Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Justice Beth Robinson
Nominee to the Court of Appeals for the Second Circuit
September 21, 2021

1. **The Judiciary Committee has received a number of letters of support from individuals who have worked with you, including your current and former colleagues on the Vermont Supreme Court. In one letter, Vermont Governor Phil Scott—a Republican—noted that you work well with your colleagues in the deliberative process and also "as a body to promote the vision of the Judicial Branch for a fair, well-managed, and impartial court system." Your former colleague, retired Justice Brian Burgess, emphasized that you are "fair, unbiased and congenial" and were "equally open to and considerate of opposing opinion during in-chambers discussion and deliberation."**

   Please describe the importance you place on working with colleagues who may have different views or who may approach an issue differently than you do.

   Response: Appellate judging is a group activity. Although we are each ultimately charged with exercising our independent judgment, the give-and-take of conferencing a case and reviewing draft opinions is a vital part of the process. In some cases, this give-and-take has led me to revisit my initial approach to a case and adopt a colleague's approach. In other cases, one or more colleagues have been persuaded to revisit their own initial positions. And in yet other cases, we have collectively identified middle ground or a third way altogether. The lessons I have learned from my fellow justices have consistently made me a better judge. I have been privileged to work with an exceptional group of colleagues for nearly ten years; although we don't always agree, I can't think of a single instance in which divergent approaches to a case before us have led to personal animosity, ill will, or anything short of the collegial and respectful relationships we enjoy. I have every expectation that the same would be true of the colleagues I would join on the Second Circuit if I am fortunate enough to be confirmed.

2. **During your hearing, members asked you about your views on religious liberty and your experience working on such matters while in private practice.**

   As a Second Circuit judge, how would you approach cases involving religious liberty issues?

   Response: The Free Exercise Clause of the First Amendment to the United States Constitution reflects a critical protection for religious liberty. As a Second Circuit judge, in addressing Free Exercise claims, I would follow the United States Supreme Court's precedent. The best evidence of my fealty to United States Supreme Court precedent in Free Exercise claims, as any other claims, is my own judicial record. I have had occasion to address a Free Exercise claim in a precedential opinion in the case of Taylor v. Town of Cabot, 2017 VT 92, 178 A.3d 313 (2017). In that case, a municipal taxpayer invoking the

Compelled Support Clause of the Vermont Constitution challenged a town's award of a grant to fund repairs to a local church building that also served as a community center and historic building. The grant program was designed to improve community infrastructure, facilities and services. The trial court preliminarily enjoined the town from awarding the grant. The Vermont Supreme Court, in an opinion I authored, reversed the injunction. Our analysis relied heavily on the United States Supreme Court's decision in Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017). See 2017 VT 92, ¶¶ 24-27, 178 A.3d at 321.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Justice Beth Robinson
Nominee to be United States Circuit Judge for the Second Circuit Court of Appeals

1. **In a Letter to the Editor in the Burlington Free Press in 2003, you commended Senator Leahy "for his strong leadership" for "resisting the Republican push to rubber-stamp" judicial nominees "without even requiring them to answer legitimate questions about their records and their views." You also "applaud[ed]" Senator Leahy for "insisting on the careful scrutiny of all nominees to these lifetime positions and for opposing those who have not shown that they could be fair and impartial to all."**

    a. **Do you still believe that careful scrutiny of federal judicial nominees and their records and views is appropriate?**

    Response: Yes.

    b. **Do you still believe that Senators should oppose nominees who do not show that they can be fair and impartial to all?**

    Response: As a sitting Justice, and out of respect for the separation of powers, I would not publicly opine on how a Senator should vote on nominees. Within our constitutional structure, Senators may exercise their authority to advise and consent as they see fit.

    c. **Do you believe that Senators should oppose nominees who decline to answer legitimate questions about their records and their views?**

    Response: As a sitting Justice, and out of respect for the separation of powers, I would not publicly opine on how a Senator should vote on nominees. Within our constitutional structure, Senators may exercise their authority to advise and consent as they see fit.

2. **In your testimony before the Judiciary Committee, you discussed your representation of Linda Paquette in *Paquette v. Regal Art Press*. In that case, your client asked a print shop to print membership cards for a pro-abortion group called Vermont Catholics for Free Choice. The print shop's owners were Catholics who believed that printing materials promoting abortion would violate their religious beliefs.**

    a. **Do you believe federal courts should force private citizens to support views that go against their religious beliefs?**

    Response: Depending on the nature of the specific claim, I would evaluate a claim that a federal law forces private citizens to support views that go against

their religious beliefs under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1; and possibly the Free Speech Clause of the First Amendment.

b. **Do you believe that the print shop owner's decision not to print pro-abortion materials is comparable to the racism at issue in the Supreme Court case *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)? Why or why not?**

Response: The plaintiff's claim in the *Paquette* case was that the printing business, which offered its printing services to the general public, was a public accommodation, and that it unlawfully denied her services on account of her religious views. Just as the state has a recognized interest in prohibiting discrimination in public accommodations on the basis of race, it has an interest in prohibiting discrimination by public accommodations on the basis of religion or creed.

c. **Does the Religious Freedom Restoration Act protect print shop owners from being forced to print materials that violate their religious beliefs? Why or why not?**

Response: The Religious Freedom Restoration Act applies with respect to federal laws; it does not apply with respect to state laws. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 and n.1; *Boerne v. Flores*, 521 U.S. 507 (1997). In cases in which RFRA applies, it provides that the government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. In evaluating whether RFRA bars application of a hypothetical federal law that sought to force print shop owners to print materials that violate their religious beliefs, I would apply that test.

d. **How and to what extent did the Religious Freedom Restoration Act and subsequent Supreme Court precedents affect the holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)?**

Response: The Religious Freedom Restoration Act does not change the constitutional standard set forth in the *Smith* case, but establishes statutory religious liberty protections against federal laws that burden a person's exercise of religion. The applicable standard under RFRA is set forth in my response to Question No. 2(c) above.

3. **Do you agree with the Supreme Court that the First Amendment's Free Exercise Clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so,**

does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?

Response: The United States Supreme Court has recognized that the First Amendment's Free Exercise Clause "lies at the heart of our pluralistic society," *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731. In addressing Free Exercise claims consistent with Supreme Court precedent I would be mindful of this guidance. The specific ramifications of the Free Exercise Clause with respect to the conduct of religious organizations in the public square are established by Supreme Court precedents, which govern a range of religious liberty claims and provide specific standards depending on the nature of the claim at issue. See, e.g., *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) (discussing standard applicable to programs that disqualify otherwise eligible recipients from a public benefit solely because of their religious character); *Employment Division, Department of Human Resources of Oregon*, 110 S. Ct. 2605 (discussing standards applicable under Free Exercise Clause to enforcement of valid and neutral law of general applicability that burdens religious liberty); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 132 S. Ct. 694 (2012) (discussing "ministerial exception" to application of employment discrimination laws); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018) (discussing laws or regulations based on hostility to a religion or religious viewpoint).

4. **Do Blaine Amendments violate the U.S. Constitution? Why or why not?**

Response: I assume that the reference to "Blaine Amendments" relates to laws prohibiting state support for religious schools. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the United States Supreme Court considered whether excluding religious schools and affected families from a state scholarship program was consistent with the United States Constitution. If faced with a case involving application of a similar state program, I would apply the standards set forth in *Espinoza*.

5. **In *Taylor v. Town of Cabot*, 205 Vt. 586, 597 (2017), you wrote that the Vermont constitution's "Compelled Support Clause" "promotes the same general goals as the First Amendment to the U.S. Constitution," but "may lead to divergent outcomes in some cases."**

    a. **What are the differences between the Compelled Support Clause and the First Amendment to the U.S. Constitution?**

    Response: In a 1999 decision, the Vermont Supreme Court explained:

> The First Amendment prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. Article 3 prohibits coerced support for "any place of worship." Vt. Const. ch. I, art. 3. We are not dealing with "slightly variant phraseology" that can be easily reconciled. See *State v. Brean,* 136 Vt. 147, 151, 385 A.2d 1085, 1088 (1978) (discussing relationship between self-incrimination clause of Fifth Amendment to

> United States Constitution and Chapter I, Article 10 of the Vermont Constitution). As applied to the myriad of circumstances that might come before us, we do not believe we can simplistically state that one provision is always more restrictive of state action with respect to religion than another.

Chittenden Town Sch. Dist. v. Department of Education, 738 A.2d 539 (1999).

b. **Do you believe the First Amendment provides greater protections for religious liberties than Vermont's constitution? Why or why not?**

Response: As noted above, with respect to the Compelled Support Clause of the Vermont Constitution and the Establishment Clause of the First Amendment, the Vermont Supreme Court has rejected any general characterization that one provision is always more restrictive of state action with respect to religion than another. With respect to Chapter I, Article 3 of the Vermont Constitution, which includes religious liberty protections analogous to the Free Exercise Clause of the First Amendment, and the Free Exercise Clause, the answer is similarly unclear. The Vermont Supreme Court held in 1994 that the provision "protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts governmental interference with free exercise under the United States Constitution." However, following the United States Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 holding that RFRA was inapplicable to state laws, the Vermont Supreme Court has indicated that the applicable standard under Chapter I, Article 3, is an open question. See, e.g., *Office of Child Support, ex rel. Stanzione v. Stanzione,* 2006 VT 98, ¶ 10, n.1, 910 A.2d 882; *Brady v. Dean*, 790 A.2d 428, 433-34 (2001) (declining to decide applicable test).

6. **In *Boyton v. ClearChoice MD, MSO, LLC*, 210 Vt. 454, 463 (Vt. 2019), you wrote that Vermont "has an 'extremely liberal' notice-pleading standard," and that a complaint "need be nothing more than a 'bare bones statement that merely provides the defendant with notice of the claims against it.'"**

a. **Please explain your understanding of the burden federal law imposes on plaintiffs seeking to survive a motion to dismiss and how this burden differs from Vermont's.**

Response: The United States Supreme Court has held that to survive a motion to dismiss under the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. In addition, the Court has explained, "[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

7. **In your testimony before the Committee, you discussed your lone dissent in *State v. Kuzawski*, 181 A.3d 62, 71-73 (Vt. 2017).**

   a. **Why is a box cutter used by a man to threaten the life of a six-year-old girl not a deadly weapon?**

   Response: My explanation for why the defendant's use of the implement in the *Kuzawski* case did not in my view meet the statutory requirements under Vermont law for aggravated domestic assault with a deadly weapon is set forth fully in my dissent in that case, which was joined by Justice Skoglund. (I note that it was not a lone dissent, as suggested by the question.) Because any attempt to summarize my reasoning would be less thorough, and would risk diverging from the reasoning agreed to by the Justice who joined that opinion, I reproduce it here, without the footnotes. As my dissent concluded, "The evidence in this case could support a conviction of defendant for any number of crimes. Domestic assault with a deadly weapon is not one of them." My dissent stated:

   ¶ *24. The majority's conclusion does not follow from its premise. I don't take issue with the majority's legal analysis that the deadliness of an implement (or weapon) should be assessed with reference to the way it is used or threatened to be used. But even within the majority's own framework, I cannot agree that defendant threatened to use the otherwise nondeadly tool at issue here in a way that converted it to a deadly weapon. The majority's holding expands the reach of the assault-with-a-deadly-weapon statute beyond any reasonable bounds.*

   ¶ *25. I agree that an implement that may not otherwise generally be viewed as a deadly weapon can be considered a deadly weapon under 13 V.S.A. §§ 1021(a)(3) and 1043(a)(2) based on the way that it is used or threatened to be used. So, for example, a threat to smother a family member with a pillow may constitute first degree aggravated domestic assault under § 1043(a)(2) even if the actor does not carry out the threatened action. But a threat to whack someone's backside with that same pillow could not. And I agree that whether the use or threatened use of an implement is "known to be capable of producing death or serious bodily injury," § 1021(a)(3), is evaluated objectively. See ante, ¶ 16. So far, so good.*

   ¶ *26. But I cannot fathom how this legal framework supports the conclusion that the implement at issue in this case was a deadly weapon. A picture speaks a thousand words.*

¶ 27. Used in the manner threatened here, this tool is not a deadly weapon. Although the tool contains a cutting blade, the blade is protected such that it cannot actually cut anything thicker than the side of a box. In that respect, it is like a small, plastic pencil sharpener, manual can opener, or stapler. It is capable of cutting (or in the case of a stapler, puncturing) something, but is engineered so that it would be extremely difficult to use to cut (or puncture) anything other than the specific object it was designed to cut or puncture. The blade in this case faces opposite the tip of the implement. You can ram this tool into someone's abdomen, but it won't penetrate their skin.

¶ 28. The State's own description in oral argument of how this tool could be used as a deadly weapon supports my view. The State posited that, because the child in this case is small, it would be possible (perhaps while she sleeps) to slice her ear, presumably by inserting her ear into the narrow channel designed for the box side. Had defendant threatened to use this tool to slice the child's earlobe off in her sleep, the State might be able to make a case that he threatened to use the implement as a deadly weapon. But he didn't. He poked it into her belly—a threatened use that could not bring about the serious bodily harm that might otherwise transform this everyday household tool into a deadly weapon triggering heightened legal penalties. The threat in this case is akin to the threat to use a pillow to swat someone's backside.

¶ 29. If we are to conclude that defendant's threat to harm the child with an implement that could conceivably cause serious injury—even if unrelated to the threatened use—supports a finding that the implement is a deadly weapon, then <u>any</u> use or threat to a family member that involves <u>any</u> object would be aggravated domestic assault with a deadly weapon. A threat to hit a child's backside with a pillow would qualify because the pillow could also be used to smother the child. Poking a sibling in the back with a small plastic pencil

sharpener would qualify because you could stick someone's finger in the slot and rotate the plastic casing. And threatening to poke a spouse in the belly with a manual can opener would qualify because you could close the cutting wheel on the tip of someone's finger and then turn the cutting mechanism. The majority has ignored the requirement of some connection between the actual or threatened use of an implement and its capacity to cause serious bodily injury. In doing so, it has stretched the definition of deadly weapon in § 1021(a)(3) to cover far more behavior than I believe the Legislature intended, particularly given the dramatically higher maximum penalties imposed for the use of a deadly weapon in connection with an assault. Compare 13 V.S.A. § 1023(b) (establishing one-year prison sentence for simple assault), with id. § 1024(b) (providing for fifteen-year prison sentence for assault with a deadly weapon), and id. § 1042 (providing for eighteen-month imprisonment for domestic assault), with id. § 1043(b) (establishing fifteen-year imprisonment for domestic assault with a deadly weapon).

¶ 30. The evidence in this case could support a conviction of defendant for any number of crimes. Domestic assault with a deadly weapon is not one of them. For these reasons, I dissent.

b. **In your testimony, you suggested that the box cutter was not a deadly weapon because it had a cover on it. Please explain how the cover renders the knife non-lethal.**

Response: The implement was not a knife and could not be used in the manner of a knife. See response to Question No. 7(a), above.

c. **Do you disagree with the majority's assessment that "the determination of whether an object is a deadly weapon depends on an objective perception of the dangerousness of the object in question?" *See* 181 A.3d at 69.**

Response: Yes. See ¶ 25 in response to Question No. 7(a), above.

8. **In your Questionnaire, you wrote that you once "represented a transgender patient who faced a slanted playing field with respect to hospital charges for uninsured transition-related expenses in a matter that led to Fletcher Allen Health Care's formally adopting a new policy to ensure a level playing field."**

a. **Please elaborate on what you meant by "a slanted playing field."**

Response: The "sticker price" for most medical procedures is substantially higher than the price insurers actually pay medical providers, including hospitals. Rather than charging uninsured patients the full "sticker price" for procedures, the hospital generally gave a substantial discount off that price for patients paying out-of-pocket. The hospital initially denied that generally available discount for transition-related procedures on the basis that the procedures were cosmetic. I

believe I wrote a letter to the hospital urging them to apply the same general discount for self-payers in connection with my client's procedure. The hospital agreed and changed its policy generally to apply the self-payer discount for transition-related procedures.

b. **Does the law require hospitals to pay for gender transitioning expenses?**

Response: I am not aware of any law that generally requires hospitals to pay for a patient's gender affirmation treatment. I have not researched the question and my answer should not be interpreted as prejudging any question that might come before me as a judge.

c. **Do uninsured people have a right to obtain free gender transitioning procedures?**

Response: I am not aware of any laws that create a general right to free gender affirmation procedures for uninsured patients. I have not researched the question and my answer should not be interpreted as prejudging any question that might come before me as a judge.

d. **Can a person change his or her biological sex?**

Response: I am mindful that the extent to which the law recognizes gender transitions for purposes of legal categorizations tied to an individual's sex is a matter of current political and legal debate. For that reason, it would be inappropriate for me as a sitting state supreme court justice, and a nominee for a federal circuit judge position, to engage with this general question.

9. **Do you believe in "living Constitutionalism"? Why or why not.**

Response: I do not identify with a particular ideology such as "originalism" or "living constitutionalism." I do recognize that many of the provisions of the Constitution are, by design, broad enough to allow for application of their core principles to new circumstances not envisioned by the framers. See, e.g., *Carpenter v. U.S.,* 138 S. Ct. 2206 (2018) (concluding that the core purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials," and applying that core principle to a scenario—search of cellular service location information—that is novel); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (applying basic principles of freedom of speech and press to laws regulating violent imagery in video games).

The reason these labels are not particularly relevant to an intermediate appellate judge is that over the past two hundred and thirty years (approximately) the United States Supreme Court has considered most constitutional provisions in depth, identifying the meaning of the provision, the values it is designed to promote, and, in most cases, the applicable test or framework for evaluating new claims implicating that provision. The

Supreme Court's holdings about the meanings of various provisions, and the applicable tests and frameworks, apply even in cases of "first impression," in which a party seeks to apply a constitutional provision to a novel category of cases. As an intermediate appellate judge, which is what I am with respect to the United States Constitution in my capacity as a state supreme court justice, and what I would be as a circuit court judge if confirmed, I am bound by those tests and frameworks and am not free to invoke a personal philosophy of constitutional interpretation to interpret and apply constitutional provisions in some other way. For that reason, I do not identify with a single philosophy of constitutional interpretation.

10. **Do you believe it is appropriate for a federal judge to consider how her decisions may catalyze broader social change when deciding cases? Why or why not.**

    Response: I do not believe federal judges should be motivated in deciding individual cases by a goal of catalyzing social change. Our analysis of the legal issues in the individual cases before us should be driven by the applicable law and the record in the case before us.

11. **In your view, what role do federal judges play in making laws?**

    Response: I do not think of federal judges as "making laws." State judges do sometimes make law in the context of developing an evolving common law, but there is very little federal common law, so federal judges do not have an analogous role in developing common law. A federal court's interpretation of a statute or the United States Constitution has the force of law within that court's jurisdiction, but I do not consider the act of interpretation to be "making" law.

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

    Response: Because this question is so broad, it is difficult to answer generally. In interpreting or applying statutes or constitutional provisions that call for courts to take such considerations into account, courts should do so. In adopting rules or tests to guide the application of specific statutes or rules, courts should take care not to inadvertently foster inequity. But courts may not disregard clear law in order to promote social equity.

13. **Please answer the following questions yes or no:**

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

       Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their

scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

Brown v. Board of Education, and associated decisions striking down legally enforced racial segregation in public education, were foundational to modern equal protection law. *Brown v. Board of Ed. of Topeka,* 347 U.S. 483, 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). For that reason, I make an exception to this general practice in acknowledging my agreement with that aspect of *Brown* and associated decisions that rejected the doctrine of "separate but equal."

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

Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

Loving v. Virginia rejected the argument that race-based restrictions on marriage did not run afoul of the Equal Protection Clause because they restricted the marriages of members of all races to the same degree. 388 U.S. 1 (1967). For that reason, I make an exception to this general practice in acknowledging my agreement with that aspect of Loving that rejected the "equal application" theory.

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

Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

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

Response: My response to Question No. 13(c) applies to this question.

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

Response: My response to Question No. 13(c) applies to this question.

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

Response: My response to Question No. 13(c) applies to this question.

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

Response: My response to Question No. 13(c) applies to this question.

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

Response: My response to Question No. 13(c) applies to this question.

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

Response: My response to Question No. 13(c) applies to this question.

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

Response: Because this question is the subject of ongoing political debate, it would be inappropriate for me to offer an opinion.

15. **Do you believe that the average citizen is capable of serving as his or her own fact-checker without aid from social media or the media?**

Response: I believe many individuals rely on media and/or social media for information about matters of public interest.

16. **Does the President have the power to remove senior officials at his pleasure?**

Response: Because this question is so broadly worded, and "senior official" is undefined, it is difficult to answer. The President's authority to remove senior officials is presumably governed by applicable constitutional, statutory, and perhaps regulatory provisions, as well as any applicable caselaw.

17. **Is it possible that removing a federal official from office—as is the President's power—can be for wholly apolitical reasons?**

Response: If faced with a case involving the President removing a federal official from office, I would apply the applicable constitutional, statutory and regulatory provisions, as well as any applicable caselaw, to the record in the case before me.

18. **Is it appropriate for the government to use law enforcement to enforce social distancing mandates and gathering limitations for individuals attempting to practice their religion in a church, synagogue, mosque or any other place of religious worship?**

    Response: If faced with a question regarding social distancing mandates and gathering limitations, I would be guided by the United States Supreme Court's decisions, including *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). In that case, the Court considered whether the restriction as applied to religious activity could truly be considered neutral as between religious and secular activities. Because it concluded that the restriction was not, it applied strict scrutiny in evaluating the restriction as applied to religious worship.

19. **Do you believe that we should defund police departments? Please explain**.

    Response: I am mindful that questions about how to best allocate public safety resources is a subject of ongoing political and policy debate. For that reason, it would be inappropriate for me as a sitting state supreme court justice, and as a nominee for a federal circuit judge position, to weigh in.

20. **Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.**

    Response: I am mindful that questions about how to best allocate public safety resources is a subject of ongoing political and policy debate. For that reason, it would be inappropriate for me as a sitting state supreme court justice, and as a nominee for a federal circuit judge position, to weigh in.

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

    Response: This is an important question for policymakers to consider. In my capacity as a judge adjudicating individual cases, if faced with a claim of racial disparities, I would evaluate the claim based on the record before me.

22. **Is the federal judiciary affected by implicit bias?**

    Response: This is an important question for policymakers to consider. In my capacity as a judge adjudicating individual cases, if faced with a claim of bias or unwarranted disparities in treatment, I would evaluate the claim based on the record before me.

23. **Do you have implicit bias? How do you know if it's implicit?**

    Response: I do not think I am immune from unconscious assumptions about individuals or circumstances. Although there are tools that attempt to identify some kinds of implicit assumptions, such as implicit association tests, I cannot know with confidence all the unconscious assumptions I may have. That is why approaching every case with an open

mind, learning from the advocates in a case, engaging meaningfully with my colleagues, and focusing on the record in a case and the applicable law are so important.

24. **Do you agree that it's possible to oppose diverse nominees without opposing them *because of* their diverse personal characteristics?**

    Response: Yes.

25. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

    Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court did not establish a test to evaluate Second Amendment claims. If I were sitting on the Second Circuit, absent further guidance from the Supreme Court, I would apply the test adopted by the Second Circuit in *N.Y. State Rifle & Pistol Ass'n v. Cuomo,* 804 F.3d 242 (2015). In particular, the Second Circuit applies a two-step analytical rubric. First, the court considers whether the restriction burdens conduct protected by the Second Amendment—in particular, whether the restriction applies to weapons that are "in common use," and "typically possessed by law-abiding citizens for lawful purposes." *Id*. at 254. If so, the court determines and applies the appropriate level of scrutiny. In determining whether heightened scrutiny applies, the court considers "how close the law comes to the core of the Second Amendment right," and "the severity of the law's burden on that right." *Id.* at 258.

26. **Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

    Response: I am not aware of a controlling United States Supreme Court or Second Circuit precedent squarely resolving this question. As a sitting state supreme court justice and a nominee for a circuit judge position, it would not be appropriate for me to weigh in on this question outside of the context of a specific case before me.

27. **If the Justice Department determines that the prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain.**

    Response: I am not aware of a controlling United States Supreme Court or Second Circuit precedent squarely resolving this question. As a sitting state supreme court justice and a nominee for a circuit judge position, it would not be appropriate for me to weigh in on this question outside of the context of a specific case before me.

28. **Over the course of your career, how many times have you spoken at events sponsored or hosted by the following liberal, "dark money" groups?**

    a. **American Constitution Society**

b. **Arabella Advisors**
c. **Demand Justice**
d. **Fix the Court**
e. **Open Society Foundation**

Response: None

29. **Will you commit, if confirmed, to both seek and follow the advice of the Department's career ethics officials on recusal decisions?**

Response: I will evaluate recusal issues based on the standards in 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any applicable decisions applying these standards. If needed, I would consult people at the Administrative Office of the United States Courts.

30. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

Response: Yes.

31. **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).**

In mid-March 2021, Senator Patrick Leahy's State Director contacted me regarding the Second Circuit vacancy left by the Honorable Peter Hall. In mid-April 2021, I had a virtual interview with members of Senator Leahy's staff, and on April 22, 2021, I had a telephone interview with Senator Leahy. On May 3, 2021, I interviewed with attorneys from the White House Counsel's Office. After that, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On August 5, 2021, the President announced his intent to nominate me.

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

Response: No

a. **Did anyone do so on your behalf?**

Response: Not to my knowledge.

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

Response: No.

a. **Did anyone do so on your behalf?**

Response: Not to my knowledge.

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

Response: No.

a. **Did anyone do so on your behalf?**

Response: Not to my knowledge.

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

Response: No

a. **Did anyone do so on your behalf?**

Response: Not to my knowledge.

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

Response: I received the questions on September 21. I drafted answers to each question based on my own knowledge and legal research. I submitted draft answers to the Office of Legal Policy for feedback, and after receiving feedback I finalized my answers for submission on September 27.

Senator Blackburn
Questions for the Record to Beth Robinson
Nominee to be United States Circuit Judge for the Second Circuit

1. **What is your approach to constitutional and statutory interpretation? Do you always start with the text?**

   Response: I typically start by determining whether there is binding precedent from a higher court establishing the interpretation and application of a statutory or constitutional provision and, if not, whether there is precedent from my own court that answers the issue at hand.

   In the absence of such precedent, my approach to interpreting a statute is to start with the text and consider whether the plain language of the statute, understood as a coherent whole, and understood the way it would have been understood at the time of its enactment, resolves the question at hand. If it does not, I may employ a host of interpretive tools. In particular, I might consider court decisions analyzing analogous language; the similarities or differences between the contested language and related statutes; dictionary definitions if the meaning of a word is disputed; various generic "maxims" of statutory interpretation; the context in which the statute was enacted (for example, was it an effort to override or codify a court decision?); whether the contested provision was in the statute when enacted or whether it was added or substituted at a later time—and if it was added or substituted, the language it replaced and the context of the amendment; Congress's purpose or purposes in enacting the statute; the likely practical implications of the competing interpretations in light of the statutory purpose; and aspects of legislative history.

   With respect to constitutional questions, in my experience deciding federal constitutional cases over the past ten years, I have found that the United States Supreme Court has considered most constitutional provisions in depth, identifying the meaning of the provision, the values it is designed to promote, and, in most cases, the applicable test or framework for evaluating new claims implicating that provision. The Supreme Court's holdings about the meanings of various provisions, and the applicable tests and frameworks, apply even in cases of "first impression," in which a party seeks to apply a constitutional provision to a novel category of cases. As an intermediate appellate judge, which is what I am with respect to the United States Constitution in my capacity as a state supreme court justice, and what I would be as a circuit court judge if confirmed, I am bound by those tests and frameworks and am not free to invoke a personal philosophy of constitutional interpretation to interpret and apply the constitutional provisions at issue in some other way.

2. **Please describe your judicial philosophy. In responding to this question, please provide your definition of "judicial activism."**

   Response: My commitment as a judge is to approach every case with an open mind; recognize that every case is extremely important, because to the litigants involved, their

case is the most important case in the world; thoroughly review the record and research the applicable law; confer thoughtfully with my colleagues in a spirit of learning and give-and-take; and, when I write, write an opinion that is as clear and understandable as possible so that the parties know what the court decided and why, as well as what the court did not decide.

I do not use the term "judicial activism" because it means different things to different people and is accordingly not a helpful descriptor. I believe judges are charged with interpreting and applying the law impartially, with fidelity to precedent, statutes, and the Constitution, as well as the record in the case viewed through the proper standard of review. I believe that a judge's personal views are irrelevant to interpreting the law.

3. **Is the Constitution a living document?**

Response: I am not certain what this question means. I do not identify with a particular ideology such as "originalism" or "living constitutionalism." I do recognize that many of the provisions of the Constitution are, by design, broad enough to allow for application of their core principles to new circumstances not envisioned by the framers. See, e.g., *Carpenter v. U.S.,* 138 S. Ct. 2206 (2018) (concluding that the core purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials," and applying that core principle to a scenario—search of cellular service location information—that is novel); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (applying basic principles of freedom of speech and press to laws regulating violent imagery in video games).

4. **Please explain the differences between Vermont's Compelled Support Clause and First Amendment protections for religious freedom, in light of what you wrote in *Taylor v. Town of Cabot* (2017).**

Response: In a 1999 decision, the Vermont Supreme Court explained:

> The First Amendment prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. Article 3 prohibits coerced support for "any place of worship." Vt. Const. ch. I, art. 3. We are not dealing with "slightly variant phraseology" that can be easily reconciled. See *State v. Brean,* 136 Vt. 147, 151, 385 A.2d 1085, 1088 (1978) (discussing relationship between self-incrimination clause of Fifth Amendment to United States Constitution and Chapter I, Article 10 of the Vermont Constitution). As applied to the myriad of circumstances that might come before us, we do not believe we can simplistically state that one provision is always more restrictive of state action with respect to religion than another.

Chittenden Town Sch. Dist. v. Department of Education, 738 A.2d 539 (1999).

5. **You have a history of political activism before your service on Vermont's Supreme Court. For example, you supported Democrat candidates and led several political**

action committees. Given this background, how can the parties who appear before you feel confident that you will remain impartial?

Response: For nearly a decade, I have served as a justice on the Vermont Supreme Court. Throughout that time, I have been disengaged from politics or issue advocacy. My "cause" in this phase of my career has been promoting the rule of law and the court's role as impartial adjudicator of conflicts. Through this period, I have developed an extensive record, deciding nearly 1,800 cases, and writing published opinions in over 300. No individual will agree with every opinion I have written or joined, but I hope and expect that taken as a whole my record demonstrates my commitment to impartial adjudication, rigorous legal analysis, and fidelity to the rule of law.

Nomination of the Honorable Beth Robinson to be
United States Circuit Judge for the Second Circuit
Questions for the Record
Submitted September 21, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

   Response: I received the questions on September 21. I drafted answers to each question based on my own knowledge and legal research. I submitted draft answers to the Office of Legal Policy for feedback, and after receiving feedback I finalized my answers for submission on September 27.

4. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

   Response: No individual outside of the United States government assisted me in drafting my answers to these questions or the written questions of other members of the Committee. The process by which I prepared my answers is set forth in response to Question No. 3.

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

Questions for the Record for Beth Robinson, 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. **Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.**

Response: In general terms, the executive branch has responsibility for enforcing federal laws; however, the executive branch also has broad discretion as to whom to prosecute. As long as a prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely within the prosecutor's discretion. *Wayte v. U.S.*, 470 U.S. 598, 607 (1985). That said, I am mindful that the question whether the executive may adopt a policy of declining to prosecute a category of cases in certain specific contexts is an active issue in political, legal and scholarly realms. For that reason, as a sitting Vermont Supreme Court justice, and a nominee for the federal circuit court, it would be inappropriate for me to address that issue.

2. **Describe how you would characterize your judicial philosophy and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Roberts Courts is most analogous with yours.**

Response: My commitment as a judge is to approach every case with an open mind; recognize that every case is extremely important, because to the litigants involved, their case is the most important case in the world; thoroughly review the record and research the applicable law; confer thoughtfully with my colleagues in a spirit of learning and give-and-take; and, when I write, write an opinion that is as clear and understandable as possible so that the parties know what the court decided and why, as well as what the court did not decide. Beyond this commitment, I don't identify with a particular ideology or philosophy of judging, and could not identify a specific U.S. Supreme Court Justice whose philosophy is closest to my own.

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

Response: The U.S. Supreme Court has applied protections in the Constitution to circumstances that were not envisioned by the framers, but in doing so has endeavored to be faithful to the principles reflected in the Constitution as enacted. See, e.g., *Carpenter v. U.S.,* 138 S. Ct. 2206 (2018) (concluding that the core purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials," and applying that core principle to a scenario—search of cellular service location information—that is novel); *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 786 (2011) (applying basic principles of freedom of speech and press to laws regulating violent imagery in video games).

4. **Please briefly describe the interpretative method known as originalism.**

Response: Black's Law Dictionary defines originalism as "The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."

5. **Please briefly describe the interpretive method often referred to as living constitutionalism**.

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."

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

Response: In my experience deciding federal constitutional cases over the past ten years, I have found that the United States Supreme Court has considered most constitutional provisions in depth, identifying the meaning of the provision, the values it is designed to promote, and, in most cases, the applicable test or framework for evaluating new claims implicating that provision. The Supreme Court's holdings about the meanings of various provisions, and the applicable tests and frameworks, apply even in cases of "first impression," in which a party seeks to apply a constitutional provision to a novel category of cases. As an intermediate appellate judge, which is what I am with respect to the United States Constitution in my capacity as a state supreme court justice, and what I would be as a circuit court judge if confirmed, I am bound by those tests and frameworks and am not free to invoke a personal philosophy of constitutional interpretation to interpret and apply constitutional provisions in some other way. For this reason, I would not likely encounter the scenario envisioned in the question in the context of serving as a circuit judge. I have decided nearly 1,800 cases in my decade on the Vermont Supreme Court and I have almost never decided a case involving a constitutional question with respect to which existing precedent did not establish a framework for resolution.

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

Response: The United States Supreme Court has recognized in some circumstances that, although the core principles embodied in the Constitution do not change, their *application* may be impacted by contemporary values and understandings. See, e.g. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (invoking "evolving standards of decency" in evaluating Eighth Amendment claim of cruel and unusual punishment); *Miller v. California*, 413 U.S. 15, 24 (1973) (identifying contemporary community standards as

relevant to factfinder's evaluation of free speech defense in obscenity prosecution). If confirmed to the Second Circuit I would follow all binding Supreme Court precedents.

8. **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 a small business operated by observant owners, like the Baker family's print shop? What are those limits?**

Response: The Religious Freedom Restoration Act (RFRA) applies with respect to federal laws; it does not apply with respect to state laws. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 and n.1 (2006); *Boerne v. Flores*, 521 U.S. 507 (1997). In cases in which RFRA applies, it provides that the government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

With respect to a constitutional free exercise claims not subject to RFRA, the United States Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* 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).' " 494 U.S. 872, 879. Laws that are *not* neutral and generally applicable must be justified by a compelling interest and must be narrowly tailored to advance that interest. *Church of the Lukummi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Facial neutrality is not necessarily determinative of the question whether a law is neutral; if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. Id. at 533. Likewise, a restriction that burdens religious liberty is not generally applicable, and thus is subject to strict scrutiny, when it authorizes the government to grant unrestricted discretionary exemptions and the government declines to grant them to those invoking religious liberty. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1878 (2021). In addition, if a free exercise defense to application of a neutral law of general applicability is adjudicated by a government body in a way that evinces hostility to religion, the religious neutrality required by the Constitution is compromised. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018). Finally, in the context of laws relating to employment, the First Amendment bars enforcement of certain employment discrimination laws when doing so would interfere with the employment relationship between a religious institution and one of its ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171, 188 (2012).

9. **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 United States Supreme Court has held that a person's sincerely held religious belief need not conform to the commands of a particular religious organization.

The operative question is whether the professed belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989).

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

Response: The United States Supreme Court has made it clear that people with sincere beliefs that their religion prevents or requires certain action are entitled to invoke the Free Exercise Clause, without a judicial evaluation of the validity of their interpretations. *Frazee*, 489 U.S. at 833-834.

10. **Under existing doctrine in the Second Circuit, explain what is meant by a sincerely held religious belief and the role of courts in examining whether a religious belief is in fact sincerely held.**

Response: The Second Circuit has held that the question whether a person's religious belief is held sincerely is a subjective test, and courts may not look behind the religious belief to assess the objective validity of the sincerely held belief. *Ford v. McGinnis*, 352 F.3d 582, 590 (2nd Cir. 2003).

11. **The First Amendment guarantees churches and religious institutions the freedom to determine, teach, and follow their own religious doctrine, without government interference. Yet, during a marriage law symposium, you suggested that church leaders and officials could be forced by law to recognize same-sex marriage.**

a. **Can religious institutions be forced to recognize same-sex marriage under the law?**

Response: I do not believe I ever indicated that church leaders and officials could be forced to conduct or solemnize marriages between partners of the same-sex, or to recognize such unions for ecclesiastical purposes. In 2003, while I was still an advocate and before I joined the Vermont Supreme Court, I stated, "I've always said that if somebody tried to force the Catholic Church to do a gay wedding, I would represent the Church pro bono."

The United States Supreme Court noted in *Obergefell v. Hodges*, "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." 576 U.S. at 679.

In evaluating a claim in which the government or an individual seeks to compel a private religiously affiliated organization or business to recognize a valid civil marriage between same-sex partners for some specific purpose, such as providing services or benefits, I would apply the applicable law, including the precedents set forth in response to Question No. 8.

b. **Would it be an "invidious" and "pernicious" form of discrimination, akin to the racial discrimination at issue in *Heart of Atlanta Motel*, for a religious institution to refuse to marry, recognize as married, or celebrate the marriage of, a same-sex couple?**

Response: See response to Question No. 11(a), above.

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

Response: The United States Supreme Court has held that laws that are not neutral relative to religion must be justified by a compelling interest and must be narrowly tailored to advance that interest. *Church of the Lukummi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

13. **You taught courses on sexuality and gender identity for three years, where you required college students read materials like *The Five Sexes: Why Male and Female Are Not Enough*.**

a. **How many biological sexes do you believe there are?**

Response: To clarify, I twice co-taught courses on the law relating to sexuality and gender identity. Questions regarding the legal sex or gender status of transgender individuals for various practical and legal purposes are contested and unresolved in the political and judicial realms. For that reason, it would not be proper for me to respond to this question.

b. **How many biological sexes should be legally recognized?**

Response: See my response to Question No. 13(a), above.

c. **Referencing the question above, is that for courts to decide?**

Response: See my response to Question No. 13(a), above.

14. **Describe in detail your legal experience pertaining to securities law, antitrust law, complex commercial litigation, and shareholder class action suits. How many cases**

have you worked on, or presided over, where the central issue involved one of these fields?

Response: In my time on the Vermont Supreme Court, I have participated in deciding several appeals that included state law securities fraud claims; I have participated in deciding approximately three dozen cases involving contract or commercial disputes between or against commercial entities (not counting a considerable number of cases in which the primary claims involved real property interests); and I have not adjudicated any antitrust or shareholder class action cases. I do not recall litigating cases in these areas prior to becoming a judge.

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

Response: The United States Supreme Court held in *District of Columbia v. Heller* that the Second Amendment protects an individual right to possess firearms for self-defense, that the right is not unlimited, and that possession of a functional handgun in one's home is protected by the Second Amendment. 554 U.S. 570 (2008).

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

Response: Each right under the Constitution must be evaluated and applied on its own terms, pursuant to the specific guidance the United States Supreme Court has provided with respect to that right.

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

Response: Each right under the Constitution must be evaluated and applied on its own terms, pursuant to the specific guidance the United States Supreme Court has provided with respect to that right.

18. **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: I don't know what training programs are provided at the United States Court of Appeals for the Second Circuit, and don't know whether judges have any role in identifying trainings or trainers. Any trainings must be consistent with the law, and my expectation is that they would be thoughtfully designed to promote the sound and impartial administration of justice.

19. **Is the criminal justice system systemically racist?**

Response: This is a very important question for policymakers. In my capacity as an appellate judge, I review individual cases. I would evaluate a claim of racially disparate treatment on the basis of the record in the case before me.

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

Response: If faced with a claim that a political appointment was unconstitutional on the basis that the appointing officer considered impermissible factors such as race or sex, I would review applicable United States Supreme Court precedents applicable to the type of appointment at issue, if any.

21. **Does the President have the authority to abolish the death penalty?**

Response: The federal death penalty is codified at 18 U.S.C. § 3591. Under our system of government, Congress would have to pass a statute repealing that provision in order to abolish the death penalty as a sentencing option in specified cases.

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

Response: Justice Roberts' opinion calls for an "exacting scrutiny" standard in evaluating government-mandated disclosure regimes. "Exacting scrutiny" requires a "substantial relation between the disclosure requirement and a sufficiently important government interest" and that the regime be narrowly tailored to the government's asserted interest, even if it is not the least restrictive means of achieving that end. *Americans for Prosperity Foundation v. Bonta,* 141 S. Ct. 2373, 2383-84 (2021). Justice Thomas would apply a strict scrutiny standard, upholding the law only if it is the least restrictive means to serve a compelling state interest. *Id*. 141 S. Ct. at 2390. Justices Gorsuch and Alito declined to conclude that a single standard applies to all disclosure requirements. *Id.*, 141 S. Ct. at 2391. The U.S. Supreme Court has explained that when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court is the narrowest grounds taken by members who concurred in the judgment. *Marks v. U.S.*, 430 U.S. 188, 193 (1977). In absence of binding Supreme Court precedent as to the applicable standard, I would first determine whether Second Circuit precedent establishes a standard. If it does not, I would analyze the United States Supreme Court's decisions in connection with past membership-disclosure cases, as well as freedom of association cases more broadly, in an effort to determine the constitutionally required standard.

23. **In *Fulton v. City of Philadelphia*, the 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: I understand the Court's decision in *Fulton v. City of Philadelphia* to hold that a restriction that burdens religious liberty is not generally applicable, and thus is subject to strict scrutiny, when it authorizes the government to grant unrestricted discretionary exemptions and the government declines to grant them to those invoking religious liberty. 141 S. Ct. 1868, 1878 (2021).

Senator Josh Hawley
Questions for the Record

Beth Robinson
Nominee, U.S. Circuit Judge for the Second Circuit

1. **The First Amendment of the United States Constitution protects the free exercise of religion.**

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

    Response: The Religious Freedom Restoration Act applies with respect to federal laws; it does not apply with respect to state laws. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 and n.1; *Boerne v. Flores*, 521 U.S. 507 (1997). Accordingly, I would evaluate the hypothetical claim applying Supreme Court precedent interpreting the Free Exercise Clause of the First Amendment.

    With respect to a constitutional Free Exercise claim, the United States Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* 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).' " 494 U.S. 872, 879. Laws that are not neutral and generally applicable must be justified by a compelling interest and must be narrowly tailored to advance that interest. *Church of the Lukummi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Facial neutrality is not necessarily determinative of the question whether a law is neutral; if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. Id. at 533. Likewise, a restriction that burdens religious liberty is not generally applicable, and thus is subject to strict scrutiny, when it authorizes the government to grant unrestricted discretionary exemptions and the government declines to grant them to those invoking religious liberty. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1878 (2021). In addition, if a free exercise defense to application of a neutral law of general applicability is adjudicated by a government body in a way that evinces hostility to religion, the religious neutrality required by the Constitution is compromised.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 1724 (2018). Finally, in the context of laws relating to employment, the first amendment bars enforcement of certain employment discrimination laws when doing so would interfere with the employment relationship between a religious institution and one of its ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171, 188 (2012).

b. Under the precedents of the Supreme Court, and the U.S. Court of Appeals 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: See response to Question No. 1(a), above.

c. Under the precedents of the Supreme Court, and the U.S. Court of Appeals to which you have been nominated, what is the standard for evaluating whether a person's religious belief is held sincerely? Please cite any cases you believe would be binding precedent.

Response: A person's sincerely held religious belief need not conform to the commands of a particular religious organization. The operative question is whether the professed belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989). The question whether a person's religious belief is held sincerely is a subjective test, and courts may not look behind the religious belief to assess the objective validity of the sincerely held belief. *Ford v. McGinnis*, 352 F.3d 582, 590 (2nd Cir. 2003). However, an asserted belief may be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Frazee*, 489 U.S. at 834, n.2 (citing *Thomas v. Review Bd. Of Indiana Employment Security Div*., 450 U.S. 707, 715 (1981)). Moreover, the Supreme Court has held that "a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 717, n.28 (2014).

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

   Response: I understand *Heller* to hold that the Second Amendment protects an individual right to possess firearms for self-defense unconnected with service in a militia, 554 U.S. at 592; that the right is not unlimited, and is not a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.,* 554 U.S. at 626; that the right applies to the sorts of weapons that were "in common use at the time," and does not extend to "dangerous and unusual weapons," *id.*, 554 U.S. at 627; and that because the challenged law effectively banned possession of a functional handgun at one's home, it ran afoul of this constitutional protection, *id*., 554 U.S. at 635.

3. **Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."**

   Response: I agree.

4. **Are there circumstances when you believe judges should consider expected policy results when deciding a case? When might those circumstances arise?**

   Response: If a case involves the interpretation of a statute and the plain meaning of the statutory text is clear, then that ends the analysis. In the context of a statute which, viewed in its entirety, is ambiguous, courts may use a host of tools to try to discern the meaning of a contested provision, including considering court decisions analyzing analogous language; the similarities or differences between the contested language and related statutes; dictionary definitions if the meaning of a word is disputed; various generic "maxims" of statutory interpretation; the context in which the statute was enacted (for example, was it an effort to override or codify a court decision?); whether the contested provision was in the statute when enacted or whether it was added or substituted at a later time—and if it was added or substituted, the language it replaced and the context of the amendment; Congress's purpose or purposes in enacting the statute; and legislative history, broadly understood. In limited circumstances, considering the expected outcomes of two reasonable constructions of a statute in light of Congress's purpose in enacting the statute may be instructive.

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

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

Response: If a case involves the interpretation of a statute and the plain meaning of the statutory text is clear then that ends the analysis. Legislative history, broadly understood, is among the tools I have used in trying to discern the meaning of ambiguous statutes. Some types of legislative history are more probative than others. As set forth in response to Question No. 4, above, understanding the context in which a statute was enacted (e.g. in response to a court decision), may be probative. When statutory language replaced a prior statutory provision, understanding that change can shed light on the meaning of an ambiguous statute. In some cases, evidence of language that was proposed in a statute but rejected or changed can be instructive. And statements of legislative purpose can be helpful. On the other hand, statements of individual legislators or advocates as to the intent of a particular provision are generally only minimally probative. In construing ambiguous Vermont statutes, I have found the section-by-section explanations nonpartisan committee counsel provide committees of jurisdiction to be instructive, as well as written reports by multi-stakeholder committees assigned by the Legislature to develop consensus legislation when the Legislature enacts the legislation proposed by such committees. I am not aware of a close federal analog to these sources.

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

Response: In my time on the Vermont Supreme Court, I have not had occasion to consider the laws of foreign nations in the context of interpreting the provisions of the U.S. Constitution. The laws of the United States are our own, and we are not bound by the laws or judicial decisions of other nations.

6. 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: Where the question is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

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

Response: I cannot answer this question without more context. In reviewing a trial court's award of damages or injunctive relief, I would apply the applicable standard of review.

8. **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 who faithfully apply the law consistent with the record and standard of review sometimes decide cases in ways we do not personally like.

    b. **Do you agree or disagree with this statement? Why?**

    Response: I agree with the statement. Judges are bound by the statutes enacted by the political branches and binding precedent of higher courts; even when the law is not entirely clear, the tools of interpretation often compel a particular legal conclusion. As a consequence, judges sometimes apply and enforce legal rules that we would not advocate if we were legislators. In addition, appellate judges are bound by the standard of review and limited by the record in the case on appeal; we cannot revisit the trial court's factual findings because we would have made different credibility determinations, and cannot set aside the trial court's discretionary rulings within the trial courts' broad discretion.

9. **Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules; they apply them."**

    a. **What do you understand this statement to mean?**

    Response: I understand this statement to mean that courts are charged with interpreting the law consistent with the record and applicable standards of review and do not have the authority to make the laws.

    b. **Do you agree or disagree with this statement? Why?**

    Response: I generally agree with this statement, though state court judges have different responsibility in developing common law.

10. **What three law professors' works do you read most often?**

Response: There are no particular law professors whose works I read regularly. I typically consult law review articles when I think they will be helpful in addressing a particular issue before me.

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

Response: My view of the law has not been significantly shaped by a particular Federalist Paper.

12. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: The opinions that have most often made me change my mind are draft opinions of colleagues on the Vermont Supreme Court. In many cases, reviewing a colleague's draft has changed my understanding of the law or the record in the case.

13. At your hearing, you defended your representation of the plaintiff in *Paquette v. Regal Art Press, Inc.*, 656 A.2d 209 (Vt. 1994) and related proceedings.

a. Did you ever advise your client to seek out an alternative printing shop that did not object to printing cards promoting abortion?

Response: Due to the attorney-client privilege, it would be inappropriate for me to disclose my advice to my client.

b. Your brief cited *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 341 (1964). Why did you believe it was appropriate to compare the Bakers' decision not to print materials advocating for abortions, in contravention of their religious beliefs, to the invidious racial discrimination experienced by African-Americans in the 1960's?

Response: The plaintiff's claim in the *Paquette* case was that the printing business, which offered its printing services to the general public, was a public accommodation, and that it unlawfully denied her services on account of her religious views. Just as the state has a recognized interest in prohibiting discrimination in public accommodations on the basis of race, as recognized in the *Heart of Atlanta Motel* decision, it has an interest in prohibiting discrimination by public accommodations on the basis of religion or creed.

c. Do you believe it is appropriate for a court to require an individual to advocate in favor of abortions, where doing so would violate his or her sincerely held religious beliefs? Under what circumstances, if any, do you believe it is appropriate to do so?

Response: I am not aware of any law that purports to require an individual to advocate in favor of abortions. In the *Paquette* case, my client conceded from the outset that if the printing business had declined to provide her services on account of the patrons' objections to abortions, she would not have had a legal claim.

14. At your hearing, you defended your decision to dissent in *State v. Kuzawski*, 181 A.3d 62 (Vt. 2017).

a. Do you think it is appropriate for an individual to threaten a six-year-old girl with a box cutter by telling her that he would kill her in her sleep?

Response: I do not, and my dissent did not suggest otherwise. As I stated in my dissent, "The evidence in this case could support a conviction of defendant for any number of crimes. Domestic assault with a deadly weapon is not one of them."

b. Do you think a box cutter is a deadly weapon?

Response: The legal question in the *Kuzawski* case was whether the implement used by the defendant, in the way he used it, was a deadly weapon for purposes of Vermont's statute. I concluded that it was not.

c. Why did you believe it was appropriate to analogize this fact pattern to using a "pillow to swat someone's backside"?

Response: The reasoning behind this analogy is clear from the reasoning in the *Kuzawski* dissent. I have reproduced that dissent, without footnotes, to fully answer this question:

¶ 24. The majority's conclusion does not follow from its premise. I don't take issue with the majority's legal analysis that the deadliness of an implement (or weapon) should be assessed with reference to the way it is used or threatened to be used. But even within the majority's own framework, I cannot agree that defendant threatened to use the otherwise nondeadly tool at issue here in a way that converted it to a deadly weapon. The majority's holding expands the reach of the assault-with-a-deadly-weapon statute beyond any reasonable bounds.

¶ 25. I agree that an implement that may not otherwise generally be viewed as a deadly weapon can be considered a deadly weapon under 13 V.S.A. §§ 1021(a)(3) and 1043(a)(2) based on the way that it is used or threatened to be used. So, for example, a threat to smother a family member with a pillow may constitute first degree aggravated domestic assault under § 1043(a)(2) even if the actor does not carry out the threatened action. But a threat to whack someone's backside with that same pillow could not. And I agree that whether the use or

threatened use of an implement is "known to be capable of producing death or serious bodily injury," § 1021(a)(3), is evaluated objectively. See ante, ¶ 16. So far, so good.

¶ 26. But I cannot fathom how this legal framework supports the conclusion that the implement at issue in this case was a deadly weapon. A picture speaks a thousand words.

¶ 27. Used in the manner threatened here, this tool is not a deadly weapon. Although the tool contains a cutting blade, the blade is protected such that it cannot actually cut anything thicker than the side of a box. In that respect, it is like a small, plastic pencil sharpener, manual can opener, or stapler. It is capable of cutting (or in the case of a stapler, puncturing) something, but is engineered so that it would be extremely difficult to use to cut (or puncture) anything other than the specific object it was designed to cut or puncture. The blade in this case faces opposite the tip of the implement. You can ram this tool into someone's abdomen, but it won't penetrate their skin.

¶ 28. The State's own description in oral argument of how this tool could be used as a deadly weapon supports my view. The State posited that, because the child in this case is small, it would be possible (perhaps while she sleeps) to slice her ear, presumably by inserting her ear into the narrow channel designed for the box side. Had defendant threatened to use this tool to slice the child's earlobe off in her sleep, the State might be able to make a case that he threatened to use the implement as a deadly weapon. But he didn't. He poked it into her belly—a threatened use that could not bring about the serious bodily harm that might otherwise transform this everyday household tool into a deadly weapon triggering heightened legal penalties. The threat in this case is akin to the threat to use a pillow to swat someone's backside.

¶ 29. If we are to conclude that defendant's threat to harm the child with an implement that could conceivably cause serious injury—even if unrelated to the threatened use—supports a finding that the implement is a deadly weapon, then <u>any</u> use or threat to a family member that involves <u>any</u> object would be aggravated domestic assault with a deadly weapon. A threat to hit a child's backside with a pillow would qualify because the pillow could also be used to smother the child. Poking a sibling in the back with a small plastic pencil sharpener would qualify because you could stick someone's finger in the slot and rotate the plastic casing. And threatening to poke a spouse in the belly with a manual can opener would qualify because you could close the cutting wheel on the tip of someone's finger and then turn the cutting mechanism. The majority has ignored the requirement of some connection between the actual or threatened use of an implement and its capacity to cause serious bodily injury. In doing so, it has stretched the definition of deadly weapon in § 1021(a)(3) to cover far more behavior than I believe the Legislature intended, particularly given the dramatically higher maximum penalties imposed for the use of a deadly weapon in connection with an assault. Compare 13 V.S.A. § 1023(b) (establishing one-year prison sentence for simple assault), with id. § 1024(b) (providing for fifteen-year prison sentence for assault with a deadly weapon), and id. § 1042 (providing for eighteen-month imprisonment for domestic assault), with id. § 1043(b) (establishing fifteen-year imprisonment for domestic assault with a deadly weapon).

¶ 30. The evidence in this case could support a conviction of defendant for any number of crimes. Domestic assault with a deadly weapon is not one of them. For these reasons, I dissent.

d. If, under your view, a box cutter is not a "deadly weapon" when plastic covers the blade, is a firearm not a "deadly weapon" under your view when the safety is turned on?

Response: I believe this question misapprehends the reasoning of our dissent in *Kuzawski*. The implement did not at all function like a knife or like the familiar kind of boxcutter with a retractable or fixed protruding blade. There was no removeable plastic cover. Rather, it was an implement with a fully and permanently protected blade facing inward, toward the person using the implement. As set forth in the dissent, it could not be used in a stabbing manner; it could only cut narrow things, like the side of a box, that could be fed into the

small channel where the fully protected blade could cut it as the operator pulled the implement toward the operator's body.

15. **May the government or a private citizen force a religious institution to recognize or perform same-sex marriages, even if doing so goes against the faith of individuals?**

    Response: Neither the government nor a private citizen may force a religious institution to perform same-sex marriages. In evaluating a claim in which the government or an individual seeks to compel a religious institution to recognize a valid civil marriage between same-sex partners for some specific purpose, I would apply, at a minimum, the legal principles set forth in response to Question No. 1, above.

16. **You previously taught a course at Dartmouth College that focused on sexuality and gender identity.**

    a. **Did your syllabus include *The Five Sexes*, by Anne Fausto-Sterling?**

       Response: Yes. This portion of the course was taught by my co-professor, a philosophy professor.

    b. **How many sexes and genders do you believe there are?**

       Response: Questions regarding the legal sex or gender status of transgender individuals for various practical and legal purposes are contested and unresolved in the political and judicial realms. For that reason, it would not be proper for me to respond to this question.

Senator Mike Lee
Questions for the Record
Justice Beth Robinson, Second Circuit Court of Appeals

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

Response: My commitment as a judge is to approach every case with an open mind; recognize that every case is extremely important, because to the litigants involved, their case is the most important case in the world; thoroughly review the record and research the applicable law; confer thoughtfully with my colleagues in a spirit of learning and give-and-take; and, when I write, write an opinion that is as clear and understandable as possible so that the parties know what the court decided and why, as well as what the court did not decide.

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

Response: First and foremost, I would consult United States Supreme Court and Second Circuit precedent to determine whether any precedent resolves the interpretational question before me. Second, if the statute had not been previously construed by the Supreme Court or Second Circuit, I would consider whether the plain language of the statute, understood as a coherent whole, resolves the question at hand. If the plain language of the statute did not resolve the question, I would potentially employ a host of interpretive tools. In particular, I might consider court decisions analyzing analogous language; the similarities or differences between the contested language and related statutes; dictionary definitions if the meaning of a word is disputed; various generic "maxims" of statutory interpretation; the context in which the statute was enacted (for example, was it an effort to override or codify a court decision?); whether the contested provision was in the statute when enacted or whether it was added or substituted at a later time—and if it was added or substituted, the language it replaced and the context of the amendment; Congress's purpose or purposes in enacting the statute; the likely practical implications of the competing interpretations in light of the statutory purpose; and aspects of legislative history.

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

Response: First and foremost, I would consult United States Supreme Court precedent. In my experience deciding federal constitutional cases over the past ten years, I have found that the United States Supreme Court has considered most constitutional provisions in depth, identifying the meaning of the provision, the values it is designed to promote, and, in most cases, the applicable test or framework for evaluating new claims implicating that provision. The Supreme Court's holdings about the meanings of various provisions, and the applicable tests and frameworks,

apply even in cases of "first impression," in which a party seeks to apply a constitutional provision to a novel category of cases. As an intermediate appellate judge, which is what I am with respect to the United States Constitution in my capacity as a state supreme court justice, and what I would be as a circuit court judge if confirmed, I am bound by those tests and frameworks and am not free to invoke a personal philosophy of constitutional interpretation to interpret and apply constitutional provisions in some other way. I have decided nearly 1,800 cases in my decade on the Vermont Supreme Court and I have almost never decided a constitutional question with respect to which existing precedent did not establish a framework for resolution.

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

Response: Please see answer to Question No. 3, above.

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

Response: If the plain meaning of the statute, taken as a whole, clearly resolves a question before me, that ends the inquiry. In many cases, the text of the statute alone does not resolve a contested question. In such cases, I use various interpretive tools as set forth in response to Question No. 2, above.

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: A statute might be subject to applications not specifically envisioned at the time it was enacted, but the meaning of the statute—that is, the principle it was designed to codify—does not evolve with social norms and linguistic conventions.

6. **In 2005 letter to the Vermont House Judiciary Committee you stated that "Although transsexualism is not specifically listed in Vermont's current non-discrimination laws. . . Insofar as our laws list sex and sexual orientation among the protected categories, they prohibit discrimination against a transsexual." To what extent did legislative history, or the intent of the Vermont legislature when drafting the state's non-discrimination laws, influence this statement?**

Response: This statement was a summary of the conclusion reached by the Vermont Attorney General in an administrative decision in the case I was describing to the Vermont House Judiciary Committee. I do not recall what sources the Attorney General relied upon in reaching this conclusion, nor what information I provided the Attorney General in advocating for my client.

a. **Should this interpretation be extended to Title IX?**

Response: In the context of a Title IX claim, this is an open question of law that could potentially come before me if I am confirmed to serve on the Second Circuit. For that reason, it would be inappropriate for me to publicly address the issue outside of the context of an actual case.

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

Response: 1) Injury in fact: an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical; 2) Causation: the injury must be fairly traceable to the challenged action of the defendant; and 3) Redressability: it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61.

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

Response: The United States Supreme Court has concluded that Congress is empowered to pursue legitimate ends within the scope of the Constitution by appropriate means, consistent with the letter and spirit of the Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). See also U.S. Constitution, Article I, sec. 8, paragraph 18 (empowering Congress "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers").

9. **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 consider whether any binding precedent has addressed Congress's authority to enact the same or a very similar law. I would consider any sources of constitutional authority proffered by the government in support of the law's constitutionality, and the standards established by Supreme Court or Second Circuit precedent for evaluating Congress's authority pursuant to each proffered source of authority. I would also evaluate whether Congress's assertion of authority to pass the challenged law is inconsistent with any restrictions on Congress's power that are established in the Constitution or binding precedent.

In the absence of binding Supreme Court precedent, or Second Circuit precedent establishing a framework for evaluating a proffered source of authority, I would consider the text of the constitutional provision, its meaning at the time of enactment, historical and recent interpretations of the provision by other courts to the extent they are persuasive, and Congress's history of enacting similar laws on the express or implied basis of the contested source of authority. The parties' presentations may lead me to explore other avenues as well.

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

Response: The United States Supreme Court has recognized numerous rights not expressly listed in the Constitution. Recognized "unenumerated" rights include the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); the right to travel, *Kent v. Dulles,* 357 U.S. 116 (1958); the right to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); the right to reproductive and sexual privacy, *Eisenstadt v. Baird,* 405 U.S. 438, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, *Lawrence v. Texas,* 539 U.S. 558 (2003); freedom of association, see, e.g., *National Association for the Advancement of Colored People v. Alabama,* 357 U.S. 449 (1958); the right to have children, *Skinner v. Oklahoma,* 316 U.S. 535; and the right to direct the upbringing of one's children, see *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of the Sisters,* 268 U.S. 510 (1925).

11. **What rights are protected under substantive due process?**

Response: The United States Supreme Court has described the liberty protected by due process as including "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). More recently, the Supreme Court has described the Fourteenth Amendment as protecting those fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). Specific examples of rights protected under substantive due process are set forth in response to Question No. 10.

12. **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 United States Supreme Court has recognized a distinction between these categories of rights. In *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937), the Court began retreating from its *Lochner*-era decisions, and in *Williamson v. Lee Optical of Oklahoma,* the Court concluded that "the guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards." 348 U.S. 483, 488 (1955). If confirmed, I would faithfully apply the Supreme Court's precedent concerning the scope of constitutional substantive due process protections.

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

Response: "Congress may regulate the use of the channels of interstate commerce . . . may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . and [may] regulate those activities having a substantial relation to interstate commerce." *U.S. v. Lopez,* 514 U.S. 549, 558-559 (1995). The Commerce Clause does not authorize Congress to regulate activities that in the aggregate have no substantial effect on interstate commerce. *Id.* 514 U.S. at 567-68. And it does not authorize Congress to compel individuals to become active in commerce, as opposed to regulating existing commercial activity. *National Federation of Independent Business v. Sebelius,* 567 U.S. 519, 552 (2012).

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

Response: The factors the Supreme Court has relied on in determining whether a group qualifies as a "suspect class" include whether the members of the class constitute a "discrete and insular minority," *id.*, 403 U.S. at 373 (citing *United State v. Carolene Products Col,* 304 U.S. 144, 152-53, n.4 (1938) (describing prejudice against "discrete and insular minorities" as a factor that seriously curtails the operation of the political processes ordinarily to be relied upon to protect minorities, calling for a correspondingly more searching judicial inquiry)); whether the group has been subjected to historical discrimination, *Lyng v. Castillo,* 477 U.S. 635, 638 (1986); and whether the group has "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Id.* In one formulation, the Supreme Court explained that a suspect class is one "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." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973). The United State Supreme Court has identified race, national origin, religion and alienage as suspect classifications. See *Graham v. Richardson*, 403 U.S. 365, 371-72; *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

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

Response: By allocating the power to legislate, execute, and adjudicate among discrete branches of government, the Constitution prevents any one branch from becoming too powerful and potentially tyrannical. The separation of powers provides greater protection for the individual rights protected by the Constitution by ensuring that three distinct branches have responsibility for protecting those rights, and by assigning to the Judiciary the authority to adjudicate claims that the legislative or executive branches have impinged on individual rights.

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

Response: My starting point would be to review any applicable United States Supreme Court or Second Circuit precedent concerning the assertion of authority in question. I would follow any applicable controlling precedent, and would draw persuasive lessons from precedent concerning distinct but analogous issues.

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

Response: To the extent that empathy describes the act of understanding or being aware of the feelings of another, a judge's respectful treatment of litigants and lawyers in a case may be informed by empathy. In the actual adjudication of individual appeals, empathy is not a helpful tool in construing a statute or interpreting the Constitution. Empathy in a general sense—understanding the experiences and perceptions of people generally—may have limited application in applying established standards to the record of a case, such as considering whether a "reasonable person" would engage in particular conduct, and may be relevant in shaping rules and tests that can be reasonably understood and followed.

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

Response: A court has the responsibility to invalidate laws that are unconstitutional and uphold laws that are constitutional. I cannot make a blanket generalization that in all cases a failure to do one of these things is worse than a failure to do the other.

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

Response: I do not have a theory to explain the trend described in the question. The downside to overly aggressive exercise of judicial review is that it impinges on the democratic process in our constitutional democracy. The downside to judicial passivity in the face of unconstitutional acts by the elected branches is that it undermines the constitutional protections in our constitutional democracy. As a constitutional democracy, we need to be respectful of both the *constitution,* and the *democracy.*

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

Response: Black's Law Dictionary defines "judicial supremacy" as "The doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." It defines "judicial review" as "A court's power to review the actions of other branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional."

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

Response: Elected officials may interpret the Constitution to require *greater* protections for individuals than the courts conclude are required, and may implement their interpretations in the form of statutory protections or executive branch actions. Doing so would not run afoul of the imperative to respect duly rendered judicial decisions. But in our constitutional structure, courts have the power and responsibility of judicial review, and elected officials should not disregard duly rendered judicial decisions.

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

Response: Courts have no tangible tools to enforce our decisions; for that reason, the authority of our rulings depends on others' respect for the rule of law. In order to engender this respect, courts must demonstrate through our actions that we act impartially, without favor to any party on account of wealth, status, social standing, or any other such factor. In our decisions, we must be judicious and faithful to the law we are charged with interpreting and applying. And our diligence and thoughtfulness determining a legal matter must be apparent not only to the prevailing party, but to those who disagree with, and may be disadvantaged by our decisions.

23. **As a Circuit court judge, you would, of course, be bound by both Supreme Court and Second Circuit precedent. What do you see as the duty of a lower court judge when confronted with a case where the precedent in question does not appear to be rooted in the constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand?**

Response: If the precedent in question does not appear to speak directly to the issue at hand, then it may not be a binding precedent with respect to the issue at hand. If the question is how to respond when binding precedent on a constitutional question that is dispositive of the issue at hand appears to be unrooted in the constitutional text, history or tradition, the responsibility of a circuit court judge would be to apply the precedent. Although it is generally not the role of a circuit court judge to critique binding precedent, it would not be inappropriate in the rare case, typically in the context of a separate opinion, to raise questions about the applicable precedent that have not previously been aired, even while faithfully applying the precedent.

24. **The federal procedural rules, and your responsibilities as a federal circuit judge, will be different from the rules and responsibilities that you have as a Vermont Supreme Court Judge. For example, in your decision in *Boyton v. ClearChoice*, you stated that Vermont "has an 'extremely liberal' notice-pleading standard." Can you explain how this differs from the federal pleading standard?**

Response: The United States Supreme Court has held that to survive a motion to dismiss under the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In addition, the Court has explained, "[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

25. **During a panel on the Vermont Judicial System, you said that "Don't enact laws [is] not quite the same as don't make laws." Can you expound on that statement?**

Response: Because the question does not identify the panel with specificity, I am not able to provide any context for the specific statement attributed to me in the question. That said, I have in the context of panels about the state court system explained that, in contrast to federal judges, state court judges do sometimes "make" law in the context of developing an evolving common law.

26. **You also stated that the "development of law" is "necessarily a three-way partnership of sorts" between the legislature, judiciary, and executive branches. What is the judiciary's role in this supposed partnership?**

Response: Because the question does not identify the panel with specificity, I am not able to provide any context for the specific statement attributed to me in the question. In speaking about the relationship among the branches, I sometimes cite examples of circumstances where one of the following has occurred:

- the Vermont Supreme Court decided a case regarding a matter of common law, and the Legislature responded by enacting a statute codifying or superseding the decision;
- the Vermont Supreme Court interpreted an ambiguous statute to the best of its ability and the Legislature either expressly codified that clarifying interpretation or amended the statute to more clearly reflect a different meaning; or
- the Vermont Supreme Court has, in the context of an opinion in a particular case, urged the Legislature to fill a statutory void or clarify a confusing statute, and the Legislature has responded in kind.

These kinds of examples illustrate the appropriate back-and-forth that sometimes takes place between the separate branches as the law develops.

a. **As a Circuit Court judge would you be more committed to "making laws" or interpreting the law?**

Response: As a Vermont Supreme Court justice I have been committed to interpreting the law for the past decade. I would bring that same commitment to the Second Circuit if confirmed.

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

Response: The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a); they include consideration of the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *Id.* § 3553(a)(6). In evaluating the propriety of a trial court's sentence, I would review these statutory factors, the sentencing guidelines, and any pertinent policy statement issued by the Sentencing Commission.

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

Response: I am not familiar with the above statement. I'm not aware of any federal statutes that define equity as set forth above. To the extent that term is used in a non-legal context, I have no opinion about its proper definition.

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

Response: I am mindful that the terms "equity" and "equality" are the subject of contemporary social, political, and scholarly discussion which may come into play in legal arguments presented to me in an individual case, whether as a justice on the Vermont Supreme Court, or a circuit judge, if I am confirmed. For that reason, it would be inappropriate for me to publicly offer opinions about the terms, their meanings, or their implications. If faced with a case that implicated these concepts, I would apply the applicable law set forth in statute or binding Supreme Court or Second Circuit precedent.

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

Response: See response to Question No. 29, above.

31. **How do you define "systemic racism?"**

Response: The Cambridge Dictionary defines "systemic racism" as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race." This definition is consistent with my understanding.

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

Response: I do not use the term "critical race theory," as I believe it is a term that means different things to different people.

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

Response: As noted in response to Question No. 32, I do not have a definition of "critical race theory."

34. **In the complaint you wrote for Linda Paquette in *Paquette v. Regal Art Press, Inc.*, you called Regal Art Press's refusal to print a pro-abortion pamphlet "invidious," "pernicious" and "similar to racial discrimination." If that case was being decided today, do you think the Supreme Court's decision in *Masterpiece Cakeshop* would influence its outcome?**

Response: The plaintiff's claim in the *Paquette* case was that the printing business, which offered its printing services to the general public, was a public accommodation, and that it unlawfully denied her services on account of her religious views. It was that discrimination by a public accommodation on the basis of a customer's religious views that was described as "invidious." In the *Masterpiece Cakeshop* decision the United States Supreme Court concluded that if a free exercise defense to application of a neutral law of general applicability is adjudicated by a government body in a way that evinces hostility to religion, the religious neutrality required by the Constitution is compromised. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018).

35. **Throughout your career you have compared opposition to same-sex marriage to racial discrimination and the civil rights movement. Can you expound on this comparison? In what way are the two movements similar?**

Response: During my time as an advocate for the right to marry for same-sex couples, I did draw analogies to the civil rights movement for racial equality. I have served on the Vermont Supreme Court for nearly a decade, and am no longer an advocate. In my capacity as a Vermont Supreme Court justice, as well as a nominee for a federal circuit judge position, it would be inappropriate for me to publicly expound on this analogy.

a. **Would this belief influence your judgements in cases involving religious institutions, beliefs, or persons?**

Response: In cases involving religious institutions, beliefs, or persons, I would apply the applicable precedent of the United States Supreme Court and the Second Circuit concerning the Free Exercise Clause of the First Amendment.

36. **Can a court judge the validity of a person's sincerely held religious beliefs?**

Response: No. The operative question is whether the professed belief is sincerely held. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989).

37. **Do you think that private organizations or businesses should be compelled to support same-sex marriage?**

Response: In evaluating a claim in which the government or an individual seeks to compel a private organization or business to recognize a valid civil marriage between same-sex partners for some specific purpose, such as providing services or benefits, I would apply the applicable law. A non-inclusive list of the law that might apply, depending on the context of a particular case, includes the Religious Freedom Restoration Act, *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 879; *Church of the Lukummi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993); *Fulton v. City of*

Philadelphia, 141 S. Ct. 1868, 1878 (2021); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1724 (2018); and *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171, 188 (2012).

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 14, 2021

Questions for all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

Questions for all judicial nominees:

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

   Response: My commitment as a judge is to approach every case with an open mind; recognize that every case is extremely important, because to the litigants involved, their case is the most important case in the world; thoroughly review the record and research the applicable law; confer thoughtfully with my colleagues in a spirit of learning and give-and-take; and, when I write, write an opinion that is as clear and understandable as possible so that the parties know what the court decided and why, as well as what the court did not decide.

2. **Would you describe yourself as an originalist?**

   Response: I do not identify with any particular judicial ideology with respect to constitutional interpretation. In my experience deciding federal constitutional cases over the past ten years, I have found that the United States Supreme Court has considered most constitutional provisions in depth, identifying the meaning of the provision, the values it is designed to promote, and, in most cases, the applicable test or framework for evaluating new claims implicating that provision. The Supreme Court's holdings about the meanings of various provisions, and the applicable tests and frameworks, apply even in cases of "first impression," in which a party seeks to apply a constitutional provision to a novel category of cases. As an intermediate appellate judge, which is what I am with respect to the United States Constitution in my capacity as a state supreme court justice, and what I would be as a circuit court judge if confirmed, I am bound by those tests and

frameworks and am not free to invoke a personal philosophy of constitutional interpretation to interpret and apply constitutional provisions in some other way.

3. **Would you describe yourself as a textualist?**

   Response: In construing a statute that has not been interpreted in binding precedent, I would consider whether the plain language of the statute as it would have been understood at the time it was enacted and understood as a coherent whole, resolves the question at hand. If it does, that is the end of the inquiry and judicial construction is not required.

4. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: I do not identify with a particular ideology such as "originalism" or "living constitutionalism." I do recognize that many of the provisions of the Constitution are, by design, broad enough to allow for application of their core principles to new circumstances not envisioned by the framers. See, e.g., *Carpenter v. U.S.,* 138 S. Ct. 2206 (2018) (concluding that the core purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials," and applying that core principle to a scenario—search of cellular service location information—that is novel); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (applying basic principles of freedom of speech and press to laws regulating violent imagery in video games).

5. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: There is no individual Justice whose jurisprudence I most particularly admire.

6. **Was Marbury v. Madison correctly decided?**

   Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

   Marbury v. Madison's establishment of judicial review is foundational to our collective understanding of the role of courts. *Marbury,* 5 U.S. 137, 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). For that

reason, I make an exception to this general practice in acknowledging my agreement with that aspect of the decision that established judicial review.

7. Was Lochner v. New York correctly decided?

Response: The United States Supreme Court abrogated *Lochner v. New York*, in *West Coast Hotel Co. v. Parrish* and its progeny. See *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423 (1952). It is no longer the law of the land and I would not apply the decision.

8. Was Brown v. Board of Education correctly decided?

Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

Brown v. Board of Education, and associated decisions striking down legally enforced racial segregation in public education, were foundational to modern equal protection law. *Brown v. Board of Ed. of Topeka,* 347 U.S. 483, 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). For that reason, I make an exception to this general practice in acknowledging my agreement with that aspect of *Brown* and associated decisions that rejected the doctrine of "separate but equal."

9. Was Bolling v. Sharpe correctly decided?

Response: My response to Question No. 8 applies to this question.

10. Was Cooper v. Aaron correctly decided?

Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

11. Was Mapp v. Ohio correctly decided?

My response to Question No. 10 applies to this question.

12. Was Gideon v. Wainwright correctly decided?

Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

Gideon v. Wainwright, 372 U.S. 335 (1963) held that the Sixth Amendment right to counsel is a fundamental due process right applicable to criminal defendants in state court under the Fourteenth Amendment. The decision is foundational to our criminal law. For that reason, I make an exception to this general practice in acknowledging my agreement with that aspect of *Gideon* that affirmed the applicability of the Sixth Amendment right to counsel to state court prosecutions.

13. Was Griswold v. Connecticut correctly decided?

My response to Question No. 10 applies to this question.

14. Was South Carolina v. Katzenbach correctly decided?

My response to Question No. 10 applies to this question.

15. Was Miranda v. Arizona correctly decided?

My response to Question No. 10 applies to this question.

16. Was Katzenbach v. Morgan correctly decided?

My response to Question No. 10 applies to this question.

17. Was Loving v. Virginia correctly decided?

Response: As a sitting Vermont Supreme Court Justice and a nominee for a federal circuit court position, I generally refrain from publicly praising or criticizing binding U.S. Supreme Court precedents. I do so out of respect for the higher court whose precedent binds my own decisions; to avoid engaging in ongoing contemporary political, legal or scholarly debate triggered by Supreme Court decisions; and to avoid giving the

impression that I have prejudged cases that might come before me that require consideration of the precedents, their scope, or their implications. Whether or not I agree with a Supreme Court decision that remains binding precedent, I would faithfully apply the precedent.

Loving v. Virginia rejected the argument that race-based restrictions on marriage did not run afoul of the Equal Protection Clause because they restricted the marriages of members of all races to the same degree. 388 U.S. 1 (1967). For that reason, I make an exception to this general practice in acknowledging my agreement with that aspect of *Loving* that rejected the "equal application" theory.

18. Was Katz v. United States correctly decided?

My response to Question No. 10 applies to this question.

19. Was Roe v. Wade correctly decided?

My response to Question No. 10 applies to this question.

20. Was Romer v. Evans correctly decided?

My response to Question No. 10 applies to this question.

21. Was United States v. Virginia correctly decided?

My response to Question No. 10 applies to this question.

22. Was Bush v. Gore correctly decided?

My response to Question No. 10 applies to this question.

23. Was District of Columbia v. Heller correctly decided?

My response to Question No. 10 applies to this question.

24. Was Crawford v. Marion County Election Board correctly decided?

My response to Question No. 10 applies to this question.

25. Was Boumediene v. Bush correctly decided?

My response to Question No. 10 applies to this question.

26. Was Citizens United v. Federal Election Commission correctly decided?

My response to Question No. 10 applies to this question.

27. Was Shelby County v. Holder correctly decided?

My response to Question No. 10 applies to this question.

28. Was United States v. Windsor correctly decided?

My response to Question No. 10 applies to this question.

29. Was Obergefell v. Hodges correctly decided?

My response to Question No. 10 applies to this question.

30. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: A panel of the Second Circuit follows circuit precedent unless a Supreme Court decision or an en banc holding of the Second Circuit implicitly or explicitly overrules the prior decision. *Anderson v. Recore,* 317 F.3d 194, 201 (2003). The United States Supreme Court has considered various factors in deciding whether to overrule its own precedent, including the "workability" of the standard, the age of the precedent, the reliance interests at stake, whether the decision was well reasoned, and changed circumstances since the time the case was decided. See, e.g., *Gamble v. United States,* 139 S. Ct. 1960, 1981 (2019); *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2096-97 (2018).

31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: See response to Question No. 30.

32. What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?

Response: If the plain language of the statute, understood as it would have been understood when enacted and understood as a coherent whole, resolves the question at hand, then I would not turn to extrinsic factors in interpreting a statute. If the plain language of the statute does not resolve the question, I might employ a host of interpretive tools. In particular, I might consider court decisions analyzing analogous language; the similarities or differences between the contested language and related statutes; dictionary definitions if the meaning of a word is disputed; various generic "maxims" of statutory interpretation; the context in which the statute was enacted (for example, was it an effort to override or codify a court decision?); whether the contested

provision was in the statute when enacted or whether it was added or substituted at a later time—and if it was added or substituted, the language it replaced and the context of the amendment; Congress's purpose or purposes in enacting the statute; the likely practical implications of the competing interpretations in light of the statutory purpose; and aspects of legislative history.

33. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: The specific factors to be considered in imposing a sentence are set forth in 18 U.S.C. § 3553(a); they include consideration of the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *Id.* § 3553(a)(6). In evaluating the propriety of a trial court's sentence, I would review these statutory factors, the sentencing guidelines, and any pertinent policy statement issued by the Sentencing Commission.

Questions from Senator Thom Tillis
for Beth Robinson
Nominee to be United States Circuit Judge for the Second Circuit Court of Appeals

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

   Response: A judge's personal views are irrelevant to interpreting the law. In applying established legal standards to the record of a case, appellate judges are sometimes called upon to exercise judgment, cabined by precedent and exercised in collaboration with fellow judges.

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

   Response: I do not use the term "judicial activism" because it means different things to different people and is accordingly not a helpful descriptor. I believe judges are charged with interpreting and applying the law impartially, with fidelity to precedent, statutes, and the Constitution, as well as the record in the case viewed through the proper standard of review. And, as I stated in response to Question No. 1, I believe that a judge's personal views are irrelevant to interpreting the law.

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. In my decade on the Vermont Supreme Court, I have sometimes decided cases in a way I found personally undesirable because I concluded the law and record before me required such a decision. It is not difficult for me to reconcile that, because I strongly believe in the rule of law and the role of courts as impartial arbiters. Protecting these core constitutional values is far more important to me than advancing personally desirable outcomes in individual cases. If confirmed, I would bring these same values to my role as a circuit judge.

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 the Second Amendment as interpreted by the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago,* 561 U.S. 742 (2010), as well as applicable Second Circuit precedent.

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: My evaluation of such a claim would include consideration of the precedent cited above concerning the Second Amendment right to bear arms, the applicable statutes relating to the sheriff's duties with respect to the issuance of permits, and any applicable precedent regarding the impact of pandemics or natural disasters on individual statutory and constitutional rights, including the Second Amendment right to bear arms.

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

Response: The United States Supreme Court held in *Harlow v. Fitzgerald* that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. 800, 818 (1982).

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

Response: The qualified immunity standard set forth in response to Question No. 9 is the law of the land, and is the standard I would apply unless Congress enacted a different standard or the United States Supreme Court issued a superseding precedent adopting a different standard.

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

Response: The qualified immunity standard set forth in response to Question No. 9 is the law of the land, and is the standard I would apply unless Congress enacted a different standard or the United States Supreme Court issued a superseding precedent adopting a different standard.

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: To the best of my recollection, when I was in private practice, I secured copyrights for one client in connection with various works of art, and advised one or more clients generally about common law copyright protections.

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

Response: None.

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

Response: None.

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

Response: I have authored at least four opinions dealing with First Amendment free speech issues. None were tied to intellectual property issues such as copyright.

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 the legislative text, viewed in the context of the statute as a whole, resolves the issue at hand, the text governs. In cases where the text is not clear, I might consider court decisions analyzing analogous language; the

similarities or differences between the contested language and related statutes; dictionary definitions if the meaning of a word is disputed; various generic "maxims" of statutory interpretation; the context in which the statute was enacted (for example, was it an effort to override or codify a court decision?); whether the contested provision was in the statute when enacted or whether it was added or substituted at a later time—and if it was added or substituted, the language it replaced and the context of the amendment; Congress's purpose or purposes in enacting the statute; the likely practical implications of the competing interpretations in light of the statutory purpose; and aspects of legislative history. Not all evidence characterized as "legislative history" is equally probative.

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: The United State Supreme Court has held that agency interpretations of a statute the agency is charged with enforcing that take the form of policy statements, agency manuals and enforcement guidelines, as opposed to formal adjudications or notice-and-comment rulemaking, do not warrant *Chevron* deference. *Christensen v. Harris County,* 529 U.S. 576, 587, 587 (2000). Instead, they are "entitled to respect" to the extent they have the "power to persuade." *Id.* (citing *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: If confronted with a case raising this question, I would endeavor to interpret the applicable statute as set forth in response to Question No. 13(a) above.

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: I do not have personal familiarity with these issues. In general, if a statute by its terms allows for an application that promotes the statute's

underlying purposes to circumstances not anticipated at the time it was enacted, courts may give effect to the plain meaning of the statute. If it does not, Congress can amend the statute to account for changes.

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 confirmed to the Second Circuit, I would be bound to follow Supreme Court precedent unless or until the Supreme Court chose to overrule it or Congress passed a superseding statute. The Supreme Court has identified changed factual circumstances as a factor that it may consider when deciding whether to depart from or overrule its own precedents. See, e.g., *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2096-97.