee, I faithfully apply Supreme Court and Second Circuit precedent regarding issues of venue.

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

Response: As a District Court Judge and Circuit Judge nominee, it would not be appropriate for me to comment on the conduct of other judges. As a District Court Judge, I faithfully apply and follow Supreme Court and Second Circuit precedent, the Federal Rules of Civil Procedure, and the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York.

d. If so, please explain your reasoning.

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

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

    Response: Please see response to Question 15(c).

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

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

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

    Response: Under 28 U.S.C. § 1651(a): "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Supreme Court has noted that mandamus against judges is a "drastic and extraordinary remed[y]," and "as [an] extraordinary remed[y]," it is "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947). As a District Court Judge and Circuit Judge nominee, it would not be appropriate for me to comment on the conduct of other judges.

1. TufAmerica, Inc. v. Diamond

United States District Court, S.D. New York. | September 10, 2013 | 968 F.Supp.2d 588 | 2013 WL 4830954

COPYRIGHTS - Music. Music licensee stated a claim for **copyright** **infringement** of phrase “say what” under fragmented literal similarity test.

Synopsis
Background: Copyright licensee brought action against music group alleging violations of the Copyright Act for group's sampling of six separate segments of licensee's songs. Music group moved to dismiss.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 fragmented literal similarity test applied;
2 licensee stated a claim for sampling of phrase “say what”;
3 a “drop the bomb” non-lyrical segment was not original;
4 a “drop the bomb” segment was not qualitatively or quantitatively significant;
5 licensee stated a claim for a series of five ascending chords; and
6 sequence including phrase “now I want y'all to break this down” was unoriginal.
Motion granted in part and denied in part.

...Copyrights and Intellectual Property 99VII Violations of Rights 99VII(B) **Copyright** **Infringement** 99VII(B)1 In General 99 542 Nature and Elements in...

...general. (Formerly 99k51 To establish a prima facie case of **copyright** **infringement**, a plaintiff must demonstrate: (1) ownership of a valid copyright...

...Copyrights and Intellectual Property 99VII Violations of Rights 99VII(B) **Copyright** **Infringement** 99VII(B)1 In General 99 547 Copying 99 548 k...

2. McDonald v. West

United States District Court, S.D. New York. | September 30, 2015 | 138 F.Supp.3d 448 | 2015 WL 5751197

COPYRIGHTS - Music. There was no substantial similarity between lyrics and theme of copyrighted song and allegedly infringing song.

Synopsis
Background: Musician brought action against alleged infringers of his song “Made in America,” asserting claim of **copyright** **infringement**. Defendants moved to dismiss.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 phrase “made in America,” used as title was not eligible for copyright protection;
2 musician failed to plausibly allege substantial similarity between works;
3 lyrics of the two works was not substantially similar; and
4 music of the two works was not substantially similar.
Motion granted.

...infringers of his song “Made in America,” asserting claim of **copyright** **infringement**. Defendants moved to dismiss. Holdings: The District Court, Alison J...

...Copyrights and Intellectual Property 99VII Violations of Rights 99VII(B) **Copyright** **Infringement** 99VII(B)1 In General 99 542 Nature and Elements in...

...k. In general. (Formerly 99k51 To state a claim for **copyright** **infringement**, a plaintiff must plausibly allege facts that demonstrate: (1) ownership...

3. Asia TV USA Ltd. v. Total Cable USA LLC

United States District Court, S.D. New York. | May 30, 2018 | Not Reported in Fed. Supp. | 2018 WL 2435175

In an order dated March 29, 2018, the Court granted in part and denied in part Plaintiff's motion for a preliminary injunction. Dkt. No. 141 (Opinion). Relevant here, the Court concluded that Plaintiff had not shown a likelihood of success on its **copyright infringement** claim and thus denied “the request to enjoin Defendants from #...

...Plaintiff had not shown a likelihood of success on its **copyright infringement** claim and thus denied “the request to enjoin Defendants from...

...provide sufficient evidence to demonstrate a likelihood success on its **copyright infringement** claim. The Court noted that failure in its decision to...

...that it asserts demonstrates its likelihood of success on the **copyright infringement** claim. Specifically, Plaintiff contends that “new evidence consisting of Defendant...

4. Architectural Body Research Foundation v. Reversible Destiny Foundation

United States District Court, S.D. New York. | September 28, 2018 | 335 F.Supp.3d 621 | 2018 WL 4693589

COPYRIGHTS — Jurisdiction. Artwork was in custody or control of probate court, as required for probate exception to divest district court of jurisdiction over copyright action.

Synopsis
Background: Foundation created by artist brought action against devisee of artwork under artist's will, artist's estate, and estate's executors, asserting claims for **copyright infringement**, conversion, replevin, and declaratory judgment that foundation was sole and rightful owner of conceptual work of art created by artist and her husband, who predeceased her. Defendants moved to dismiss for lack of subject-matter jurisdiction.
Holdings: The District Court, Alison J. Nathan, J., adopted the opinion of Barbara Moses, United States Magistrate Judge, and held that:
1 estate lacked capacity to sue or be sued;
2 facial defects in foundation's **copyright infringement** claim were not jurisdictional;
3 artwork was in custody or control of state probate court, as required for probate exception to divest district court of jurisdiction;
4 foundation's conversion and replevin claims sought to dispose of property within custody or control of state probate court, and thus probate exception divested district court over such claims;
5 foundation's declaratory judgment claim sought to dispose of property within custody or control of state probate court, and thus probate exception divested district court of its jurisdiction over that claim; and
6 foundation's **copyright infringement** claims would similarly require adjudication of foundation's claim to ownership of property that was under control of state probate court, and thus probate exception divested district court of jurisdiction over infringement claims.
Motion granted.

...artist's will, artist's estate, and estate's executors, asserting claims for **copyright infringement**, conversion, replevin, and declaratory judgment that foundation was sole and...

...to sue or be sued; (2) facial defects in foundation's **copyright infringement** claim were not jurisdictional; (3) artwork was in custody or...

...court of its jurisdiction over that claim; and (6) foundation's **copyright infringement** claims would similarly require adjudication of foundation's claim to ownership...

5. Capitol Records, LLC v. Escape Media Group, Inc.

United States District Court, S.D. New York. | March 25, 2015 | Not Reported in F.Supp.3d | 2015 WL 1402049

Before the Court is the report and recommendation (“Report” or “R & R”) of Magistrate Judge Sarah Netburn dated May 28, 2014, Dkt. No. 90, regarding Plaintiff EMI Music North America (“EMI”)'s motion for summary judgment. EMI moved for summary judgment as to its First and Sixth Claims for federal and common law **copyright infringement**. By...

...its First and Sixth Claims for federal and common law **copyright infringement**. By stipulation, Defendant Escape Media Group, Inc. (“Escape”) conceded liability...

...of reproduction, but granting the motion as to its remaining **copyright infringement** claims and as to Escape's affirmative defenses under the Digital...

...strike the Kowalski Declaration under Rule 37(c)(1). B. **Copyright Infringement** With one minor exception, Escape does not make any specific...

6. Agence France Presse v. Morel

United States District Court, S.D. New York. | January 14, 2013 | 934 F.Supp.2d 547 | 2013 WL 146035

E-COMMERCE - Intellectual Property. News service did not have a license to use photographs in website's news feed under website's terms of service.

Synopsis
Background: News service brought action against photojournalist, seeking declaration that news service had not infringed photojournalist's copyrights in certain photographs and alleging commercial defamation. Photojournalist counterclaimed against news service, international distributor of photographs, and newspaper company, asserting willful infringement of his copyrights, and that news service and distributor were secondarily liable for infringement of others and violated Digital Millennium Copyright Act (DMCA). Cross-motions for summary judgment were filed.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 news service did not have license to use photographs in website's news feed under website's terms of service;
2 fact issues precluded summary judgment on whether distributor was entitled to benefit of safe harbor under DMCA;
3 fact issues precluded summary judgment on photojournalist's claim against news service for willful **copyright infringement**;
4 fact issues precluded summary judgment on photojournalist's claim for contributory **copyright infringement** against news service and distributor;
5 fact issues precluded summary judgment on photojournalist's claim for vicarious liability against distributor; and
6 fact issues precluded summary judgment on photojournalist's DMCA claims against news service and distributor.
Defendant's motion granted in part; Plaintiff's motion denied.

...summary judgment on photojournalist's claim against news service for willful **copyright infringement**; (4) fact issues precluded summary judgment on photojournalist's claim for contributory **copyright infringement** against news service and distributor; (5) fact issues precluded...

...the scope of the license is at issue in a **copyright infringement** action, the copyright owner bears the burden of proving that...

...Service providers. (Formerly 99k75 A " service provider " under the Online **Copyright** **Infringement** Liability Limitation Act (OCILLA) is an entity engaged in facilitating...

7. Oyewole v. Ora

United States District Court, S.D. New York. | March 08, 2018 | 291 F.Supp.3d 422 | 2018 WL 1276838

COPYRIGHTS — Fair Use. The use of a phrase in two songs by a rapper and a pop singer respectively qualified as fair use in **copyright** **infringement** action.

Synopsis
Background: Founding member of spoken word group brought action against pop singer and various individuals, and entities who performed, composed, produced, published, or distributed a rapper and a pop singer's songs for alleged **copyright** **infringement**. Singer and defendants moved to dismiss.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 member did not show that he effected sufficient service of process on music services companies;
2 good cause for failure to serve process on companies did not exist so as to warrant an extension;
3 the use of the phrase "party and bullshit" was sufficiently transformative so as to support a finding of fair use; and
4 the use of the phrase "party and bullshit" qualified as fair use.
Motion granted.

...distributed a rapper and a pop singer's songs for alleged **copyright** **infringement**. Singer and defendants moved to dismiss. Holdings: The District Court...

...effected sufficient service of process on music services companies in **copyright** **infringement** action arising from the alleged infringement of group's song by...

...founding member of spoken word group did not exist in **copyright** **infringement** action arising from the alleged infringement of group's song by...

8. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | January 24, 2019 | 329 F.R.D. 518 | 2019 WL 340712

COPYRIGHTS — Discovery. Expedited discovery was warranted to subpoena third-party Internet service provider (ISP).

Synopsis
Background: In **copyright** **infringement** action, adult film website owner moved, ex parte, to serve third party subpoena on Internet service provider (ISP) to ascertain identity of alleged infringer.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 owner made out prima facie claim of **copyright** **infringement**;
2 discovery request was sufficiently specific;
3 owner lacked alternative means of obtaining information sought in subpoena;
4 absent ability to subpoena third-party, owner would be unable to continue litigation; but
5 protective order would issue, given risk of false positive identification of John Doe.
Motion granted.

...Signed 01/23/2019 Filed 01/24/2019 Background: In **copyright** **infringement** action, adult film website owner moved, ex parte, to serve...

...held that: (1) owner made out prima facie claim of **copyright** **infringement**; (2) discovery request was sufficiently specific; (3) owner lacked alternative...

...Copyrights and Intellectual Property 99VII Violations of Rights 99VII(B) **Copyright** **Infringement** 99VII(B)1 In General 99 542 Nature and Elements in...

9. Chiykowski v. Goldner

United States District Court, S.D. New York. | May 31, 2020 | Slip Copy | 2020 WL 2834225

Plaintiff Peter Chiykowski, a visual artist, comics illustrator, and an author of songs, short stories, webcomics, and comic books and strips, brings this suit against Defendants Marc Goldner and two limited liability companies of which Goldner is an officer and member, Golden Bell Entertainment, LLC and Golden Bell Studios, LLC, alleging **copyright**...

...Golden Bell Entertainment, LLC and Golden Bell Studios, LLC, alleging **copyright** **infringement**, fraudulent inducement, and breach of contract claims, and seeking a...

...Before the Court is Defendants' partial motion to dismiss the **copyright** **infringement** and declaratory judgment claims for failure to state a claim...

...claims asserted by Plaintiff in his Second Amended Complaint for **copyright** **infringement** and a declaratory judgment respectively. For the following reasons, Defendants' motion is denied. A. **Copyright** **Infringement** Claim Defendants argue that Plaintiff has failed to adequately allege each element of his **copyright** **infringement** claim. The Court disagrees. To state a **copyright** **infringement**...

10. TufAmerica, Inc. v. Diamond

United States District Court, S.D. New York. | March 24, 2015 | Not Reported in Fed. Supp. | 2015 WL 10846075

Plaintiff TufAmerica, Inc. ("TufAmerica") brings this **copyright** **infringement** action against Defendants Michael Diamond, Adam Horovitz, and Adam Yauch (the "Beastie Boys Defendants"), as well as Universal–Polygram International Publishing, Inc. and Capital Records, LLC (the "UMG Defendants," and,...

...J. NATHAN , District Judge Plaintiff TufAmerica, Inc. ("TufAmerica") brings this **copyright** **infringement** action against Defendants Michael Diamond, Adam Horovitz, and Adam Yauch...

...judgment as to TufAmerica's remaining First and Fifth Claims for **copyright** **infringement** of the pre–1990 sound recordings and compositions for the...

...are focused on whether TufAmerica has standing to bring this **copyright** **infringement** action in the first place. For the reasons discussed below...

11. Yang v. Mic Network, Inc.

United States District Court, S.D. New York. | September 24, 2019 | 405 F.Supp.3d 537 | 2019 WL 4640263

COPYRIGHTS — Fair Use. Screenshot of news story containing licensed photograph, posted in online article satirizing the news story, was fair use of photograph.

Synopsis
Background: Photographer brought action against online publisher, asserting claim for **copyright** **infringement** arising from publisher's alleged unauthorized use of a licensed photograph. Publisher moved to dismiss.

Holding: The District Court, Alison J. Nathan, J., held that defendant's use of the photograph was fair, and thus not infringing.
Motion granted.

...Background: Photographer brought action against online publisher, asserting claim for **copyright infringement** arising from publisher's alleged unauthorized use of a licensed photograph...

...Formerly 99k53.2 Ultimate test of fair use as defense to **copyright infringement** is whether the copyright law's goal of promoting the progress...

...use. (Formerly 99k83(1) Fair use is an affirmative defense to **copyright infringement**, and therefore the defendant bears the burden of showing that...

12. Prestige Global Company Ltd. v. L.A. Printex Industries, Inc.

United States District Court, S.D. New York. | March 12, 2014 | Not Reported in Fed. Supp. | 2014 WL 12783273

This action arises out of a settlement agreement (the “Settlement Agreement”) in a previous litigation before Judge Batts, Prestige Global Co. v. L.A. Printex Industries, Inc., 11-cv-02880 (the “Batts Litigation”). Prestige Global Company (“Prestige”) and Family Dollar Stores, Inc. (“FDS”) have filed...

...claims for declaratory relief as to L.A. Printex's claims for **copyright infringement**. (Joint Undisputed Facts ¶1 & Ex. 1). On or about...

...the copyright registration at issue is incapable of supporting the **copyright infringement** action, then PRESTIGE shall pay the lower of the above...

...the copyright registration at issue is capable of supporting the **copyright infringement** action, then PRESTIGE shall pay the higher of the above...

13. Agence France Presse v. Morel

United States District Court, S.D. New York. | August 13, 2014 | Not Reported in F.Supp.3d | 2014 WL 3963124

On November 22, 2013, following trial, a jury found that Agence France Presse (“AFP”) and Getty Images (US), Inc. (“Getty,” and together with AFP, “Defendants”) had willfully infringed Daniel Morel's copyright in eight photographs taken in the aftermath of the January 2010 Haiti earthquake. The jury awarded Morel $303,889.77 in actual damages and...

...the eight photographs, 2 Morel filed counterclaims against AFP for **copyright infringement** and violations of the DMCA and the Lanham Act, and...

...of which had asserted any other defenses, were liable for **copyright infringement**. The Court also held that genuine issues of material fact precluded judgment on (1) Getty's remaining defenses against **copyright infringement**; (2) whether Defendants' **copyright infringement** was “willful” so as to trigger enhanced statutory damages under...

...578 On reconsideration, the Court clarified that Defendants' liability for **copyright infringement** was joint and several, and that Morel could therefore prove...

14. American Broadcasting Companies, Inc. v. AEREO, Inc.

United States District Court, S.D. New York. | July 11, 2012 | 874 F.Supp.2d 373 | 2012 WL 2848158

COPYRIGHTS - Internet. There was no likelihood of success on a **copyright infringement** claim against a provider of “live” internet broadcasts.

Synopsis
Background: Holders of copyrights to broadcast television programs sued a provider of “live” internet broadcasts, alleging, inter alia, **copyright infringement**. Plaintiffs moved for a preliminary injunction.
Holding: The District Court, Alison J. Nathan, J., held that plaintiffs failed to show a likelihood of success, and although they demonstrated that they faced irreparable harm, they did not demonstrate that the balance of hardships decidedly tipped in their favor.
Motion denied.

...sued a provider of “live” internet broadcasts, alleging, inter alia, **copyright infringement**. Plaintiffs moved for a preliminary injunction. Holding: The District...

...Injunctive Relief 99 1124 Particular Subjects of Relief 99 1127 **Copyright Infringement** 99 1127(2) k. Preliminary or temporary relief. (Formerly 99k85...

...programs failed to show a likelihood of success on a **copyright infringement** claim against a provider of “live” internet broadcasts, asserting that...

15. Elohim EPF USA, Inc. v. 162 D & Y Corp.

United States District Court, S.D. New York. | June 04, 2021 | Slip Copy | 2021 WL 2292682

This **copyright infringement** action was initiated in March 2019. In November 2019, the Clerk's Office issued certificates of default against some of the defendants. Several months later, some of those defendants appeared. On September 10, 2020, Defendants Sing Sing Bell, Inc., d/b/a Christmas Karaoke; Jin E. An; M & S Music Studio, Inc., d/b/a...

...Sun. MEMORANDUM OPINION & ORDER ALISON J. NATHAN , District Judge: This **copyright infringement** action was initiated in March 2019. In November 2019, the...

...Elohim thus alleges that the Defendants are liable for direct **copyright infringement**, contributory **copyright infringement**, vicarious **copyright infringement**, and inducement of **copyright infringement**. Elohim filed its original Complaint in March 2019. Dkt. No...

...engage in public performance or display for purposes of a **copyright infringement** claim. This claim is potentially meritorious and is ultimately a...

16. Charles v. Seinfeld

United States District Court, S.D. New York. | September 30, 2019 | 410 F.Supp.3d 656 | 2019 WL 4805684

COPYRIGHTS — Radio and Television. Purported co-author's claims for **copyright infringement** and joint authorship were untimely.

Synopsis
Background: Purported co-author brought action against other co-author and others asserting claims for infringement of his copyright to treatment for television show, as well as claims for joint authorship, injunctive relief, and several state law causes of action. Defendants moved to dismiss.
Holding: The District Court, Alison J. Nathan, J., held that plaintiff's infringement and joint authorship claims were untimely.
Motion granted.

...Copyrights and Intellectual Property 99VII Violations of Rights 99VII(B) **Copyright Infringement** 99VII(B)1 In General 99 542 Nature and Elements in...

...543 k. In general. (Formerly 99k51 To successfully sue for **copyright infringement**, plaintiff must show (1) ownership of valid copyright, and (2...

...Coffee. Id. ¶¶ 1-3, 99. He brings claims for **copyright infringement** of the treatment, script, and pilot, as well as claims...

17. Digital Sin, Inc. v. Does 1-176

United States District Court, S.D. New York. | January 30, 2012 | 279 F.R.D. 239 | 2012 WL 263491

COPYRIGHTS - Internet. Expedited discovery was ordered in **copyright infringement** suit involving Internet file sharing program.

Synopsis
Background: Copyright owner brought action against John Doe users of Internet peer-to-peer (P2P) file-sharing program, alleging that users had downloaded and illegally distributed its copyrighted adult film. After Internet protocol (IP) addresses of 176 John Doe users had been obtained, plaintiff filed ex parte motion for expedited discovery to obtain mailing addresses and locations of the users from internet service provider (ISP).
Holdings: The District Court, Alison J. Nathan, J., held that:
1 good cause existed for expedited discovery, and
2 defendants' actions constituted a series of transactions or occurrences for purposes of joinder.
Ordered accordingly.

...existed for granting ex parte request for expedited discovery in **copyright infringement** suit brought by owner of adult film against John Doe...

...series of transactions or occurrences ” for purposes of joinder in **copyright infringement** suit brought by owner of adult film against 174 John...

...Sin contracted “Copyright Enforcement Group” (“CEG”), a company that discovers **copyright infringements** and arranges for enforcement (Nicolini Dec. ¶3). CEG determined...

18. Aaberg v. Francesca’s Collections, Inc.

United States District Court, S.D. New York. | March 27, 2018 | Not Reported in Fed. Supp. | 2018 WL 1583037

Plaintiffs, a group of artists who create enamel pins, bring this lawsuit against certain distributors and retailers of enamel pins they accuse of sourcing and selling “knock-offs” of the Plaintiffs' designs. Defendants O.K. Originals, Ltd. and Express, LLC move to dismiss the Second Amended Complaint for failure to state a cause of...

...allegations, Plaintiffs contend that Defendants have committed direct and contributory **copyright infringement** in violation of 17 U.S.C. §§106 and 501 (Copyright...

...3d 87, 98 (2d Cir. 2007) III.Discussion A.Direct **Copyright Infringement** Claim (First Claim for Relief) “A properly plead[ed] **copyright infringement** claim must allege 1) which specific original works are the...

...The OK-Express Defendants next criticize Plaintiffs' pleading of the **copyright infringement** claims as insufficiently specific under the pleadings standards of Federal...

19. Ace Arts, LLC v. Sony/ATV Music Pub., LLC

United States District Court, S.D. New York. | September 26, 2014 | 56 F.Supp.3d 436 | 2014 WL 4804465

INTERNATIONAL LAW - Abstention. Exceptional circumstances did not exist to justify abstention based on pending litigation in foreign court.

Synopsis
Background: Distributor of documentary that included footage from music concert brought action against holder of copyright to several songs performed at concert and music distributor, seeking declaratory judgments and alleging violation of Sherman Act, and asserting state law claims for interference with contract, interference with prospective economic relations, unfair competition, and violation of New York consumer protection statute. Defendants moved to dismiss or stay action in deference to an action previously filed in the United Kingdom, and to dismiss the amended complaint for failure to state a claim.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 exceptional circumstances did not exist to justify abstention based on pending litigation in foreign court;
2 district court was required to entertain film distributor's request for declaratory judgment;
3 film distributor failed to state a claim of violation of Sherman Act;
4 film distributor failed to state claim of tortious interference with contract;
5 film distributor failed to state claim of tortious interference with economic relations;
6 film distributor failed to state claim of unfair competition; and
7 film distributor failed to state claim under New York consumer protection statute prohibiting deceptive acts or practices.
Motions granted in part and denied in part.

...improper means without any legitimate business justification in raising its **copyright infringement** claims with film exhibitor, and that holder's claim of **copyright infringement** was meritless, were insufficient to show that holder acted solely...

...deceptive conduct of copyright holder communicating to film exhibitor its **copyright infringement** claims against film distributor was not the type of “consumer...

...used dishonest, unfair or improper means” when it raised its **copyright infringement** claims with Screenvision. Kirch, 449 F.3d at 400 Again...

20. Yang v. Mic Network, Inc.

United States District Court, S.D. New York. | November 09, 2020 | Slip Copy | 2020 WL 6562403

Plaintiff brought this action in 2018 for **copyright infringement**, alleging that Mic Network used his photograph without authorization. Defendant then moved to dismiss and, in September 2019, the Court granted that motion in full and dismissed Plaintiff's complaint with prejudice. After that decision, Plaintiff moved for reconsideration of the...

...NATHAN , District Judge: Plaintiff brought this action in 2018 for **copyright infringement**, alleging that Mic Network used his photograph without authorization. Defendant...

...¶ 13. In August 2018, Plaintiff filed this suit for **copyright infringement**. Dkt. No. 1. After Defendant moved to dismiss, Plaintiff filed...

...true, Plaintiff had failed to state a plausible claim for **copyright infringement**, as Defendant's use was transformative and thus fair for several...

21. Johnson v. Classic Material NY, LLC

United States District Court, S.D. New York. | March 25, 2021 | Slip Copy | 2021 WL 1164089

Plaintiff, a professional photographer and business owner, brings an action for direct **copyright infringement** under 17 U.S.C. § 501. The Plaintiff alleges that the Defendant printed Plaintiff's photographs on the Defendant's apparel-products and sold them without Plaintiff's consent. The Defendant has been served but failed to appear and so...

...professional photographer and business owner, brings an action for direct **copyright infringement** under 17 U.S.C. § 501 The Plaintiff alleges that the...

...on November 13, 2019, bringing claims against Defendant for direct **copyright infringement** under 17 U.S.C. § 501 Dkt. No. 1. Defendant was...

...2007) and Ashcroft v. Iqbal , 556 U.S. 662, 678 (2009) " **Copyright infringement** is established by proving 'ownership of a valid copyright' and...

22. Asia TV USA, Ltd. v. Total Cable USA LLC

United States District Court, S.D. New York. | March 29, 2018 | Not Reported in Fed. Supp. | 2018 WL 1626165

This case involves allegations by Plaintiff Asia Today USA, Ltd. ("Asia Today") that Defendants Total Cable USA LLC ("Total Cable LLC"), Lalon TV, Inc. ("Lalon TV"), Ahmodul Barobhuiya, and Habibur Rahman infringed or contributed to the infringement of ATUL's copyrights and trademarks in certain television...

...Barobhuiya, and Habibur Rahman alleging, inter alia, federal trademark and **copyright infringement** and seeking injunctive relief and damages. See Dkt. No. 1...

...to prevail on its federal trademark infringement claim, its federal **copyright infringement** claim, its contributory infringement claim, and its New York State...

...copyright owner is an infringer of the copyright "To establish [**copyright**] **infringement**, two elements must be proven: (1) ownership of a valid...

23. Agence France Presse v. Morel

United States District Court, S.D. New York. | May 21, 2013 | 934 F.Supp.2d 584 | 2013 WL 2253965

COPYRIGHTS - Damages. Copyright law entitled photojournalist to receive, at most, one award of statutory damages per work infringed.

Synopsis
Background: News service brought action against photojournalist, seeking declaration that news service had not infringed photojournalist's copyrights in certain photographs and alleging commercial defamation. Photojournalist counterclaimed against news service, international distributor of photographs, and newspaper company, asserting willful infringement of his copyrights, and that news service and distributor were secondarily liable for infringement of others and violated Digital Millennium Copyright Act (DMCA). The District Court, Alison J. Nathan, J., 934 F.Supp.2d 547, 2013 WL 146035,granted partial summary judgment to photojournalist and denied summary judgment to news service, international distributor, and newspaper company. International distributor and newspaper company moved for reconsideration.
Holding: The District Court, Alison J. Nathan, J., held that copyright law's statutory damages provision entitled photojournalist to receive, at most, one award of statutory damages per work infringed.
Ordered accordingly.

...When determining the amount of statutory damages to award for **copyright infringement**, courts consider: (1) the infringer's state of mind; (2) the...

...cases such as this, a plaintiff seeking statutory damages for **copyright infringement** may not multiply the number of per-work awards available...

...When determining the amount of statutory damages to award for **copyright infringement**, courts consider: (1) the infringer's state of mind; (2) the...

24. Tianhai Lace USA Inc. v. Forever 21, Inc.

United States District Court, S.D. New York. | September 27, 2017 | Not Reported in Fed. Supp. | 2017 WL 4712632

Plaintiff Tianhai Lace USA Inc. (“Tianhai”) filed this action on July 26, 2016 against Defendant Forever 21, Inc. (“Forever 21”) and DOES 1-10. Before the Court is Defendant's motion to transfer this case to the United States District Court for the Central District of California. Dkt. No. 17. For the reasons stated herein,...

...1115 (2d Cir. 1986) (describing the inquiry in determining if **copyright infringement** is willful). Indeed, the issue of willfulness is highly significant to a **copyright infringement** action: the maximum permissible statutory award per infringed work rises...

...are likely to be material is that a finding of **copyright infringement** requires either direct or indirect evidence of actual copying. It...

...2d at 19 In the context of unfair competition and **copyright infringement** claims, courts have at times expanded this analysis to include...

25. Agence France Presse v. Morel

United States District Court, S.D. New York. | March 23, 2015 | Not Reported in Fed. Supp. | 2015 WL 13021413

This case commenced in March 2010 when Plaintiff Agence France Presse (“AFP”) sought a declaratory judgment establishing that it did not infringe on the copyrighted photographs of the Defendant, Daniel Morel (“Morel”), a photojournalist covering the 2010 earthquake in Haiti and its tragic aftermath. See Dkt. No. 1. Shortly...

...against CBS and TBS, while denying motion to dismiss his **copyright infringement** and DMCA claims against AFP, Getty, CBS, and TBS, and...

...at 58 (granting Morel's motion for summary judgment as to **copyright infringement**, but denying it as to the scope of statutory damages...

...with further expense would, naturally, act as a deterrent to **copyright infringement**, such a punitive measure is not necessary in light of...

26. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | April 25, 2018 | Not Reported in Fed. Supp. | 2018 WL 2229124

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference.

Specifically, Strike 3 seeks to serve a subpoena on Spectrum, an Internet Service Provider (“ISP”), in order to ascertain the...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

27. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | July 19, 2018 | Not Reported in Fed. Supp. | 2018 WL 3756453

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Spectrum Time Warner Cable (“TWC”), an internet service provider...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

28. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | January 15, 2019 | Not Reported in Fed. Supp. | 2019 WL 418500

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Spectrum, an Internet Service Provider (“ISP”), in order to ascertain the...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

29. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | April 10, 2019 | Not Reported in Fed. Supp. | 2019 WL 1837447

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Spectrum, an Internet Service Provider (“ISP”), in order to ascertain the...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright** **infringement** by alleging ownership of the registered copyright and alleging unlawful...

30. Digital Sin, Inc. v. Does 1-179

United States District Court, S.D. New York. | February 01, 2012 | Not Reported in F.Supp.2d | 2012 WL 8282825

On November 16, 2011, plaintiff filed an ex parte motion seeking permission to take expedited discovery from third-party Internet Service Providers (“ISPs”) to identify the names, physical addresses, email addresses, and Media Access Control addresses of each unidentified defendant (Dkt.3). On November 29, 2011, this Court granted...

...Sin contracted “Copyright Enforcement Group” (“CEG”), a company that discovers **copyright** **infringements** and arranges for enforcement (Nicolini Dec. f 3). CEG determined...

...motion papers, the Court has become aware of several analogous **copyright** **infringement** cases from across the country finding it improper under Fed...

...cases finding joinder of so many Doe defendants improper in **copyright** **infringement** cases were distinguishable because they involved substantially more defendants from...

31. Allstar Marketing Group, LLC v. 123 Beads Store

United States District Court, S.D. New York. | September 30, 2020 | Slip Copy | 2020 WL 5836423

Before the Court is Plaintiff's motion for the entry of default judgment. For the following reasons, the Court GRANTS Plaintiff's motion as to its federal and one of its state claims, enters a permanent injunction, and awards Plaintiff statutory damages. The Court also grants Plaintiff relief under N.Y. C.P.L.R § 5222 and dissolves the...

...Act, 15 U.S.C. § 1125(a) , Compl. ¶¶ 120–128; **copyright** **infringement** of federally registered copyrights in violation of the Copyright Act...

...causes of action is warranted. 2. Default Judgment on Plaintiff's **Copyright** **Infringement** Claim Is Warranted To prevail on a claim of **copyright** **infringement**, a plaintiff must establish (1) ownership of a valid copyright...

...passing off, and unfair competition under the Lanham Act; (4) **copyright** **infringement**; and (5) common law unfair competition. Plaintiff's requests for a...

32. Allstar Marketing Group, LLC v. Bigbigdream320

United States District Court, S.D. New York. | September 30, 2020 | Slip Copy | 2020 WL 5836514

Before the Court is Plaintiff's motion for the entry of default judgment. For the following reasons, the Court GRANTS Plaintiff's motion as to its federal and one of its state claims, enters a permanent injunction, and awards Plaintiff statutory damages. The Court also grants Plaintiff relief under N.Y. C.P.L.R § 5222 and dissolves the...

...Act, 15 U.S.C. § 1125(a) , Compl. ¶¶ 70–78; **copyright** **infringement** of federally registered copyrights in violation of the Copyright Act...

...causes of action is warranted. 2. Default Judgment on Plaintiff's **Copyright Infringement** Claim Is Warranted To prevail on a claim of **copyright infringement**, a plaintiff must establish (1) ownership of a valid copyright...

...passing off, and unfair competition under the Lanham Act; (4) **copyright infringement**; and (5) common law unfair competition. Plaintiff's requests for a...

33. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | April 23, 2019 | Not Reported in Fed. Supp. | 2019 WL 1949746

Plaintiff Strike 3 Holdings, LLC ("Strike 3") now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Verizon Online LLC, an Internet Service Provider ("ISP"), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. "To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 "Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

34. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | July 09, 2019 | Not Reported in Fed. Supp. | 2019 WL 3242570

Plaintiff Strike 3 Holdings, LLC ("Strike 3") now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Verizon Online LLC, an Internet Service Provider ("ISP"), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. "To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 "Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

35. Allstar Marketing Group, LLC v. 178623

United States District Court, S.D. New York. | September 30, 2020 | Slip Copy | 2020 WL 5836512

Before the Court is Plaintiff's motion for the entry of default judgment. For the following reasons, the Court GRANTS Plaintiff's motion as to its federal and one of its state claims, enters a permanent injunction, and awards Plaintiff statutory damages. The Court also grants Plaintiff relief under N.Y. C.P.L.R § 5222 and dissolves the...

...Act, 15 U.S.C. § 1125(a) , Compl. ¶¶ 69–77; **copyright infringement** of federally registered copyrights in violation of the Copyright Act...

...causes of action is warranted. 2. Default Judgment on Plaintiff's **Copyright Infringement** Claim Is Warranted To prevail on a claim of **copyright infringement**, a plaintiff must establish (1) ownership of a valid copyright...

...passing off, and unfair competition under the Lanham Act; (4) **copyright infringement**; and (5) common law unfair competition. Plaintiff's requests for a...

36. Mattel, Inc. v. 1622758984

United States District Court, S.D. New York. | May 31, 2020 | Not Reported in Fed. Supp. | 2020 WL 2832812

Before the Court is Plaintiff's motion for the entry of default judgment. For the following reasons, the Court GRANTS Plaintiff's motion as to its federal and one of its state claims, enters a permanent injunction, and awards Plaintiff statutory damages. The Court also grants Plaintiff relief under N.Y. C.P.L.R § 5222 and dissolves the...

...Act, 15 U.S.C. § 1125(a) , Compl. ¶¶ 72–80; **copyright infringement** of federally registered copyrights in violation of the Copyright Act...

...causes of action is warranted. 2. Default Judgment on Plaintiff's **Copyright Infringement** Claim Is Warranted To prevail on a claim of **copyright infringement**, a plaintiff must establish (1) ownership of a valid copyright...

...passing off, and unfair competition under the Lanham Act; (4) **copyright infringement**; and (5) common law unfair competition. Plaintiff's requests for a...

37. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | July 16, 2019 | Slip Copy | 2019 WL 10374275

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Verizon Online LLC, an Internet Service Provider (“ISP”), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

38. Malibu Media LLC v. Doe

United States District Court, S.D. New York. | January 22, 2019 | Not Reported in Fed. Supp. | 2019 WL 280517

Plaintiff Malibu Media LLC (“Malibu”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Malibu seeks to serve a subpoena on Spectrum, an Internet Service Provider (“ISP”), in order to ascertain the identity of...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...2013) “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

39. Malibu Media LLC v. Doe

United States District Court, S.D. New York. | January 23, 2019 | Not Reported in Fed. Supp. | 2019 WL 297607

Plaintiff Malibu Media LLC ("Malibu") now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Malibu seeks to serve a subpoena on Spectrum, an Internet Service Provider ("ISP"), in order to ascertain the identity of...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. "To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...2013) "Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

40. TufAmerica Inc. v. Diamond

United States District Court, S.D. New York. | January 12, 2018 | Not Reported in Fed. Supp. | 2018 WL 401510

In the Court's July 12, 2016 Memorandum and Order granting in part and denying in part Plaintiff's motion for reconsideration, the Court called for supplemental briefing on two issues. First, in light of the Court's decision to allow reconsideration to account for the relative financial strength of the parties, the parties were asked to submit...

...24, 2015 Memorandum & Order, Dkt. No. 101. Plaintiff filed this **copyright infringement** action on May 3, 2012. Dkt. No. 1. On September...

...have gotten Avery's signed agreement back allowing us to pursue **copyright infringement** actions on his behalf. I believe that this provides the...

...While the Court never reached the merits of the substantive **copyright infringement** question, Defendants have persuasively argued that Plaintiff was not diligent...

41. Malibu Media, LLC v. John Doe Subscriber Assigned IP Address 173.68.5.86

United States District Court, S.D. New York. | May 16, 2016 | Not Reported in Fed. Supp. | 2016 WL 2894919

Plaintiff Malibu Media LLC ("Malibu") now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Malibu seeks to serve a subpoena on Verizon Internet Services, an Internet Service Provider ("ISP"), in order to ascertain...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. "To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 "Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

42. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | December 15, 2020 | Slip Copy | 2020 WL 7360471

Plaintiff Strike 3 Holdings, LLC ("Strike 3") now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(l), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Dkt. No. 6. Specifically, Plaintiff seeks to serve a subpoena on Verizon Fios, an Internet Service Provider ("ISP"), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. "To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 "Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

43. McDermott v. NYFirestore.com, Inc.

United States District Court, S.D. New York. | May 28, 2020 | Slip Copy | 2020 WL 2765045

On May 1, 2019, Plaintiff Matthew McDermott filed a motion for default judgment. See Dkt. No. 17. For the reasons that follow, the Court GRANTS in part and DENIES in part Plaintiff's motion. On November 19, 2018, Plaintiff filed a Complaint against Defendant, alleging **copyright infringement** and the removal of copyright management information by...

...November 19, 2018, Plaintiff filed a Complaint against Defendant, alleging **copyright infringement** and the removal of copyright management information by Defendant. See...

...denial without prejudice of plaintiff's request for actual damages for **copyright infringement** because plaintiff failed to submit any affidavits or other documentary...

...5 (denying without prejudice unsupported request for actual damages for **copyright infringement** with leave to renew with supporting evidence). With respect to...

44. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | February 01, 2021 | Slip Copy | 2021 WL 326214

Plaintiff Strike 3 Holdings, LLC ("Strike 3") now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Dkt. No. 7. Specifically, Plaintiff seeks to serve a subpoena on Verizon Fios, an Internet Service Provider ("ISP"), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. "To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 "Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

45. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | April 05, 2021 | Slip Copy | 2021 WL 1254559

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(l), for leave to serve a third-party subpoena prior to a Rule 26(f) conference. Dkt. No. 8. Specifically, Plaintiff seeks to serve a subpoena on Verizon Fios, an Internet Service Provider (“ISP”), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

46. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | May 26, 2021 | Slip Copy | 2021 WL 2138548

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(l), for leave to serve a third-party subpoena prior to a Rule 26(f) conference. Dkt. No. 6. Specifically, Plaintiff seeks to serve a subpoena on Verizon Fios, an Internet Service Provider (“ISP”), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

47. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | January 17, 2020 | Slip Copy | 2020 WL 264584

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(L), for leave to serve a third party subpoena prior to a Rule 26(f) conference. Specifically, Strike 3 seeks to serve a subpoena on Spectrum, an Internet Service Provider (“ISP”), in order to ascertain the...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

48. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | May 18, 2021 | Slip Copy | 2021 WL 1987383

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(l), for leave to serve a third-party subpoena prior to a Rule 26(f) conference. Dkt. No. 7. Specifically, Plaintiff seeks to serve a subpoena on Verizon Fios, an Internet Service Provider (“ISP”), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

49. Strike 3 Holdings, LLC v. Doe

United States District Court, S.D. New York. | May 12, 2021 | Slip Copy | 2021 WL 1910639

Plaintiff Strike 3 Holdings, LLC (“Strike 3”) now moves ex parte, pursuant to Federal Rule of Civil Procedure 26(d)(1), for leave to serve a third-party subpoena prior to a Rule 26(f) conference. Dkt. No. 6. Specifically, Plaintiff seeks to serve a subpoena on Verizon Fios, an Internet Service Provider (“ISP”), in order to...

...Analysis Plaintiff has made out a prima facie claim of **copyright infringement**. “To make out a prima facie case of **copyright infringement**, a party must show (1) ownership of a valid copyright...

...5 “Plaintiff has made a concrete, prima facie case of **copyright infringement** by alleging ownership of the registered copyright and alleging unlawful...

50. McGraw-Hill Companies Inc. v. Jones

United States District Court, S.D. New York. | March 12, 2014 | Not Reported in F.Supp.3d | 2014 WL 988607

Plaintiffs in this case have filed suit alleging that Defendants were involved in a scheme (the “Chop Shop”) to unlawfully purchase copies of Plaintiffs' textbooks sold abroad and re-sell them in the United States. (TAC ¶¶ 1, 3). The Third Amended Complaint asserts claims against all Defendants for direct **copyright infringement**; contributory...

...Third Amended Complaint asserts claims against all Defendants for direct **copyright infringement**; contributory **copyright infringement**; removal, alteration, and falsification of copyright management information; and trademark...

...in the Complaint as the “Dominican Defendants,” and for contributory **copyright infringement** against Griffin. Elmudesi, Letiva, and Griffin have filed a total...

...a review of the claims at issue, in cases of **copyright infringement**, the operative facts typically relate to the design, development, and...

51. Paramount Pictures Corp. v. Puzo

United States District Court, S.D. New York. | September 26, 2012 | Not Reported in F.Supp.2d | 2012 WL 4465574

Paramount Pictures Corporation (“Paramount”) initiated this action against the Estate of Mario Puzo (“the Estate”), seeking declaratory relief and damages for alleged ongoing and prospective violations of the federal Copyright Act, 17 U.S.C. § 101 et seq., and of the federal trademark laws, 15 U.S.C. §§ 1114...

...to Paramount is, of course, the ultimate issue underlying Paramount's **copyright infringement** claims and one that both parties agree is not before...

...proof of elements that make it qualitatively different from a **copyright infringement** claim. In order to demonstrate **copyright infringement**, a party must show ownership of a valid copyright and...

...the Estate's breach of contract claim distinguish it from a **copyright infringement** claim. See Forest Park, 683 F.3d at 430 "[I]f...

52. Moose Toys Pty LTD v. Addition

United States District Court, S.D. New York. | May 31, 2020 | Slip Copy | 2020 WL 2832767

Before the Court is Plaintiffs' motion for the entry of default judgment. For the following reasons, the Court GRANTS Plaintiffs' motion as to its federal and one of its state claims, enters a permanent injunction, and awards Plaintiffs statutory damages. The Court also grants Plaintiffs relief under N.Y. C.P.L.R § 5222 and...

...Act, 15 U.S.C. § 1125(a) , Compl. ¶¶ 73–81; **copyright infringement** of federally registered copyrights in violation of the Copyright Act...

...causes of action is warranted. 2. Default Judgment on Plaintiffs' **Copyright Infringement** Claim Is Warranted To prevail on a claim of **copyright infringement**, a plaintiff must establish (1) ownership of a valid copyright...

...passing off, and unfair competition under the Lanham Act; (4) **copyright infringement**; and (5) common law unfair competition. Plaintiffs' requests for a...

53. WowWee Group Ltd. v. Meirly

United States District Court, S.D. New York. | March 27, 2019 | Not Reported in Fed. Supp. | 2019 WL 1375470

Before the Court is Plaintiffs' motion for the entry of default judgment. For the following reasons, the Court will GRANT Plaintiffs' motion as to its federal and one of its state claims, enter a permanent injunction, and award Plaintiffs statutory damages. The Court declines to enter a post-judgment asset freeze. On January 26, 2018, Plaintiffs...

...Act, 15 U.S.C. §1125(a) , Compl. ¶¶69–77; **copyright infringement** of federally registered copyrights in violation of the Copyright Act...

...of action are is warranted. 2.Default Judgment on Plaintiffs' **Copyright Infringement** Claim Is Warranted To prevail on a claim of **copyright infringement**, a plaintiff must establish (1) ownership of a valid copyright...

...passing off, and unfair competition under the Lanham Act; (4) **copyright infringement**; and (5) common law unfair competition. Plaintiffs' requests for a...

54. Charles v. Seinfeld

United States District Court, S.D. New York. | February 26, 2021 | Slip Copy | 2021 WL 761851

After fending off claims that his one-time collaborator Christian Charles owned copyrights in the television show Comedians in Cars Getting Coffee, comedian Jerry Seinfeld now seeks to recoup his attorneys' fees. The Court referred Seinfeld's motion for fees to the Honorable Katharine H. Parker, who recommended it be denied. Though the Court...

...Section 507 of the Copyright Act requires a claim for **copyright infringement** to be filed within three years of the date the...

...attempt to substitute jargon for substance. Charles sued Seinfeld for **copyright infringement**. To enforce a copyright, one must own it. Feist Publ'ns...

...some other means—Charles could not maintain a claim for **copyright infringement**. The Court thus concludes that Charles lacked a reasonable legal...

55. Wnet v. Aereo, Inc.

United States District Court, S.D. New York. | May 18, 2012 | 871 F.Supp.2d 281 | 2012 WL 1850911

COPYRIGHTS - Radio and Television. State law claim for unjust enrichment was preempted by the Copyright Act.

Synopsis
Background: Producers and distributors of television programs filed suit against company which had retransmitted television signals over the Internet to its subscribers, allowing them to view live television programming, alleging violation of Copyright Act and unfair competition under New York common law. Defendant moved for judgment on the pleadings on claim for unfair competition.
Holding: The District Court, Alison J. Nathan, J., held that unfair competition claim was preempted by the Copyright Act, since it was not qualitatively different from exclusive rights within general scope of Copyright Act.
Motion granted.

...use, see, e.g., 17 U.S.C. §107 , has engaged in **copyright infringement**. See 17 U.S.C. §501(a) S.A.R.L. Louis Feraud Int'l...

...any extra elements that make it qualitatively different from a **copyright infringement** claim." Id. at 305–06. The question before the Court...

...extra element that make [the claim] qualitatively different from a **copyright infringement** claim." See Briarpatch, 373 F.3d at 305. "To determine...

56. Malibu Media, LLC v. Doe

United States District Court, S.D. New York. | September 29, 2016 | Not Reported in Fed. Supp. | 2016 WL 5478433

Plaintiff Malibu Media, LLC ("Malibu") brings this action for **copyright infringement** against a John Doe defendant ("Defendant") who to date has been identified only by his internet protocol ("IP") address. Malibu alleges that Defendant illegally copied and distributed a file containing 127 pornographic...

...Judge Plaintiff Malibu Media, LLC ("Malibu") brings this action for **copyright infringement** against a John Doe defendant ("Defendant") who to date has...

...in assessing whether expedited discovery is appropriate in an online **copyright infringement** case. See id. at 4 . Moreover, the fact that the...

...associated with an IP address not to be responsible for **copyright infringement** traceable to that IP address. Id. at 11-12 He...

57. Velvet Underground v. Andy Warhol Foundation for the Visual Arts, Inc.

United States District Court, S.D. New York. | September 07, 2012 | 890 F.Supp.2d 398 | 2012 WL 3893518

COPYRIGHTS - Art and Architecture. Image user failed to statute a justiciable claim against image creator in user's declaratory judgment action.

Synopsis
Background: Rock band that allegedly held trademark in design used on band's first album cover brought action against foundation of artist who created the design, seeking declaratory judgment that foundation did not have a copyright in the design. Foundation moved to dismiss.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 covenant not to sue issued by foundation divested court of jurisdiction;
2 assertion by foundation that it had a copyright to image was insufficient to create a case or controversy;
3 possibility that foundation would attempt to shield itself from liability on trademark claims by claiming it had a right in the image did not create a controversy;
4 assertions of economic harm were speculative and did not involve a legal right; and
5 plaintiff was not entitled to benefits of statute providing for further relief in declaratory judgment actions.
Motion granted.

...The Warhol Foundation has covenanted not to sue VU for **copyright infringement** for VU's use of the Banana Design, and now moves...

...Warhol Foundation gave VU a covenant not to sue for **copyright infringement**. See James Decl. Ex. 2 ("Covenant") at 2). In the...

...of the United States—regardless of whether said Claim for **copyright infringement** accrues before, on, or after the Effective Date and regardless...

58. TufAmerica Inc. v. Diamond

United States District Court, S.D. New York. | March 09, 2016 | Not Reported in Fed. Supp. | 2016 WL 1029553

Plaintiff filed this **copyright infringement** action on May 3, 2012. Dkt. No. 1. On September 10, 2013, the Court granted Defendants' motion to dismiss with respect to four of Plaintiff's claims. Dkt. No. 43. On March 24, 2015, the Court granted Defendants' motion for summary judgment with respect to Plaintiff's remaining claims. Dkt. No. 101....

...AND ORDER ALISON J. NATHAN , District Judge Plaintiff filed this **copyright infringement** action on May 3, 2012. Dkt. No. 1. On September...

...Copyright Act, holders of an exclusive license may sue for **copyright infringement**, while holders of a nonexclusive license may not. See Eden...

...at 8-9. The Court did not reach the substantive **copyright infringement** question in its summary judgment order, see Dkt. No. 101...

59. American Broadcasting Cos. v. Aereo Inc.

United States District Court, S.D. New York. | July 11, 2012 | Not Reported in F.Supp.2d | 2012 WL 3854042

Plaintiffs, a group of corporate entities engaged in the production, marketing, distribution, and transmission of broadcast television programs, move to enjoin Defendant AEREO, Inc., ("Aereo") from engaging in those aspects of its service that allow its users to access "live" copyrighted content over the internet. Aereo claims that its conduct does...

...a preliminary injunction, asserting that Aereo was directly liable for **copyright infringement** by publicly performing Plaintiffs' copyrighted works. 2 (3/13/12...

...Cir. 2010) “[T]o make out a prima facie case of **copyright infringement**, a party must establish ownership of a valid copyright and...

...Aereo has argued that it cannot be held liable for **copyright infringement** because it does not engage in “volitional conduct” sufficient to...

60. Bass v. Diversity Inc. Media

United States District Court, S.D. New York. | May 28, 2020 | Not Reported in Fed. Supp. | 2020 WL 2765093

On July 10, 2019, Plaintiff Gabriella Bass filed a motion for default judgment. See Dkt. No. 14. For the following reasons, the Court GRANTS Plaintiff's motion. On March 12, 2019, Plaintiff filed a Complaint against Defendant Diversity Inc. Media, alleging **copyright infringement** and the removal of copyright management information by Defendant. See...

...Plaintiff filed a Complaint against Defendant Diversity Inc. Media, alleging **copyright infringement** and the removal of copyright management information by Defendant. See...

...that Defendant willfully infringed Plaintiff's copyright. Compl. ¶ 16. Indeed, “ **[c]opyright infringement** is deemed willful by virtue of a defendant's default.” Rovio...

61. Ferrick v. Spotify USA Inc.

United States District Court, S.D. New York. | May 22, 2018 | Not Reported in Fed. Supp. | 2018 WL 2324076

A hearing was held on December 1, 2017, during which time the Court heard Plaintiffs' Motion for Final Approval of the Class Action Settlement and their Application for Award of Attorneys' Fees and Expenses and Incentive Award for Class Representatives. The Court had, on June 28, 2017, entered an Order of Preliminary Approval approving notice to...

...Dkt. No. 72 at 3. Whether Spotify's alleged conduct constitutes **copyright infringement** is “a common contention capable of classwide resolution” whose “truth...

...in the Central District of California, asserting a claim of **copyright infringement**. See Dkt. No. 72 at 2. After cross-motions to...

...would have to provide that information to pursue their own **copyright infringement** action. See Reed Elsevier, Inc. v. Muchnik , 559 U.S. 154...

62. Arista Records, LLC v. Tkach

United States District Court, S.D. New York. | June 03, 2015 | 122 F.Supp.3d 32 | 2015 WL 4743756

E-COMMERCE - Computers and Online Services. Third party internet service provider was bound by TRO and preliminary injunction covering trademarked domain name.

Synopsis
Background: In trademark infringement action involving domain name related to online music streaming service, mark owner moved to extend temporary restraining order (TRO) and preliminary injunction to cover third party internet service provider.

Holding: The District Court, Alison J. Nathan, J., held that provider was bound by TRO and preliminary injunction.
Ordered accordingly.

...Id. The Court had earlier found Escape liable for **copyright infringement** based on its operation of Grooveshark. Capitol Records, LLC v...

...Judge Griesa also found Escape and its founders liable for **copyright infringement** in the separate action. UMG Recording v. Escape Media Grp...

63. Rice v. Musee Lingerie, LLC

United States District Court, S.D. New York. | December 05, 2019 | Not Reported in Fed. Supp. | 2019 WL 6619491

On October 4, 2018, Plaintiff filed this action against Defendant alleging **copyright infringement** under 17 U.S.C. §§ 106 and 501. See Compl. ¶¶ 16-22. After a case management plan was entered, Dkt. No. 21, Defendant filed a motion requesting that the Court order Plaintiff to post a bond in order to proceed with the present...

...October 4, 2018, Plaintiff filed this action against Defendant alleging **copyright infringement** under 17 U.S.C. §§ 106 and 501 See Compl. ¶¶...

64. American Broadcasting Companies, Inc. v. Aereo, Inc.

United States District Court, S.D. New York. | April 13, 2012 | Not Reported in Fed. Supp. | 2012 WL 13070725

In letters dated April 6, 2012, and April 12, 2012, Defendant has requested that the Court order production of certain retransmission agreements and related documents that they contend are relevant to Plaintiffs' claim of irreparable harm in support of Plaintiffs' request for a preliminary injunction. Plaintiffs have submitted letters dated April...

...F. Supp. 2d 594, 617-20 (S.D.N.Y. 2011) , plaintiffs alleging **copyright infringement** under similar circumstances were not required to produce retransmission agreements...

65. Rice v. Musee Lingerie, LLC

United States District Court, S.D. New York. | July 03, 2019 | Not Reported in Fed. Supp. | 2019 WL 2865210

On April 3, 2019, Defendant filed a motion requesting that the Court order Plaintiff to post a bond in order to proceed with the present action. Dkt. No. 23. For the following reasons, Defendant's motion is granted. Plaintiff is a professional New York-based is a professional photographer in the business of licensing his photographs to online and...

...October 4, 2018, Plaintiff filed this action against Defendant alleging **copyright infringement** under 17 U.S.C. §§ 106 and 501 See Compl. ¶...

66. WowWee Group Ltd. v. Meirly

United States District Court, S.D. New York. | January 07, 2020 | Slip Copy | 2020 WL 70489

This is a trademark infringement action brought by Plaintiffs WowWee Group Ltd., WowWee Canada, Inc., and WowWee USA, Inc. against 83 Defendants. On March 27, 2019, the Court issued a Final Default Judgment as to Plaintiffs' federal claims, as well as one of its state claims against 45 defaulting defendants. It also granted a post-judgment...

...Plaintiffs' trademark counterfeiting, trademark infringement, false designation of origin, and **copyright infringement** claims. It also granted the motion with respect to Plaintiffs...

67. Mantel v. Microsoft Corporation

United States District Court, S.D. New York. | March 29, 2018 | Not Reported in Fed. Supp. | 2018 WL 1602863

This case concerns alleged violations of the Copyright Act and Digital Millennium Copyright Act arising from the unauthorized use of a photograph taken by the Plaintiff. Before the Court are the Defendants' motion for summary judgment and the Plaintiff's motion for partial summary judgment. For the reasons explained below, the Defendants' motion is...

...at 13-14. The Court agrees. "In order to demonstrate **copyright infringement**, a plaintiff must show ownership of a valid copyright and...

68. Myeress v. Elite Travel Group USA

United States District Court, S.D. New York. | November 14, 2018 | Not Reported in Fed. Supp. | 2018 WL 5961424

On May 2, 2018, Plaintiff Joe Myeress filed a motion for default judgment. See Dkt. Nos. 12-13. For the following reasons, the Court GRANTS Plaintiff's motion. On January 12, 2018, Plaintiff filed a complaint against Defendant Elite Travel Group USA, alleging **copyright infringement** and the alteration of copyright management information by...

...filed a complaint against Defendant Elite Travel Group USA, alleging **copyright infringement** and the alteration of copyright management information by Defendant. See...

69. Kashef v. BNP Paribas SA

United States District Court, S.D. New York. | February 16, 2021 | Slip Copy | 2021 WL 603290

This putative class action is brought on behalf of victims of the Sudanese government's campaign of human rights abuses from 1997 to 2009. Plaintiffs bring various state law claims against Defendant financial institution and its subsidiaries for assisting the Sudanese government in avoiding U.S. sanctions, which Plaintiffs claim provided the Regime...

...Court declined to hold an internet servicer liable for the **copyright** **infringement** of third parties, even though it was aware of the...

70. Agence France Presse v. Morel

United States District Court, S.D. New York. | October 24, 2013 | 293 F.R.D. 682 | 2013 WL 5770288

COPYRIGHTS - Sanctions. Photojournalist was precluded from seeking damages for violations not provided in his pretrial disclosures.

Synopsis
Background: News agency brought action seeking declaratory judgment that it did not infringe photojournalist's copyrights. Photojournalist filed counterclaim against agency and third party complaint against image licensing company alleging **copyright** **infringement** and violation of Digital Millennium Copyright Act (DMCA). Agency and company filed motions in limine.
Holding: The District Court, Alison J. Nathan, J., held that photojournalist was precluded from seeking damages for violations not provided in his pretrial disclosures.
Motions granted in part.

...agency and third party complaint against image licensing company alleging **copyright** **infringement** and violation of Digital Millennium Copyright Act (DMCA). Agency and...

71. CYI, Inc. v. Ja-Ru, Inc.

United States District Court, S.D. New York. | December 21, 2012 | 913 F.Supp.2d 16 | 2012 WL 6646188

TRADEMARKS - Venue. Transfer of venue of toy developer's trade-dress infringement and unfair competition action was appropriate.

Synopsis
Background: Toy developer brought action in Southern District of new York against competitors, asserting claims for trade-dress infringement and unfair competition arising from competitors' marketing of toys similar to those of developer. Defendants moved to transfer action to Middle District of Florida.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 locus of operative facts did not weigh against transfer of venue;
2 convenience of witnesses weighed in favor of transfer;
3 location of relevant documents and ease of access to sources of proof weighed in favor of transfer; and
4 convenience of the parties weighed in favor of transfer.
Motion granted.

...is more akin to an action for design patent or **copyright** **infringement** than an action for trademark infringement. In order to prove...

72. Alzheimer's Disease and Related Disorders Association, Inc. v. Alzheimer's Foundation of America, Inc.

United States District Court, S.D. New York. | April 20, 2018 | Not Reported in Fed. Supp. | 2018 WL 1918618

In September 2017, the Court held a bench trial between two Alzheimer's charities—Counterclaim Plaintiff Alzheimer's Disease and Related Disorders Association (hereafter, “Alzheimer's Association”

or the “Association” or “Counterclaim Plaintiff”) and Counterclaim Defendant Alzheimer's Foundation of America...

...court granted plaintiffs a preliminary injunction with respect to their **copyright** **infringement** claims, false advertising claims, and false designation of origin claim...

73. Alzheimer's Disease and Related Disorders Association, Inc. v. Alzheimer's Foundation of America, Inc.

United States District Court, S.D. New York. | April 20, 2018 | 307 F.Supp.3d 260 | 2018 WL 2122829

TRADEMARKS — Marks and Logos. Alzheimer's charity's purchase of another charity's marks as keywords in Internet searches did not support trademark infringement claim.

Synopsis
Background: Two Alzheimer's charities filed cross-claims against each other, alleging, inter alia, trademark claims under Lanham Act and New York law, unlawful deceptive acts and practices under New York law, and tortious interference with prospective business advantage under New York common law. The District Court, Sweet, J., 796 F.Supp.2d 458, dismissed all claims except Lanham-related claims in countersuit. The case proceeded to bench trial.
Holding: The District Court, Alison J. Nathan, J., held that charity's purchase of another charity's marks, including “Alzheimer's Association,” as keywords in Internet searches, without additional behavior that confused consumers, did not support trademark infringement claim.
Ordered accordingly.

...court granted plaintiffs a preliminary injunction with respect to their **copyright** **infringement** claims, false advertising claims, and false designation of origin claim...

1. Greer v. Mehiel

United States District Court, S.D. New York. | January 12, 2017 | Not Reported in Fed. Supp. | 2017 WL 128520

On October 3, 2016, pro se Plaintiff Steven Greer moved this Court for leave to amend his complaint for a third time. See Dkt. No. 178 (hereafter "Motion to Amend"). Mr. Greer sought, in particular, to amend the heading of his first cause of action, "violation of **First Amendment** Rights," to add additional parties, namely...

...the heading of his first cause of action, "violation of **First Amendment** Rights," to add additional parties, namely Howard Milstein, Steven Rossi...

...in this action) did not plausibly allege a claim for **First Amendment** retaliation against the Landlord Defendants, and that amending it to...

...the operative complaint, without amendment, did not plausibly allege a **First Amendment** retaliation claim against one or all of the Landlord Defendants...

2. Greer v. Mehiel

United States District Court, S.D. New York. | February 24, 2016 | Not Reported in Fed. Supp. | 2016 WL 828128

Plaintiff Steven E. Greer, a resident of the Battery Park City community at the southwestern tip of Manhattan, brings this action pro se against the company that owns his apartment building, the company that manages the building, the Battery Park City Authority ("BPCA"), and several individuals associated with each entity. Greer's suit...

...associated with each entity. Greer's suit alleges violations of his **First Amendment** rights, violations of the Fair Housing Act, 42 U.S.C. §...

...1) that the Defendants retaliated against him for exercising his **First Amendment** rights, in violation of 42 U.S.C. § 1983 ; (2) that...

...may seek a preliminary injunction on the basis of his **First Amendment** retaliation claim. But the Court also concludes that Greer has...

3. Collins v. City of New York

United States District Court, S.D. New York. | March 29, 2018 | 295 F.Supp.3d 350 | 2018 WL 1596190

CIVIL RIGHTS — Arrest and Detention. Arresting officers and city were entitled to qualified immunity on § 1983 claim alleging unlawful arrest under New York's disorderly conduct statute.

Synopsis
Background: Arrestees brought 1983 action against arresting officers and city alleging that their arrests at a demonstration violated their constitutional rights. Defendants moved for summary judgment.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 defendants were entitled to qualified immunity on claim for violation of **First Amendment**;
2 defendants were entitled to qualified immunity on unlawful arrest claim;

3 defendants were entitled to qualified immunity on **First Amendment** retaliation claim;
4 an arresting officer was entitled to qualified immunity on excessive force claim;
5 genuine issue of material fact as to whether an arresting officer had lied precluded summary judgment on claim for violation of right to fair trial; but
6 even if different arresting officer had lied, it did not support claim for violation of right to fair trial.
Motion granted in part and denied in part.

...were entitled to qualified immunity on claim for violation of **First Amendment**; (2) defendants were entitled to qualified immunity on unlawful arrest claim; (3) defendants were entitled to qualified immunity on **First Amendment** retaliation claim; (4) an arresting officer was entitled to qualified...

...sidewalk, it was not clearly established that such order violated **First Amendment**, and thus officers and city were entitled to qualified immunity...

...§ 1983 claim that officers and city had violated their **First Amendment** rights by failing to narrowly tailor order and provide alternative...

4. Taylor v. New York City Dept. of Educ.

United States District Court, S.D. New York. | September 06, 2012 | Not Reported in F.Supp.2d | 2012 WL 3890599

Plaintiff, Mildred Taylor, has filed this action alleging that Defendants violated her **First Amendment** right to speak as a citizen on matters of public concern, and claiming municipal and supervisory liability against a number of the Defendants. Defendants move to dismiss (D.E.21, 24), arguing that Taylor cannot state a viable **First Amendment** claim...

...Taylor, has filed this action alleging that Defendants violated her **First Amendment** right to speak as a citizen on matters of public...

...D.E.21, 24), arguing that Taylor cannot state a viable **First Amendment** claim as a matter of law, and that even if her **First Amendment** claim is sufficient to survive a motion to dismiss as...

...of the plaintiff. Kassner, 496 F.3d at 237 III. **FIRST AMENDMENT** RETALIATION A. Speech “as a Citizen” A plaintiff alleging unconstitutional...

5. Troy v. City of New York

United States District Court, S.D. New York. | September 25, 2014 | Not Reported in F.Supp.3d | 2014 WL 4804479

This action arises from the investigation of a physical altercation between Plaintiff Suzannah Troy and non-party Delita Hooks by police officers employed by the City of New York (“City”). Plaintiff, proceeding pro se, brings this action against the City and individual defendants Lieutenant Agnes, Lieutenant Burgos, Sergeant Chen,...

...1) the right to be free from retaliation under the **First Amendment**; (2) the **First Amendment** right to petition for redress of grievances; (3) “freedom from...

...his failure to investigate her complaint against Ms. Hooks. B. **First Amendment** Plaintiff alleges that that Defendants deprived her of her **First Amendment** rights to be free from retaliation and to “petition for...

...to allege that she engaged in conduct protected by the **First Amendment** by filing a police complaint against Ms. Hooks and engaging...

6. Garanin v. New York City Housing Preservation & Development

United States District Court, S.D. New York. | March 30, 2016 | Not Reported in Fed. Supp. | 2016 WL 1690301

Plaintiff Vsevolod Garanin brings this pro se action under 42 U.S.C. § 1983, alleging that his constitutional rights were violated when his application to rent a middle-income housing unit in Manhattan was denied. Defendants are Chanel Zeisel ("Zeisel"), an employee at the private company that denied his application;...

...her supervisor, and that this violated his rights under the **First Amendment**. Third, Garanin brings a **First Amendment** retaliation claim against the City Defendants, claiming that they are...

...equal protection claim must be dismissed in its entirety. B. **First Amendment** Retaliation Claim Against Zeisel Garanin's remaining claims are brought under the **First Amendment**, and turn on factual allegations and legal issues specific to...

...his complaint to her supervisor, and that this violated the **First Amendment**. Garanin's **First Amendment** claim against Zeisel fails because he has not adequately pled...

7. Greer v. Mehiel

United States District Court, S.D. New York. | March 29, 2018 | Not Reported in Fed. Supp. | 2018 WL 1626345

Pro se Plaintiff Steven E. Greer brings this suit against the company that owns his former apartment, the company that manages that apartment building, the Battery Park City Authority ("BPCA"), and several individuals associated with those entities. At this stage, two claims remain in Plaintiff's suit—a **First Amendment** retaliation...

...At this stage, two claims remain in Plaintiff's suit—a **First Amendment** retaliation claim and a **First Amendment** equal access claim. Before the Court are three motions for...

...85 (SAC) Plaintiff alleged, inter alia, that Defendants violated his **First Amendment** rights. Specifically, he claimed that the non-renewal of his...

...at this point, Plaintiff has two remaining claims: (1) a **First Amendment** retaliation claim against Defendants BPCA and Robert Serpico (the "BPCA...

8. Mark v. Gawker Media LLC

United States District Court, S.D. New York. | November 16, 2015 | Not Reported in Fed. Supp. | 2015 WL 7288641

On August 14, 2015, the Court received by email a request from Plaintiffs to file redacted versions of documents associated with their motions for class certification and summary judgment using the Electronic Case Filing system ("ECF"), and to file unredacted versions of the relevant documents under seal. On August 18, 2015, the Court ordered...

...of access with any "competing considerations." Id. at 120 The **First Amendment** to the United States Constitution also informs this inquiry by...

...F.3d at 120 Should the Court find that a **First Amendment** right of access attaches, the documents "may be sealed [only...

...documents to be significant under both the common law and **First Amendment** analysis. See Lugosch, 435 F.3d at 121 "[D]ocuments submitted...

9. United States v. Nejad

United States District Court, S.D. New York. | February 22, 2021 | 521 F.Supp.3d 438 | 2021 WL 681427

CRIMINAL JUSTICE — Prosecutorial Misconduct. Prosecutors did not intentionally withhold a letter from bank to Office of Foreign Assets Control that flagged first payment charged in prosecution.

Synopsis
Background: After vacation of defendant's convictions in prosecution for conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, bank-fraud conspiracy, and money laundering, and after indictment had been dismissed with prejudice, government was ordered to provide information regarding *Brady* violations, and government's response indicated government's previous lack of candor to the court. The United States District Court for the Southern District of New York, Alison J. Nathan, J., 487 F.Supp.3d 206, ordered prosecutors to read order and prepare declarations on whether further evidentiary hearing was necessary. Prosecutors filed declarations and urged that no further fact-finding was necessary, and requested that their declarations be sealed.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 prosecutors did not intentionally withhold a letter from bank to Office of Foreign Assets Control (OFAC);
2 prosecutors' representations to the court were not made to intentionally mislead the court;
3 district court would require government to submit a further status report in six months to discuss any training initiatives or policy changes undertaken to prevent improper use of information loaded into a database maintained by the Federal Bureau of Investigation (FBI);
4 declarations by prosecutors were judicial documents for purposes of public access analysis;
5 prosecutors' declarations were not exempt from disclosure due to dismissal of charges against defendant;
6 **First Amendment** supported public access to party letters and prosecutors' declarations; and
7 sealing of documents was not appropriate under common-law principles.
Filing of declarations, exhibits, and status report ordered.

...from disclosure due to dismissal of charges against defendant; (6) **First Amendment** supported public access to party letters and prosecutors' declarations; and...

...In General 92 2089 k. Court documents or records. The **First Amendment's** presumptive right of access to judicial documents yields only where...

...of public access under both the common law and the **First Amendment**, the court begins with whether the document sought is a...

10. Hollander v. Pressreader, Inc.

United States District Court, S.D. New York. | May 30, 2020 | Not Reported in Fed. Supp. | 2020 WL 2836189

Plaintiff Roy Den Hollander, an attorney proceeding pro se, brings this suit against Pressreader, Inc., a digital newspaper and magazine distribution and publishing company, alleging that Pressreader's

publication of two articles that “falsely depict” Hollander's law practice and business consultancy violates his right to publicity...

...civil RICO claim must be dismissed because it violates the **First Amendment** and otherwise fails to state a claim upon which relief...

...public concern” and thus lies “at the heart of the **First Amendment's** protection.” Snyder v. Phelps , 562 U.S. 443, 451–52 (2011...

...Such speech “occupies the highest rung of the hierarchy of **First Amendment** values, and is entitled to special protection.” Id. at 452...

11. Yunus v. Robinson

United States District Court, S.D. New York. | January 11, 2019 | Not Reported in Fed. Supp. | 2019 WL 168544

Since 2016, Plaintiff has been required to register as a sex offender and has been subject to parole conditions designed to control the threat posed by sex offenders, including limitations on where he can live and travel, what websites he can access and what technology he can possess, and whether he can own a pet or rent a post office box....

...violate his rights under the Due Process Clause and the **First Amendment**. Plaintiff sought a preliminary injunction on some of his claims...

...are void for vagueness, SAC ¶¶152-58, violate his **First Amendment** rights, SAC ¶¶159-63, violate his due process right...

...Parole Condition No. 48 and Other Technology Restrictions Violate His **First Amendment** Rights (Claim 4) Plaintiff's parole conditions place a variety of...

12. Shim-Larkin v. City of New York

United States District Court, S.D. New York. | January 17, 2018 | Not Reported in Fed. Supp. | 2018 WL 461100

Before the Court is Plaintiff Heena Shim-Larkin's motion for reconsideration of this Court's October 25, 2017 order denying her objections to the Magistrate Judge's order denying her motion to compel. For the reasons that follow, that motion is denied. Plaintiff Heena Shim-Larkin, proceeding pro se and in forma pauperis, filed suit against the City...

...the Court overlooked that she has a right under the **First Amendment** to “associate with anyone and speak to anyone.” Support at...

...rule on this basis, it is well-established that the **First Amendment** may be limited by rules of discovery. See, e.g., Seattle...

...are a matter of legislative grace. A litigant has no **First Amendment** right of access to information made available only for purposes...

13. Doe v. U.S. Immigration and Customs Enforcement

United States District Court, S.D. New York. | August 30, 2021 | Slip Copy | 2021 WL 3862708

Plaintiff John Doe and Organizational Plaintiffs The Door, Make the Road New York, New York Immigration Coalition, Sanctuary for Families, and the Urban Justice Center bring this suit against Defendants U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, and several federal officials acting in their official capacities....

...of access with any “competing considerations.” Id. at 120 The **First Amendment** to the United States Constitution also informs this inquiry by...

...F.3d at 120 Should the Court find that a **First Amendment** right of access attaches, the documents “may be sealed [only...

...of access attaches, under both the common law and the **First Amendment**.” Lugosch , 435 F.3d at 121 Upon the Court's review...

14. Hesse v. Godiva Chocolatier, Inc.

United States District Court, S.D. New York. | May 29, 2020 | 463 F.Supp.3d 453 | 2020 WL 2793014

COMMERCIAL LAW — Consumer Protection. Reasonable consumers could be misled as to location where manufacturer's chocolate was made.

Synopsis
Background: New York and California buyers of chocolate brought action against the manufacturer, alleging that they were misled by manufacturer's use of the representation “Belgium 1926” on packaging and in advertising. Manufacturer filed motion to dismiss.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 buyers lacked Article III standing to seek injunction prohibiting manufacturer's use of the representation;
2 buyers' allegations were sufficient to support consumer-protection claims under New York and California law;
3 buyers stated claim for breach of express warranty;
4 New York buyer was in vertical privity with manufacturer, as required for implied warranty claims under New York law;
5 California buyers failed to satisfy vertical privity requirement for implied warranty claims under California law;
6 buyers failed to state claims for fraud and intentional misrepresentation under New York law; and
7 buyers failed to state claim for negligent misrepresentation under New York law.
Motion granted in part and denied in part.

...the pleading stage as restrictions on commercial speech; whether the **First Amendment's** protections applied required a factual determination of whether the speech...

...1535 k. In general. Commercial speech is protected by the **First Amendment**, and restrictions on such speech are reviewed under a form...

...untruthful, deceptive, or misleading speech. A court determines whether the **First Amendment's** protections apply to commercial speech, in part, by determining whether...

15. Hamilton v. Department of Corrections

United States District Court, S.D. New York. | November 14, 2018 | Slip Copy | 2018 WL 10322880

Plaintiff Kareem Hamilton, who had been incarcerated on Rikers Island, filed these related cases May and December of 2015 alleging that his conditions of confinement were illegal and unconstitutional.

Dkt. 33 (describing the background of these cases). Judge Forrest found that while the cases remained separate, Defendants would be permitted to file...

...Housing ("ESH") and for access to religious services under the **First Amendment**, while granting the motion as to all other Defendants. Id...

...in either of his complaints and instead relied on the **First Amendment**; and that even if Plaintiff had articulated a claim for...

...which provides considerably stronger protections for incarcerated individuals than the **First Amendment**. See Joseph v. Fischer , 900 F. Supp. 2d 320, 325...

16. Republic of Turkey v. Christie's Inc.

United States District Court, S.D. New York. | December 02, 2019 | 425 F.Supp.3d 204 | 2019 WL 6619618

TORTS — Limitations. Demand was necessary for limitations to run on conversion claim even against open possessor.

Synopsis
Background: Republic of Turkey asserted ownership interest in historical artifact that was the object of sale by New York auction house and brought cause of action for conversion and replevin, as well as for declaratory relief. Defendants cross-claimed for tortious interference with contract and with prospective economic advantage, and the parties cross-moved for summary judgment. *Daubert* motion and request to seal record were also filed.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 statute of limitations on the Republic of Turkey's conversion and replevin claims did not begin to run until it had made demand for return of artifact;
2 genuine issues of material fact precluded entry of summary judgment for defendants on conversion and replevin claims asserted by the Turkish government;
3 Turkey was not liable under New York law for tortiously interfering with auction house's contract with high bidder;
4 Republic of Turkey's clear interest in recovering historical artifact that it regarded as property of the state vitiated any argument that, in acting to replevy artifact from New York auction house, it was acting for sole purpose of inflicting intentional harm;
5 in what was anticipated to be bench-tried case regarding the Republic of Turkey's ownership interest in historical artifact that was the object of auction by New York auction house, district court would reserve judgment on Turkey's *Daubert* motion; and
6 documents that were the subject of the parties' sealing requests were "judicial documents," in which there was significant presumption of access.
Motions for summary judgment granted in part and denied in part; motion to seal denied; judgment on *Daubert* motion reserved.

...presumption of access under both the common law and the **First Amendment**. U.S. Const. Amend. 1 [29] 326 Records 326VI Access to...

...significant presumption of access under both common law and the **First Amendment**, some redactions and limited sealing might nevertheless be appropriate, but...

...confidentiality agreement covering judicial documents is insufficient to overcome the **First Amendment** presumption of access. U.S. Const. Amend. 1 Frank Knight Lord...

17. Karim v. Ball

United States District Court, S.D. New York. | November 19, 2020 | Slip Copy | 2020 WL 6807078

Plaintiff brings claim against Defendant officers under 42 U.S.C. § 1983 for retaliation in violation of his **First Amendment** rights and unconstitutional conditions of confinement in violation of his Eighth and Fourteenth Amendment rights. Defendants move to dismiss all claims for failure to state a claim under Federal Rule of Civil Procedure...

...42 U.S.C. § 1983 for retaliation in violation of his **First Amendment** rights and unconstitutional conditions of confinement in violation of his...

...his repugnant conditions of confinement and for violations of his **First Amendment** rights for the retaliation against him by the Defendant officers...

...1983 Plaintiff alleges that Defendant officers deprived him of his **First Amendment** rights by retaliating against him for his complaint against Defendant...

18. NAACP Legal Defense & Education Fund, Inc. v. Department of Justice

United States District Court, S.D. New York. | May 29, 2020 | 463 F.Supp.3d 474 | 2020 WL 2793015

GOVERNMENT — Records. Department of Justice's search for responsive records was inadequate, for purposes of requester's Freedom of Information Act request.

Synopsis
Background: Requester brought action under the Freedom of Information Act (FOIA) against Department of Justice (DOJ), seeking records pertaining to proposed inclusion of a citizenship status question on the decennial census. Parties cross-moved for summary judgment.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 DOJ's search terms were unreasonably narrow, and thus search was inadequate, and
2 DOJ did not search all locations likely to have responsive records, and thus search was inadequate.
Requester's motion granted and DOJ's motion denied.

...where the records are 'most likely' to be found." Knight **First Amendment** Inst. at Columbia Univ. v. U.S. Dep't of Homeland Sec...

...nature of the records system or database searched." See Knight **First Amendment** Inst. , 407 F. Supp. 3d at 324 see also Schwartz...

...terms used and the nature of the database, see Knight **First Amendment** Inst. , 407 F. Supp. 3d at 324 , to determine whether...

19. Bowling v. Johnson & Johnson

United States District Court, S.D. New York. | April 22, 2019 | Not Reported in Fed. Supp. | 2019 WL 1760162

Plaintiff Suzannah Bowling brings this suit against McNeil Nutritionals, LLC ("McNeil") the distributor of the butter alternative spread Benecol, and Johnson & Johnson, its parent company. Bowling alleges that the statement "No Trans Fat," which appeared on Benecol's labeling until 2011, was false and misleading, and brings...

...the subject information under both the common law and the **First Amendment**. Mark, 2015 WL 7288641, at *2 cf. Lugosch, 435 F...

...of access attaches, under both the common law and the **First Amendment**." The analysis does not end here, however. Some redactions and...

...6, 2017) "Having concluded that both the common law and **First Amendment** provide a right of access to the documents, the Court...

20. Doe v. U.S. Immigration and Customs Enforcement

United States District Court, S.D. New York. | September 28, 2020 | 490 F.Supp.3d 672 | 2020 WL 5769478

IMMIGRATION — Privileges. Immigration and Nationality Act (INA) did not preempt New York's common law privilege against civil arrests in and around courthouses.

Synopsis
Background: Noncitizen and immigration legal services providers brought action against United States Immigration and Customs Enforcement (ICE), Department Homeland Security, and federal officials seeking declaratory and injunctive relief against ICE policy of carrying out federal immigration arrests of noncitizens at state courthouses without a judicial warrant, alleging violation of New York common law against civil arrests at courthouse, the Administrative Procedures Act (APA), and the First, Fifth, and Sixth Amendments. Defendants moved to dismiss the complaint.
Holdings: The District Court, Alison J. Nathan, J., held that:
1 noncitizen sufficiently alleged concrete intention to seek order of protection against his former partner, as would establish alleged injury to support Article III standing to bring action;
2 noncitizen adequately alleged credible threat of being arrested by ICE while pursuing an order of protection, as would establish alleged injury to support Article III standing;
3 immigration legal services providers adequately alleged injuries in fact caused by ICE's policy, as would establish Article III standing;
4 interests of immigration legal services providers were sufficiently within the zone of interests protected by the Immigration and Nationality Act (INA), and thus, providers stated actionable claim under the APA;
5 claims asserted by noncitizen and providers were reviewable under the APA;
6 common law privilege against civil arrests in and around courthouses of alleged noncitizens existed;
7 INA did not preempt New York's common law privilege against civil arrests in and around courthouses;
8 noncitizen and providers adequately alleged a violation of the right of access to the courts in violation of the First and Fifth Amendments; and
9 noncitizen and providers failed to adequately allege a violation of the Sixth Amendment.
Motion granted in part and denied in part.

...in their own right only with respect to the Complaint's **First Amendment** claim. See Dkt. No. 64 at 9–10; Dkt. No...

...source of this right has been variously located in the **First Amendment** right to petition for redress, the Privileges and Immunities Clause...

...The Court rejects out of hand Defendants' suggestion that Plaintiffs' **First Amendment** claim fails because non-citizens unlawfully present in the United States do not have any **First Amendment** rights. See Dkt. No. 64 at 20–21. As Defendants...

21. Hayashi v. Ozawa

United States District Court, S.D. New York. | March 19, 2018 | Not Reported in Fed. Supp. | 2018 WL 1737232

The Court assumes the parties' familiarity with the facts of this case. The Plaintiff, Mika Hayashi, is a podiatrist licensed and practicing in the State of New York. First Amended Complaint ("FAC"), Dkt. No. 14, ¶¶6-7. She is of Japanese heritage and understands fluent Japanese. FAC ¶7. She owns a private...

...Ms. Hayashi's favor. Injunctions on speech are "repugnant to the **First Amendment** " and thus should be treated by this Court with skepticism...

...so extreme that this Court should encroach on Mr. Ozawa's **First Amendment** rights and force him to edit or remove his blog...

...Defendant's speech based on the significant rights guarded by the **First Amendment**, the Court cannot conclude that the balance of hardships tips...

22. Jackson v. Stanford

United States District Court, S.D. New York. | September 27, 2019 | Not Reported in Fed. Supp. | 2019 WL 4735353

Plaintiff Nahshon Jackson brings this suit under 42 U.S.C. § 1983 alleging violations of his constitutional rights to the free exercise of religion, to due process, and to petition the government. Defendants move to dismiss, while Mr. Jackson cross moves for default judgment. For the reasons given below, Defendants' motion is GRANTED and...

...of liberty under the Fourteenth Amendment; (2) violation of his **First Amendment** right to the free-exercise of religion; and (3) violation of his **First Amendment** right to petition. Compl. ¶¶ 68. Defendant has moved to...

...his Free Exercise Clause claim without prejudice. C.Mr. Jackson's **First Amendment** Right to Petition Claim Is Dismissed with Prejudice Finally, turning...

...Hale's failures to act on other grievances violated Mr. Jackson's **First Amendment** right to petition the government. However, "[w]hile the filing of...

23. American Railcar Industries, Inc. v. Gyansys, Inc.

United States District Court, S.D. New York. | May 08, 2017 | Slip Copy | 2017 WL 11501880

The above-captioned matter is scheduled for a bench trial commencing on June 12, 2017. The Court is in receipt of three motions each from the parties, dated January 12, 2017, seeking to exclude certain testimony and/or opinions of purported experts William R. Zollinger, III, P.E., Grant Small, Michael Doane, Bruce F. Webster, Thyagarajan...

...such documents rooted in both the common law and the **First Amendment**. Lugosch , 435 F.3d at 119-20 That presumption may...

...outweighed by "competing considerations" or, in the case of the **First Amendment**-based presumption, that "closure is essential to preserve higher values...

24. Kosmidis v. Port Authority of New York and New Jersey

United States District Court, S.D. New York. | September 28, 2021 | Slip Copy | 2021 WL 4442812

This action arises out of an arrest that took place on September 15, 2017. Plaintiff Constantino Kosmidis sues Defendants the Port Authority of New York and New Jersey, Port Authority Police Sergeant Bernard Buckner, Port Authority Police Officer Steven O'Shea, Port Authority Police Officer Alexander Velez, Jr., and Port Authority Police Officer...

...Thus, summary judgment is GRANTED as to this claim. J. **First Amendment** The Defendants next move for summary judgment on Kosmidis's **First Amendment** retaliation claim. To prevail on such a claim, a plaintiff...

...show that "(1) he has an interest protected by the **First Amendment**; (2) the Defendant[s'] actions were motivated or substantially caused...

...Defendant[s'] actions effectively chilled the exercise of the Plaintiff's **First Amendment** rights." See Galarza v. Monti , 327 F. Supp. 3d 594...

25. Jackson v. Stanford

United States District Court, S.D. New York. | August 19, 2021 | Slip Copy | 2021 WL 3781837

In 2016, Plaintiff Nahshon Jackson filed this case under 42 U.S.C. § 1983 alleging violations of his constitutional rights to the free exercise of religion, to due process, and to petition the government. In September 2019, the Court dismissed Plaintiff's complaint for failure to state a claim. Jackson v. Stanford, No. 16-cv-9702 (AJN), 2019...

...4735353, at *4 Plaintiff also alleged a violation of his **First Amendment** right to the free exercise of religion against Jeff McKoy...

...to the PLRA. Finally, Plaintiff alleged a violation of his **First Amendment** right to petition against Jeffrey A. Hale, the former Director...

...court." (second emphasis added)). Finally, this Court previously dismissed the **First Amendment** claims against Defendant Hale with prejudice, finding that there was...

26. Greer v. Mehiel

United States District Court, S.D. New York. | January 31, 2019 | Not Reported in Fed. Supp. | 2019 WL 400607

Pro se Plaintiff Steven E. Greer moves pursuant to Federal Rule of Civil Procedure 60(b) for reconsideration of the Court's March 28, 2018 Memorandum Opinion & Order granting summary judgment in favor of Defendants. Dkt. No. 466. For the reasons set forth below, Plaintiff's motion for relief under rule 60(b) is denied. Pro se Plaintiff Steven E....

...remaining claims that survived the motion to dismiss phase—a **First Amendment** retaliation claim and a **First Amendment** equal access claim against BPCA only. With respect to the...

...concluding that under Lozman , this justification does not defeat a **First Amendment** claim. See Dkt. No. 467 at 4. Plaintiff's equal access...

27. Agence France Presse v. Morel

United States District Court, S.D. New York. | November 03, 2014 | Not Reported in F.Supp.3d | 2014 WL 5568562

On October 30, 2014, the Court received a request to redact limited information contained in the Defendants' opposition to Plaintiff's motion for attorneys' fees and costs. In short, Defendants propose to redact information about the pretrial settlement offers made to Plaintiff—such as the timing and amount of those offers—as well as off-the-record...

...Id. at 120 The public may also have a qualified **First Amendment** right of access to certain judicial documents. The Second Circuit has set forth two approached for determining whether the **First Amendment** right applies. The first is the “experience and logic” approach...

28. Malibu Media, LLC v. Doe

United States District Court, S.D. New York. | September 29, 2016 | Not Reported in Fed. Supp. | 2016 WL 5478433

Plaintiff Malibu Media, LLC (“Malibu”) brings this action for copyright infringement against a John Doe defendant (“Defendant”) who to date has been identified only by his internet protocol (“IP”) address. Malibu alleges that Defendant illegally copied and distributed a file containing 127 pornographic...

...privacy grounds to demonstrate that the subpoena would violate their **First Amendment** right to anonymous internet usage. See, e.g., Arista Records , 604...

...118 “To the extent that anonymity is protected by the **First Amendment**, a court should quash or modify a subpoena designed to...

...to quash after applying five-factor test for determining if **First Amendment** protects defendant's identity); Malibu Media, LLC v. Doe No. 4...