Senator Lindsey Graham, Ranking Member
Questions for the Record
Judge Vernon Oliver
Nominee to be United States District Judge for the District of Connecticut

1. **In 2009 you suggested that pretextual stops of minorities by the police contributed to racial disparity in criminal justice system. Do you believe that police unlawfully targeting minorities for enforcement action explains the racial disparity problem? Please explain.**

   Response: In 2009, my testimony to a 2003-2004 report created and disseminated by the Connecticut Commission on Racial and Ethnic Disparities in the Criminal Justice System. That Commission was created by the Connecticut legislature in 2000 and tasked with examining and evaluating data and submitting reports for legislative consideration. I referenced, the 2003-2004 Report, Summary and Recommendations, which included data from the Connecticut Department of Correction, United States Department of Justice, and United States Census Bureau, among other sources. The report contained data and suggestions concerning the exercise of discretion by relevant stakeholders in the criminal justice system.

2. **While you served on the Connecticut Sentencing Commission a number of concerning recommendations emerged.**

   a. **Do you support the commission's recommendation to restore convicted felons' right to vote and to provide assistance in voting from prison?**

      Response: I abstained from the ultimate vote concerning the above-referenced recommendation, even in an advisory capacity, out of concern that the issue of voting rights may come before me as a sitting Connecticut Superior Court Judge and might improperly suggest how I might adjudicate the matter.

      As a sitting state court judge and federal court nominee, I may not comment on cases, controversies or issues that are or may come before the court. See Connecticut Code of Judicial Conduct Rule 2.10. Additionally, if confirmed as a federal judge, I will be bound to abide by the Code of Conduct for United States Judges, Canon 3A(6).

   b. **In 2020 the Commission unanimously supported a proposal to reduce drug-free school zones from 1,500 feet to 200 feet. Why did you support this proposal?**

      Response: The mission of the Commission includes reviewing proposed criminal justice legislation. Its enactment statute states that the Commission shall review criminal justice legislation, as requested, and shall make legislative recommendations concerning criminal justice issues. The practice is for a member or members of the Connecticut General Assembly to first submit a request to the

Commission to review a specific matter. Then, the Commission often forms a working group or subcommittee to research and review the matter and make proposals to the full Commission. Finally, the full Commission membership reviews and approves sending certain proposals to the relevant legislative or judicial committee for debate and consideration, and individual members may vote to advance the proposals, not to advance the proposal, or to abstain from voting.

My vote was in an advisory capacity only, to suggest language that the Connecticut Judiciary Committee might consider, after a multi-factored analysis, discussion and collaboration with my fellow commissioners, presentations by experts in the field, and consideration of public safety concerns, in the event the Committee decided to move forward with the proposal.

c. **You abstained from voting on a proposal to permit sex offenders to petition the court to have their names removed from the registry early. Do you support the proposal?**

Response: I abstained from the vote concerning the above-referenced recommendation, even in an advisory capacity, out of concern that my vote might be seen as a preview as to how I might rule as a judge presiding over the criminal court sex offender registry removal hearing contemplated by the proposal. As a sitting state court judge, I may not comment on cases, controversies or issues that are or may come before the court. See Connecticut Code of Judicial Conduct Rule 2.10. Additionally, if confirmed as a federal judge, I will be bound to abide by the Code of Conduct for United States Judges, Canon 3, A(6), which precludes me from commenting on issues that may come before me.

3. **As a sitting judge, how many criminal cases have you presided over?**

Response: In nearly fifteen years as a Connecticut Superior Court Judge, I have presided over thousands of criminal cases in felony and misdemeanor matters, including criminal jury trials, criminal bench trials, criminal violation of probation hearings, arraignments, and thousands of resolutions via pleas of guilty or no contest by the defendant. I have presided over approximately 300 civil bench trials, approximately 20 criminal and civil jury trials and dozens of criminal and civil evidentiary hearings.

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

Response: I disagree strongly with that statement. As a judge for nearly 15 years, I have faithfully and impartially applied precedent of the United States Supreme Court,

Connecticut Supreme Court, and the Connecticut Court of Appeals. If confirmed, I will continue to apply precedent faithfully and impartially.

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

   Response: I am not familiar with this statement or the context in which it was made. If confirmed, I understand that I would follow Supreme Court and Second Circuit precedent. District Court judges are bound to apply the binding precedent of the court above them. As a sitting judge of nearly fifteen years, I have faithfully and impartially applied precedent.

6. **Please define the term "living constitution."**

   Response: Black's Law Dictionary (11th ed. 2019) defines "living constitution" as "A constitution whose interpretation and application can vary over time according to changing circumstances and changing social values."

7. **Do you agree with then-Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am unfamiliar with the context in which the statement was made. I understand that the Constitution has a fixed meaning that applies to circumstances beyond those specifically anticipated at the time of adoption. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: Black's Law Dictionary (11th ed. 2019) defines a "fact" as "1. Something that actually exists; an aspect of reality … Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and the holding of opinions. 2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation … 3. An evil deed; a crime."

   The Federal Rules of Evidence recognize two types of facts: adjudicative facts and legislative facts. See Fed. R. Evid. 201 (Advisory Committee's note to subd. (a)). Adjudicative facts are "simply the facts of the particular case." *Id*. They are established through documentary or testimonial evidence and are typically found by a jury. *Id*. Legislative facts "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id*. Legislative facts are typically subject to judicial

notice. *Id*. The Supreme Court has not articulated a bright line test to distinguish a factual finding from a legal conclusion and has acknowledged that "the proper characterization as one of fact or law is sometimes slippery," *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995).

The Second Circuit adopts the logic and embraces the, at times, "slippery" distinction between a factual finding and a legal conclusion in *Parsad v. Greiner*, 337 F.3d 175 (2d Cir. 2003) (Appellate review of findings regarding custody require both inquiries of fact and mixed questions of facts and law).

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

   Response: The Supreme Court has drawn a distinction between attacks on "the integrity or the competence of the judges," which may subject lawyers to discipline, and criticism of the law or judges' application of the law, which lawyers are free to do. *In re Sawyer*, 360 U.S. 622, 631-33 (1959).

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

    Response: In my nearly fifteen years as a state court judge, having sentenced many individual defendants, I have considered and applied Connecticut's version of 18 U.S.C. § 3553(a). If confirmed, I will be bound to consider all four primary purposes of sentencing, as outlined in 18 U.S.C. § 3553(a), and the appropriate balance would depend on the facts of the individual case. The statute does not provide that one factor is more important than any other.

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

    Response: I cannot identify a specific Supreme Court decision that exemplifies my judicial philosophy. As a siting judge of nearly fifteen years, allowing the parties a fair hearing on the merits, thorough research on the relevant legal precedent and statutory authority, faithful application of the law to the facts before me, and judicial restraint have become the foundation of my judicial philosophy. If confirmed as a district judge, this is the judicial philosophy I will continue to follow.

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

Response: I cannot identify a specific Second Circuit decision that exemplifies my judicial philosophy. As a siting judge of nearly fifteen years, allowing the parties a fair hearing on the merits, thorough research on the relevant legal precedent and statutory authority, faithful application of the law to the facts before me, and judicial restraint have become the foundation of my judicial philosophy. If confirmed as a district judge, this is the judicial philosophy I will continue to follow.

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

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

14. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I am not aware of any Second Circuit precedent ruling on the constitutionality of 18 U.S.C. § 1507. However, in *Cox v. Louisiana*, 379 U.S. 559, 562 (1965), the Supreme Court rejected a facial challenge to a similarly worded state statute, explaining that: "A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. A narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate to vindicate the State's interest in assuring justice under law." If confirmed as a district judge, I will follow Supreme Court and Second Circuit precedent when analyzing the constitutionality of a statute.

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

Response: According to the Supreme Court, "fighting words" are those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provide violent reaction." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

Response: The Supreme Court has held that "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" are Constitutionally unprotected "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

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

    Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. However, because *Brown v. Board of Education* presents issues that are unlikely to come before me, I am comfortable sharing my opinion that *Brown v. Board of Education* was correctly decided.

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

    Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. However, because *Loving v. Virginia* presents issues that are unlikely to come before me, I am comfortable sharing my opinion that *Loving v. Virginia* was correctly decided.

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

    Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Griswold v. Connecticut* and all other mandatory authority.

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

    Response: *Roe v. Wade*, 410 U.S. 113 (1973) was overturned by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

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

    Response: *Planned Parenthood of Southeaster Pa. v. Casey*, 505 U.S. 833 (1992), was overturned by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Gonzales* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Heller* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *McDonald* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Hosanna-Tabor* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Bruen* and all other mandatory authority.

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

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

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

    Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022), the Supreme Court held that individuals possess a "constitutional right to bear arms in public for self-defense." The Court instructed that the proper way to analyze regulations affecting these Second Amendment rights is to first assess if the plain text covers the individual's conduct; if so, the conduct is presumptively protected under the Constitution. *Id.* at 2126. To then justify the restriction, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

19. **Please describe a law or regulation that you oppose as a matter of policy, but believe is constitutional under current Supreme Court and Second Circuit precedent.**

    Response: As a sitting state court judge and federal court nominee, I may not comment on cases, controversies or issues that are or may come before the court. See Connecticut Code of Judicial Conduct Rule 2.10. Additionally, if confirmed as a federal judge, I will be bound to abide by the Code of Conduct for United States Judges, Canon 3A(6). If confirmed, I will faithfully and impartially apply all Supreme Court and Second Circuit precedent.

20. **Please describe a law or regulation that you support as a matter of policy, but believe is unconstitutional under current Supreme Court and Second Circuit precedent.**
    Response: As a sitting state court judge and federal court nominee, I may not comment on cases, controversies or issues that are or may come before the court. See Connecticut Code of Judicial Conduct Rule 2.10. Additionally, if confirmed as a federal judge, I will be bound to abide by the Code of Conduct for United States Judges, Canon 3A(6).). If confirmed, I will faithfully and impartially apply all Supreme Court and Second Circuit precedent.

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

       Response: No.

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

       Response: No.

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

Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

Response: No.

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

Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

25. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

    Response: No.

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

Response: On January 20, 2023, I applied to the Offices of Senators Blumenthal and Murphy for a federal judicial vacancy in the District of Connecticut. On January 30, 2023, I was contacted and offered an interview with the Connecticut Senators' Advisory Panel. On February 4, 2023, I interviewed with the Senators' Advisory Committee. On February 15, 2023, I interviewed with Senators Blumenthal and Murphy. On March 3, 2023, I was interviewed by attorneys from the White House Counsel's Office. Since March 4, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 3, 2023, the President announced his intent to nominate me.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On March 3, 2023, I was interviewed by attorneys from the White House Counsel's Office. Since March 4, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 3, 2023, the President announced his intent to nominate me.

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

Response: On June 14, 2023, I received these questions from the Office of Legal Policy. I drafted my answers and where necessary, reviewed my Senate Judiciary Questionnaire, other publicly available information, and conducted appropriate legal research. I shared my draft with the Office of Legal Policy and received limited feedback that I reviewed and considered before finalizing my answers.

Senate Judiciary Committee
Nominations Hearing
June 7, 2023
Questions for the Record
Senator Amy Klobuchar

Vernon Dion Oliver, nominee to be United States District Court Judge for the District of Connecticut

Over the past 14 years you have presided over 300 bench trials, approximately 20 jury trials, and dozens of evidentiary hearings as a judge on the Connecticut Superior Court. You have also presided over thousands of hearings involving felony and misdemeanor matters.

- **How do you typically approach a new case, or an area of the law that you may be unfamiliar with?**

  Response: As a sitting judge for more than fourteen years, I approach a new area of law or a new case by first immersing myself in the related law, including controlling precedent and relevant statutes. I seek the wisdom of colleagues with substantial experience in the particular area of law and discuss how they have handled similar matters. I then make certain to master the facts of the case before me as contained in the pleadings. Finally, I thoroughly familiarize myself with any disputed issues in the case.

- **How have you worked to ensure that those who appear before you believe that the court reached a fair and just decision, regardless of the outcome?**

  Response: Having presided over matters involving litigants represented by counsel as well as self-represented litigants, I work to ensure the faith of those who come before me by allowing the parties sufficient time to file pleadings and attempt to reach an agreed upon resolution. I also allow the parties to present all relevant and competent evidence. I do not insert my own opinions or personal beliefs into the litigation. I ensure the parties' ability to make their arguments concerning any disputed issues in the case. Finally, I make certain to issue a clear and thorough decision.

Senator Mike Lee
Questions for the Record
Vernon Oliver, Nominee to the United States District Court for the District of Connecticut

1. How would you describe your judicial philosophy?

Response: As a sitting judge of nearly fifteen years, allowing the parties a fair hearing on the merits, thorough research on the relevant legal precedent and statutory authority, faithful application of the law to the facts before me, and judicial restraint have become the foundation of my judicial philosophy.

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

Response: I would first look to the text of the statute and precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit regarding the meaning of the text. If the text is unambiguous, that would end the inquiry. If the text is ambiguous and there is no relevant precedent, I would look to analogous precedent of the United States Supreme Court and the Second Circuit interpreting the same or similar language in other parts of the statute, as well as other sources authorized by the Supreme Court and the Second Circuit, including the canons of statutory construction, persuasive precedent from other courts, and authoritative legislative history. The Supreme Court has held that committee reports are "more authoritative" sources of legislative history because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: I would look to Supreme Court and Second Circuit precedent, the plain text of the constitutional provision, and the interpretive methodology used by the Supreme Court and the Second Circuit for that provision.

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

Response: The Supreme Court has held that the text and original meaning of a constitutional provision both play a critical role in interpreting the Constitution. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111, 2127-29 (2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: I would first look to the text of the statute and precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit

regarding the meaning of the text. If the text is unambiguous, that would end the inquiry. If the text is ambiguous and there is no relevant precedent, I would look to analogous precedent of the United States Supreme Court and the Second Circuit interpreting the same or similar language in other parts of the statute, as well as other sources authorized by the Supreme Court and the Second Circuit, including the canons of statutory construction, persuasive precedent from other courts, and authoritative legislative history. The Supreme Court has held that committee reports are "more authoritative" sources of legislative history because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The Supreme Court has stated that "'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: "To demonstrate standing, a litigant must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury." *Massachusetts v. E.P.A.*, 549 U.S. 497, 498 (2007).

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

Response: The Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., art. I, § 8.

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

Response: The Supreme Court has held that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power it undertakes to exercise." *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012). I would look to precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit to determine whether enactment of the law was within the scope of Congress' powers and consistent with the Constitution.

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

Response: The Supreme Court has held the Constitution protects unenumerated rights that "are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). These rights include the rights to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); to contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to marry, *Loving v. Virginia*, 388 U.S. 1 (1967) and *Obergefell v. Hodges*, 576 U.S. 644 (2015); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The Supreme Court held in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), that the Constitution does not protect a right to abortion. It held in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that the Constitution does not protect the economic rights at stake in *Lochner v. New York*. As a sitting judge and judicial nominee, I may not comment on matters that may come before me to avoid the appearance of pre-judging an issue. *See* Connecticut Code of Judicial Conduct and Code of Conduct for United States Judges, Canon 3, A(6). If confirmed, I will be bound to abide by the Canons of the Code of Conduct for United States Judges and to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit.

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

Response: The Supreme Court has held that the Commerce Clause provides Congress the authority to regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has examined whether a particular group shares "traditional indicia of suspectedness," such as whether it has an "immutable characteristic determined solely by the accident of birth" or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (citations and internal quotation marks omitted) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

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

Response: The Supreme Court has noted that "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others…. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011).

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

Response: I would carefully consider the issues presented by the parties, determine the applicable law, including precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit and the plain text of the Constitution, and apply it to the record presented by the parties.

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

Response: Judges should decide cases based on the law and the evidence, and not based on personal views or feelings. If I were confirmed as a United States District Judge, I would work to treat all litigants fairly and with respect and courtesy, but my decisions and rulings would be based solely on the applicable law and evidence in a particular case.

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

Response: Both outcomes are equally concerning and are to be avoided.

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

Response: I have not researched the trend referenced in the question and cannot intelligently comment on it. If confirmed as a district judge, I would apply the binding precedent of the United States Supreme Court and the Court of Appeals for the Second Circuit.

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

Response: Judicial review refers to the bedrock principal that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also* Black's Law Dictionary (11th ed. 2019) (defining "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp[ecially], the courts' power to invalidate legislative and executive actions as being unconstitutional"). Judicial supremacy is defined as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: The Constitution mandates that all "Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution . . . ." U.S. Const. art. VI, cl. 3. The Supreme Court has rejected the argument that "there is no duty on state officials to obey federal court orders resting on th[e Supreme] Court's considered interpretation of the United States Constitution." *Cooper v. Aaron*, 385 U.S. 1, 4 (1958). As a sitting state court judge and a judicial nominee, it would be inappropriate to comment further on whether these obligations conflict and, if so, how an elected official should balance them.

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

Response: In Federalist 78, Hamilton described will as the actions of Congress in "prescrib[ing] the [law. The] ... rules by which the duties and rights of every citizen are to be regulated." He further described the court's exercise of its judgment as the "steady, upright and impartial administration of the laws," and that "the courts of justice are to be considered as the bulwarks of the of a limited Constitution against legislative encroachments." The Court's role is limited to interpreting the laws, not making or enforcing them.

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

Response: If I am confirmed as a United States District Judge for the District of Connecticut, I will apply the binding precedent of the Supreme Court and the Court of Appeals for the Second Circuit, even if the precedent in question does not seem to be rooted in constitutional text, history, or tradition. It would not be my function to question whether the United States Supreme Court or the United States Second Circuit has properly decided the cases that are binding precedents.

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

Response: None.

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

Response: Black's Law Dictionary (11th ed. 2019) defines the term "equity" as "[f]airness; impartiality; evenhanded dealing." If I were fortunate enough to be confirmed as a United States District Judge, I would work to treat all persons in a fair, impartial, and evenhanded manner without regard to their race, gender, or status.

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

Response: According to Black's Law Dictionary (11th ed. 2019), the term "equity" refers to "[f]airness; impartiality; evenhanded dealing" and the term "equality" refers to "[t]he quality, state, or condition of being equal; esp., likeness in power or political status."

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

Response: The Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const., amend. XIV, § 1. I am unaware of any United States Supreme Court or Second Circuit precedent considering whether the definition of "equity" cited above constitutes a protected right under the Equal Protection Clause. If confirmed as a district judge, I will faithfully follow United States Supreme Court and Second Circuit precedent in assessing the scope of protections afforded under the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: "Systemic racism" is defined as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)," Merriam-Webster's Dictionary (2022).

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

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

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

Response: "Systemic racism" is defined as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)," Merriam-Webster's Dictionary (2022), while "critical race theory" is defined as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Black's Law Dictionary (11th ed. 2019)

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

Questions for the Record for Vernon Oliver, nominated to be United States District Judge for the District of Connecticut

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Racial discrimination is unlawful and is proscribed by a variety of statutes and the U.S. Constitution. For example, Title VII of the Civil Rights of 1964 prohibits discrimination in employment on the basis of race, religion, sex and national origin and the Equal Protection Clause of the Fourteenth Amendment prohibits discriminating on the basis of race, among other things.

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

Response: The Supreme Court has held the Constitution protects unenumerated fundamental rights that "are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). These rights include the rights to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999); to contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to marry, *Loving v. Virginia*, 388 U.S. 1 (1967) and Obergefell v. Hodges, 576 U.S. 644 (2015); marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

Response: I cannot identify a specific Supreme Court Justice that exemplifies my judicial philosophy. As a siting judge of nearly fifteen years, allowing the parties a fair hearing on the merits, thorough research on the relevant legal precedent and statutory authority, faithful application of the law to the facts before me, and judicial restraint have become the foundation of my judicial philosophy. If confirmed as a district judge, this is the judicial philosophy I will continue to follow.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as the "doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." I do not subscribe to a particular label.

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

Response: Black's Law Dictionary defines "living constitution" as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." Black's Law Dictionary (11th ed. 2019). This dictionary also defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Id*. I do not subscribe to a particular label.

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

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Second Circuit precedent. In the unlikely event that this occurs, I would look to the text and the Supreme Court guidance as to the method of interpreting the text, the role of the provision in the constitutional structure, and any evidence of the original public meaning of the provision. If the original public meaning of the Constitution were clear and resolved the issue, my inquiry would end there. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: In *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 574-575 (2002)*,* the United States Supreme Court reviewed certain First Amendment claims under "contemporary community standards" tests.

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

Response: The United Supreme Court explained in *Bruen* that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2132 (2022),

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

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

a. **Was it correctly decided?**

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Dobbs* and all other mandatory authority.

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

Response: The Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* is controlling and binding precedent.

a. **Was it correctly decided?**

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. I will faithfully apply *Bruen* and all other mandatory authority.

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

Response: The Supreme Court's ruling in *Brown v. Board of Education* is controlling and binding precedent.

a. **Was it correctly decided?**

Response: As a sitting judge and candidate for the District Court, it is generally impermissible for me to comment on the correctness or lack of correctness of precedent I am duty-bound to follow. However, because *Brown v. Board of Education* presents issues that are unlikely to come before me, I am comfortable sharing my opinion that *Brown v. Board of Education* was correctly decided.

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

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

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

Response: As set forth in 18 U.S.C. § 3142(f), the presumption in favor of pretrial detention reflects Congress's determination that defendants accused of the certain crimes present a greater flight risk or danger to the community.

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

Response: The free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA) create identifiable limits to what government may impose or require of religious organizations and small businesses operated by observant owners. For example, under RFRA, the federal government may not substantially burden a person's exercise of religion—even through a facially neutral law—unless the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Similarly, under the free exercise clause of the First Amendment, the government may not treat any comparable secular activity more favorably than religious exercise. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: Under the free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), the government is not permitted to discriminate against religious organizations or religious people unless the discriminatory law or regulation is narrowly tailored (or, under RFRA, the "least restrictive means") to achieve a compelling governmental interest. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Strict scrutiny applies to any state law or action that discriminates "based on religious status". *Espinosa v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2257 (2020). The First Amendment imposes a duty on government "not to base laws or regulations on hostility to a religion or religious viewpoints." *Masterpiece Cakeshop*, 138 S. Ct. 1719, 1731 (2018)

15. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.**

Response: The Supreme Court held that the church and synagogues were entitled to a preliminary injunction because they had "made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Roman Catholic*

Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (internal punctuation omitted). The Supreme Court reached this conclusion, in part, because of evidence that the challenged rules appeared to be targeting Orthodox Jews, as well as evidence that comparable secular activity was not subject to the same restrictions. *Id.* at 66-67. The Supreme Court further concluded that the challenged restrictions, if enforced, would cause irreparable harm in the form of lost First Amendment freedoms. *Id.*

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

Response: In *Tandon*, the Supreme Court held that government regulations are not neutral and generally applicable if they treat any comparable secular activity more favorably than religious exercise. In such circumstances, the regulation must satisfy strict scrutiny review. *Tandon* held that Covid-19-related restrictions in California did not satisfy this standard because the regulation treated "some comparable secular activities more favorably than at-home religious exercise."

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

Response: Yes. *See*, e.g., *Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022) (so holding).

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

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

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

Response: Yes. An individual's religious belief, if "sincerely held," need not be "logical, consistent and comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)); see also *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 832-35 (1989). The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Person Act also include broad language protecting "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." See *Burwell v. Hobby Lobby*, 573 U.S. 682, 695–696 (2014).

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

Response: Please see response to Question 19.

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

Response: In evaluating religious sincerity, courts cannot consider whether a religious belief is an acceptable view or limitation. Thomas v. Review Board … 450 U.S. 707, 714 (1981).

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

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

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), Catholic school teachers sued their employers alleging employment discrimination. The Supreme Court held that the "ministerial exception" protects religious institutions from certain discrimination claims, and that such institutions are permitted to "decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (quoting *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.,* 565 U.S. 171, 186 (2012)). In determining whether a case falls under the ministerial exception, the Court's inquiry looked to the functions performed by the employee in question. The Court found that even though the teachers were not "ministers" the specific role of the teachers was "educating young people in their faith, inculcating its teachings, and training them to live their faith," which the Court concluded was central to the school's mission. *Our Lady of Guadalupe*, 140 S. Ct. at 2064. As such, the ministerial exemption barred the teachers' employment discrimination suits.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court applied strict scrutiny to the city's policy excluding a Catholic organization from its foster care program on account of the organization's refusal to certify same-sex couples

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

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

Response: Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause because a State may not exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits. *Carson v. Makin*, 142 S. Ct. 1987, 1997-98, 2002 (2022).

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

Response: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from governmental reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2433 (2022). In *Bremerton,* A high school football coach, who lost his job after he knelt at midfield after games to offer a quiet personal prayer, brought a § 1983 action against the school district, alleging violations of his rights under the First Amendment's Free Speech and Free Exercise Clauses. The Court held that the school district burdened the coach's rights under the Free Exercise Clause by suspending him for his decision to persist in praying quietly at midfield; the coach engaged in private speech, not government speech attributable to school district, when he uttered prayers quietly at midfield without his players; the school district's burdening of the coach's rights under the Free Exercise and Free Speech Clauses could not be justified on ground his suspension was essential to avoid an Establishment Clause violation; and his private religious exercise was not impermissible government coercion of students to pray.

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

Response: The Supreme Court in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), vacated a state court judgment and remanded the case, a Religious Land Use and Institutionalized Persons Act ("RLUIPA") matter, for further consideration in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Justice Gorsuch concurred to identify issues the state courts "may wish to consider on remand" as to the proper interpretation of RLUIPA. *Id.* at 2430. For example, Justice Gorsuch stated that the state

courts had erred by treating the government's "general interest" in enforcing certain sanitation rules as "'compelling' without reference to the specific application of those rules" to the RLUIPA claimants before the state courts. *Id*. at 2432.

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

Response: If confirmed, and confronted with a case that required interpretation of Title 18, United States Code, Section 1507 considering its constitutionality, I would assess the matter based on: the facts before me; the parties' arguments; the governing law, including, as appropriate, *Cox v. Louisiana*, 379 U.S. 559 (1965), which upheld an arguably analogous state statute against a First Amendment challenge.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I am not aware of the existence of such trainings that may or may not be offered. If confirmed, I would not support such trainings.

28. **Will you commit that you will not engage in racial discrimination when selecting**

and hiring law clerks and other staff, should you be confirmed?

Response: Yes

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

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

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

"Systemic racism" is defined as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)," Merriam-Webster's Dictionary (2022).

I have not studied the issue of systemic racism. The issue has not been raised before me during my nearly fifteen-year career as a sitting superior court judge. If confirmed to serve as a United States District Judge, I would ensure that any individual I interact with is treated fairly and with dignity, regardless of their race.

31. **Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

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

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

Response: No.

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

Response: My understanding of the original public meaning of the Second Amendment is that articulated by the Supreme Court. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the original public meaning of the Second Amendment guarantees the right of an individual to keep and bear arms in the home for

self-defense. In *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court concluded that the original public meaning of the Second Amendment also affords the right to keep and bear arms for self-defense outside the home.

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

Response: In *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), the U.S. Supreme Court held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

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

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

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

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

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

Response: No.

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

Response: The Supreme Court has recognized that the executive branch has broad discretion in deciding whether or how to prosecute cases. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248 (1980); *Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (the court held that the decision not to prosecute or enforce, whether through criminal or civil process, is a decision generally committed to an agency's absolute discretion). As a sitting judge and judicial nominee, it would be inappropriate for me to offer an opinion as to how this discretion should be exercised.

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

Response: Prosecutorial discretion generally refers to the discretion vested in a prosecutor to initiate or not to initiate enforcement proceedings. A substantive administrative rule change is a change to a rule.

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

Response: The federal death penalty is reflected in a statute, Title 18, United States Code, Section 3591, and the President does not have the power to unilaterally abolish federal statutes. The Supreme Court stated in *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) "there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Centers for Disease Control lacked the authority to impose a nationwide moratorium on evictions to protect tenants from COVID-19, and to slow the spread of disease. Finding that petitioners were likely to succeed on the merits of their claim, the Court vacated a stay imposed pending appeal of a district court's nationwide injunction against the imposition of the moratorium. The Court stated "we expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* at 2489. Because the relevant statute also lacked any clear authority for a nationwide eviction moratorium, the Court concluded the plaintiffs were "virtually certain to succeed on the merits of the argument that the CDC has exceeded it authority." *Id*. at 2486; 2488-89.

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

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

43. **As a co-chair of the Connecticut Sentencing Commission, you provided legislative recommendations to the Connecticut General Assembly, including recommendations to grant inmates the ability to vote and to provide certain sex offenders the opportunity to be removed from the sex offender registry early.**

    a. **Did you vote in favor of these measures?**

Response: I did not vote in favor of the above-referenced measures.

b. **Did you support the Sentencing Commission's proposal to reduce the drug-free school zones from 1,500 feet to just 200 feet?**

Response: My vote was in an advisory capacity only, to suggest language that the Connecticut Judiciary Committee might consider, after a multi-factored analysis, discussion and collaboration with my fellow commissioners, presentations by experts in the field, and consideration of public safety concerns in the event the Committee decided to move forward with the proposal.

44. **In your 2009 confirmation hearing before the Connecticut General Assembly Judiciary Committee to be a judge on the Connecticut Superior Court, you argued that racial disparities are present in the criminal justice system.**

a. **Is America a systematically racist country?**

Response: My 2009 testimony in support of my confirmation as a Connecticut Superior Court Judge was limited solely to a 2003-2004 report created and disseminated by the Connecticut Commission on Racial and Ethnic Disparities in the Criminal Justice System. That Commission was created by the Connecticut legislature in 2000 and tasked with examining and evaluating data and submitting reports for legislative consideration. I referenced the 2003-2004 Report, Summary and Recommendations, which included data from the Connecticut Department of Correction, United States Department of Justice, and United States Census Bureau, among other sources. The report contained data and suggestions concerning the exercise of discretion by relevant stakeholders in the criminal justice system.

I have not studied the issue of systemic racism. The issue has not been raised before me during my nearly fifteen-year career as a sitting superior court judge. If confirmed to serve as a United States District Judge, I would ensure that any individual I interact with is treated fairly and with dignity, regardless of their race.

b. **Is Connecticut's criminal justice system systemically racist? If so, please explain how.**

Response: I have not studied the issue of systemic racism. The issue has not been raised before me during my nearly fifteen-year career as a sitting superior court judge. If confirmed to serve as a United States District Judge, I would ensure that any individual I interact with is treated fairly and with dignity, regardless of their race.

c. **Is the federal criminal justice system systemically racist? If so, please explain how.**

Response: I have not studied the issue of systemic racism. The issue has not been raised before me during my nearly fifteen-year career as a sitting superior court judge. If confirmed to serve as a United States District Judge, I would ensure that any individual I interact with is treated fairly and with dignity, regardless of their race.

Senator John Kennedy
Questions for the Record

Vernon Oliver

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

   Response: As a sitting judge of nearly fifteen years, allowing the parties a fair hearing on the merits, thorough research on the relevant legal precedent and statutory authority, faithful application of the law to the facts before me, and judicial restraint have become the foundation of my judicial philosophy.

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

   Response: The Constitution has a fixed meaning that applies to circumstances beyond those specifically anticipated at the time of adoption. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: As the Supreme Court stated in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020), "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.".

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

   Response: The Supreme Court has held that some forms of legislative history are more probative of legislative intent than others. In *Garcia v. United States*, 469 U.S. 70, 76 (1984), the Court explained: "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen in drafting and studying proposed legislation.'" (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))). If confirmed as a district judge, I would follow the binding precedent of the United States Supreme Court and the Court of Appeals for the Second Circuit.

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

   Response: In *PruneYard Shopping Center v. Robins*, the Supreme Court upheld a California state constitutional provision requiring a shopping center owner to permit individuals to exercise free speech and petition rights at the shopping center, but also affirmed that the shopping center owner "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." 447 U.S. 74, 83 (1980). In another case, *Lloyd Corp., Ltd. v. Tanner*, the Court noted that private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." 407 U.S. 551, 569 (1972). If confirmed as a district judge and called upon to address this issue, I would apply all Supreme Court and Second Circuit precedent.

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

   Response: Generally, non-citizens receive certain constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. *See*, *e.g., Plyler v. Doe*, 457 U.S. 202, 212 (1982) (the provisions of the Fourteenth Amendment "'are universal in their application, to all persons within the territorial jurisdiction....'") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). If presented with a case involving a non-citizen's claim to a right to privacy, I would apply all Supreme Court and Second Circuit precedent.

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

   Response: In *United States v. Ramsey*, 431 U.S. 606, 615 (1977), the Supreme Court reiterated that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *See also United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (explaining that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior"); *Carroll v. United States*, 267 U.S. 132, 153-154 (1925) (recognizing the distinctions between searches within this country—that require probable cause—and border searches). If presented with a case involving a non-citizen's claim to a right to privacy, I would apply all Supreme Court and Second Circuit precedent.

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

Response: I am not aware of Supreme Court or Second Circuit precedent resolving this precise question. In *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228, 2261 (2022), the Supreme Court expressed that its opinion "is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." If confirmed as a district judge, I will faithfully follow Supreme Court and Second Circuit precedent when analyzing the scope of equal protection rights.

9. **A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.**

   a. **Do you agree?**

      Response: In *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022), the court held that there is not a Fourteenth Amendment Due Process-based right to abortion and "return[ed] the issue of abortion to the people's elected representatives." *Id*. at 2244. I would faithfully apply *Dobbs* and all other Supreme Court and Second Circuit precedent. As a sitting state court judge and federal court nominee, I may not comment on an issue that may come before me. See Connecticut Code of Judicial Conduct Rule 2.10 and Code of Conduct for United States Judges, Canon 3, A(6). I am bound to abide by the Code of Conduct and to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and if confirmed to serve in the District of Connecticut, I will continue to abide by the Code and to apply precedent. In the event I were confronted with this issue, I would carefully consider the issues presented by the parties, determine the applicable law, including precedent of the Supreme Court and the Second Circuit, and apply it to the record before me.

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

      Response: No. Lower courts have a duty and an obligation to follow controlling precedent.

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

    Response: No. Lower courts have a duty and an obligation to follow controlling precedent.

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

Response: The Supreme Court held that Indiana's law that required voters to present identification in order to cast a ballot was permissible. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). If confirmed as a district judge, I will faithfully follow Supreme Court and Second Circuit precedent when analyzing voting rights claims.

12. Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022), the Supreme Court held that individuals possess a "constitutional right to bear arms in public for self-defense." The Court instructed that the proper way to analyze regulations affecting these Second Amendment rights is to first assess if the plain text covers the individual's conduct; if so, the conduct is presumptively protected under the Constitution. *Id.* at 2126. To then justify the restriction, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

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

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

Response: In *Janus v. AFSCME*, 138 S. Ct. 2448, 2478-2479 (2018), the Supreme Court identified five salient factors to consider when deciding whether to depart from the preferred course of stare decisis: "the quality of reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." The Court stated that "all these reasons" provided the "special justification" for overruling precedent. *Id*. at 2486. Similarly, in *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228, 2265 (2022), the Supreme Court relied on five factors that it concluded weighed strongly in favor of overruling *Roe* and *Casey*: "the nature of their error, the quality of their reasoning, the 'workability of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." I am unaware of any precedent specifying how many factors must be present to overturn precedent.

b. Is one factor alone ever sufficient?

Response: Please see my response to Question 13a.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "judicial review" as "[a] court's power to review the actions of other branches or levels of government; esp[ecially], the courts' power to invalidate legislative and executive actions as being unconstitutional." It defines "judicial supremacy" as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp[ecially] U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." I would also note that judicial review refers to the foundational principle that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

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

Response: I understand that the Constitution has a fixed meaning that applies to circumstances beyond those specifically anticipated at the time of adoption. *See*, *e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). I am unaware of any Supreme Court or Second Circuit opinion treating the Ninth Amendment differently from other provisions of the Constitution.

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

Response: In his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742, 851 n.20 (2010) (citations omitted), Justice Thomas wrote, "[C]ertain Bill of Rights provisions prevent federal interference in state affairs and are not readily construed as protecting rights that belong to individuals. The Ninth and Tenth Amendments are obvious examples, as is the First Amendment's Establishment Clause, which does not purport to protect individual rights." (internal quotations and citation omitted).

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

Response: The Ninth Amendment expressly references rights enumerated elsewhere in the Constitution. *See* U.S. Const. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")

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

Response: The United States Supreme Court has explained that the original meaning and text play a critical role in interpreting many constitutional provisions, and Founding-era history can be helpful in determining what that original meaning is. *See*, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 47–50 (2004) (Sixth Amendment Confrontation Clause).

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

a. Who is included within the meaning of *'the people'*?

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), the Supreme Court defined the meaning of "the people" as used in the Fourth Amendment as those within the territory of the United States who have developed sufficient connections with this country. In *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), the Supreme Court explained that the meaning of "the people" as used in the Second Amendment refers to "all members of the political community." If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Second Circuit to the specific facts of the case before me.

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

Response: Please see my answer to Question 19a.

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: Please also see my responses to Questions 6, 7 and 19a. Additionally, the Supreme Court held in *Plyler v. Doe*, 457 U.S. 202, 210 (1982) that: "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."

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

Response: I understand that the Constitution has a fixed meaning that applies to circumstances beyond those specifically anticipated at the time of adoption. *See, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Response: The Supreme Court has long held that the Privileges or Immunities Clause of the Fourteenth Amendment "protects only those rights 'which ow[e] their existence to the Federal government, its National character, its Constitution or its laws.'" *McDonald v. Chicago*, 561 U.S. 742, 754 (2010) (quoting *Slaughter-House Cases*, 83 U.S. 36, 79 (1872)).

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

Response: I am not aware of Supreme Court or Second Circuit precedent ruling on this precise question. It would be improper for me to opine on issues that are or may be the subject of litigation before the courts, as doing so might suggest to future litigants that I have pre-judged the issue. If confirmed as a district judge, I will faithfully apply Supreme Court and Second Circuit precedent when interpreting all constitutional provisions.

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

Response: When interpreting the meaning of statutes under *Chevron*, courts apply a two-step test. First, they must decide if the statute's meaning is "unambiguous." If the meaning is clear, the court applies that meaning. But if it is ambiguous, the court must defer to the agency's interpretation so long as it is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court has clarified that *Chevron* deference does not apply in "extraordinary cases that involve major questions." *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022).

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

Response: In *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022), the Supreme Court held that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." *Id*. (citing *Utility Air v. Environmental Protection Agency*, 573 U.S. 302, 324 (2014)). To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Id.* The judicial branch must also assess whether agency action is consistent with the Administrative Procedure Act, 5 U.S.C. Section 551, et seq.

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

Response: The powers of Congress are enumerated in Article I of the Constitution. However, section 9 of Article I sets forth explicit limits on Congress' power, including, for example, a prohibition on the passage of bills of attainder or ex post facto laws. In *McCulloch v. Maryland*, 17 U.S. 316, 324 (1819), the Supreme Court recognized that under the Necessary and Proper Clause of Article I, Section 8, Congress has implied powers as well that include the authorization to pass all laws "necessary and proper to carry into execution the powers conferred on it." The Constitution also limits Congress' power by granting enumerated powers to the executive and judicial branches in Articles

II and III. The Tenth Amendment reserves for the States powers that the Constitution neither delegates to the United States nor prohibits.

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

Response: The Supreme Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 558 (1995). They are: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." *Id.* at 558–59 (internal citations omitted).

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

Response: In *Lopez v. United States*, 514 U.S. 549 (1995), the Supreme Court held that Congress exceeded its authority under the Commerce Clause in enacting a statute criminalizing individual gun possession in a school zone. The Court concluded that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

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

Response: The Supreme Court has affirmed the long-standing rule that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable[.]" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: As a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which advises that judges and nominees should not make public comment regarding a matter that may come before them. If confirmed as a district judge and called upon to address this issue, I would faithfully and impartially apply the precedent of the Supreme Court and the Court of Appeals for the Second Circuit to the specific facts of the case before me.

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

Response: Please see my answers to Questions 24 and 25.

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

Response: The Supreme Court has stated: "[W]hile Congress has substantial power under the Constitution to encourage the States to [take an action], the Constitution does not confer upon Congress the ability simply to compel the States to do so." *New York v. United States*, 505 U.S. 144, 149 (1992); *see also Printz v. United States*, 521 U.S. 898, 935 (1997) ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly."). "The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." *Id.*

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

Response: The Constitution is an enduring document with a fixed meaning that can apply to modern circumstances. See *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). The Supreme Court has stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-312 (2002), citing *Trop v. Dulles*, 356 U.S. 86 (1958).

34. Do you believe the death penalty is constitutional?

Response: The Supreme Court has held that the death penalty is constitutional in certain circumstances. *Kennedy v. Louisiana*, 554 U.S. 407, 446, as modified (Oct. 1, 2008), opinion modified on denial of reh'g, 554 U.S. 945 (2008).

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

Response: As a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Second Circuit to the specific facts of the case before me.

However, Article II of the United States Constitution and *United States v. Nixon*, 418 U.S. 683, 693 (1974), directs that the Executive Branch is granted the discretion and authority to decide whether to prosecute a case.

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

Response: As a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which advises that a judge or nominee should not make public comment regarding a matter that may come before them. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Second Circuit to the specific facts of the case before me.

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

Response: Please see my response to Question 5.

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

Response: As a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Second Circuit to the specific facts of the case before me.

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

Response: The Supremacy Clause establishes that the federal constitution, and federal law generally, take precedence over state laws including state constitutions. U.S. Const. Art. IV, paragraph 2. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. See, e.g., *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Ware v. Hylton*, 3 U.S. (3Dall.) 199 (1796).

The Adequate and Independent State grounds doctrine says that, where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the federal court lacks jurisdiction if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The Adequate and Independent State grounds doctrine therefore respects the principles codified by the Supremacy Clause while prohibiting the federal court from assuming jurisdiction when a case has been satisfactorily decided based on state law.

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

Response: I am not aware of any Supreme Court or Second Circuit precedent ruling on this precise question. As a district court nominee, I am bound by Canon 3A(6) of the Code of Conduct for United States Judges, which provides that a judge should not make public comment regarding a matter that may come before him as a sitting judge. If confirmed as a district judge and called upon to address this issue, I would faithfully apply the precedent of the Supreme Court and the Court of Appeals for the Second Circuit to the specific facts of the case before me.

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

Response: To the best of my knowledge, the Supreme Court has not cited a textual source for the different standards of review for determining whether state laws or regulations violate constitutional rights. Thus, it is decisions of the Supreme Court that provide the sources of the different standards of review.

The strict scrutiny test has its origin in *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). The intermediate scrutiny test was first applied to gender discrimination in *Craig v. Boren*, 429 U.S. 190, 197 (1976). Finally, the rational basis test appears to be far older. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

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

Response: Federal Rule of Civil Procedure 65 controls the issuance of injunctions. The Supreme Court has held that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

43. Please answer the following questions regarding your experience in federal court. If the answer is no to any question below, please explain how you are prepared to serve on the federal bench.

a. Have you ever participated in federal litigation?

Response: In my eleven years as a criminal and civil litigator and nearly fifteen years as a Connecticut Superior Court Judge, all litigation in which I have participated has been in Connecticut State courts. However, at nearly every point in my career as a litigator and jurist, I have contemplated, litigated, argued and adjudicated federal constitutional issues, including claims made pursuant to the

Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution in criminal and habeas corpus matters.

b. Have you ever filed a motion or brief in federal court as a counsel of record?

Response: In my eleven years as a criminal and civil litigator and nearly fifteen years as a Connecticut Superior Court Judge, all motions and briefs I have filed have been in Connecticut State courts. However, at nearly every point in my career as a litigator and jurist, I have contemplated, litigated, argued and adjudicated federal constitutional issues, including claims made pursuant to the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution in criminal and habeas corpus matters.

c. Have you ever participated in oral argument in a federal court?

Response: In my eleven years as a criminal and civil litigator and nearly fifteen years as a Connecticut Superior Court Judge, all oral arguments in which I have participated have been in Connecticut State courts. However, at nearly every point in my career as a litigator and jurist, I have contemplated, litigated, argued and adjudicated federal constitutional issues, including claims made pursuant to the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution in criminal and habeas corpus matters.

Questions from Senator Thom Tillis
for Vernon Dion Oliver
Nominee to be United States District Judge for the District of Connecticut

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

   Response: Yes. As a sitting judge for nearly fifteen years, it is my view that a judge should not let personal views interfere with their responsibility to impartially interpret and apply the law.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines judicial activism as "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents."

   No. I do not find judicial activism appropriate. If confirmed as a District Court judge, I will faithfully and impartially cases that come before me, as I have in my nearly fifteen years as a sitting judge.

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

   Response: I believe impartially deciding the issues of fact and law before them is both an expectation and an aspiration of a judge.

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

   Response: No. A judge should rule based on a faithful application of the facts to the law, and never to reach a desired outcome.

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

   Response: Yes. As a sitting state court judge, I strive to faithfully apply the law to the facts in reaching a decision, without regard to the outcome.

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

   Response: No. A judge's personal politics or policy preferences should play no role in their interpretation and application of the law.

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

   Response: I will continue to faithfully apply all controlling legal precedent, including that involving the Second Amendment, if confirmed, as set forth in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

   Response: I would carefully consider the issues presented by the parties, determine the applicable law, including precedent of the United States Supreme Court in cases such as *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), and the United States Court of Appeals for the Second Circuit, and apply it to the record before me.

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: I carefully consider the issues presented by the parties, determine the applicable law, including precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and apply it to the record. The Supreme Court has held that qualified immunity protects government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Pearson* requires that the plaintiff must show that facts make out a violation of a constitutional right and that right was clearly established at the time of defendant's misconduct. *Id*. at 231. Courts may decide "which of the two prongs of the qualified immunity analysis should be addressed first." And if either prong is lacking, qualified immunity must be granted. *Id*. at 236.

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: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety is a question of policy properly addressed by policy makers. The Supreme Court has held that qualified immunity protects government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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

Response: The proper scope of qualified immunity protections for law enforcement is a question of policy properly addressed by policy makers. The Supreme Court has held that qualified immunity protects government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: As a sitting state court judge and federal court nominee, It would not be appropriate to comment on the correctness of Supreme Court patent eligibility precedent. See Connecticut Code of Judicial Conduct Rule 2.10 and Code of Conduct for United States Judges, Canon 3, A(6). I am bound to abide by the Code of Conduct and to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit for patent cases, and if confirmed to serve in the District of Connecticut, I will continue to abide by the Code and to apply precedent.

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

Response: As a sitting state court judge and federal court nominee It would not be appropriate to comment on the correctness of Supreme Court patent eligibility precedent See Connecticut Code of Judicial Conduct Rule 2.10 and Code of Conduct for United States Judges, Canon 3, A(6). I am bound to abide by the Code of Conduct and to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit for patent cases, and if confirmed to serve in the District of Connecticut, I will continue to abide by the Code and to apply precedent. I would carefully consider the issues presented by the parties, determine the applicable law, including precedent of the Supreme Court and the Second Circuit, and apply it to the record before me.

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

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

Response: In my nearly fifteen years of experience as a judge and eleven years as an attorney, I have not had the opportunity to work with copyright law.

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

Response: In my nearly fifteen years of experience as a judge and eleven years as an attorney, I have not had the opportunity to work with the Digital Millennium Copyright Act.

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

Response: In my nearly fifteen years of experience as a judge and eleven years as an attorney, I have not had the opportunity to work with the issue of intermediary liability for online service providers posted by users.

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

Response: In my nearly fifteen years of experience as a judge and eleven years as an attorney, I have not had the opportunity to work with First Amendment, free speech and intellectual property, including copyright, issues.

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

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

Response: If there is no binding precedent of the United States Supreme Court or the United States Court of Appeals for the Second Circuit, and the text of the statute is ambiguous, courts may consider analogous precedent of the Supreme Court and the Second Circuit interpreting the same or similar language in other parts of the statute,

as well as other sources authorized by the Supreme Court and the Second Circuit, including the canons of statutory construction, persuasive precedent from other courts, and authoritative legislative history. The Supreme Court has held that committee reports are "more authoritative" sources of legislative history because they "represent the considered and collective judgment of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984). A court may resort to legislative history "only when necessary to interpret ambiguous text." *Bedrock v. United States*, 541 U.S. 176, 187, fn. 8 (2004).

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

Response: If there is no binding precedent of the United States Supreme Court or the United States Court of Appeals for the Fifth Circuit, courts apply the two-step process set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), for reviewing an agency's interpretation of a statute it administers. If "Congress has directly spoken to the precise question at issue" and its intent is clear, that ends the matter. *Id.* at 842–43. "If Congress has not unambiguously expressed its intent", then courts will defer to an agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. An agency's interpretation of its own regulations and administrative rules may also be entitled to deference under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), *Auer v. Robbins*, 519 U.S. 452, 461–463 (1997), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Additionally, in *Christensen v. Harris Cnty*., the Supreme Court held that "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.* at 587. Instead, those interpretations are "entitled to respect," but only to the extent that they have the "power to persuade." *Id.*

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

Response: As a sitting state court judge and federal court nominee, I may not comment on matters that may come before me. I am bound to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and if confirmed, I will do so.

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

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

Response: As a sitting state court judge and federal court nominee, I may not comment on matters that may come before me. See Connecticut Code of Judicial Conduct Rule 2.10 and Code of Conduct for United States Judges, Canon 3, A(6). I am bound to abide by the Code of Conduct and to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit for patent cases, and if confirmed to serve in the District of Connecticut, I will continue to abide by the Code and to apply precedent. I would carefully consider the issues presented by the parties, determine the applicable law, including precedent of the Supreme Court and the Second Circuit, and apply it to the record before me.

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: I am bound to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit for patent cases, and if confirmed to serve in the District of Connecticut, I will continue to apply binding precedent. In the event I was assigned a case involving opinions that relied upon the then-current state of technology, once that technological landscape has changed, I would carefully consider the issues presented by the parties, determine the applicable law, including precedent of the Supreme Court and the Second Circuit, and apply it to the record before me.

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

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

Response: As a sitting judge and judicial nominee, I may not comment on matters that may come before me, such as issues regarding venue and motions to transfer venue, in order to avoid the appearance of pre-judging an issue. See Connecticut Code of Judicial Conduct Rule 2.10 and Code of Conduct for United States Judges, Canon 3, A(6). I am bound to abide by Code of Conduct and to apply precedent of

the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and if confirmed to serve on that court, I will continue to abide by the Code and to apply precedent.

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

Response: Judges are required to take an oath or affirm that they will "faithfully and impartially discharge and perform" their duties. See 28 U.S.C. § 453. In *Farens v. John Deere*, 494 U.S. 516, 527 (1990), the Supreme Court discussed the "policy against forum-shopping" articulated in *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

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

Response: No

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

Response: I commit to not engage in such conduct.

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

Response: Whether it is appropriate to inquire whether procedures or rules adopted in a district have biased the administration of justice and encouraged forum shopping is a question of policy. Canon 1 of the Code of Conduct for United States Judges provides that judges "should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." Paragraph A of Canon 2 provides that judges "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." If confirmed, I will be bound to abide by the Code of Conduct and to apply precedent of the United States Supreme Court and the United States Court of Appeals for the Second Circuit.

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

Response: Whether a local rule that requires all patent cases to be assigned randomly to judges across the district should be implemented to prevent the possibility of judge-shopping is a question for federal judicial administration policy makers. If confirmed, I will be bound to abide by the Code of Conduct for United States Judges and to apply precedent

of the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and if confirmed, I will abide by the Code and apply precedent.