Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Maria Kahn
Nominee to the Court of Appeals for the Second Circuit
September 28, 2022

1. **You have the distinction of having served at all three levels of the Connecticut judiciary. For the past five years, you have served as a Justice on the Connecticut Supreme Court and you have authored 55 majority opinions in that time. Before your elevation, you served as a judge on the Connecticut Appellate Court, authoring eight opinions. Prior to that, you spent 11 years as a judge on the Superior Court, where you presided over thousands of matters, 50 criminal trials, and several civil trials. You also have the distinction of having served as both a state public defender and a federal prosecutor during your legal career.**

    a. **Could you give us an overview of the types of cases you have tried as an attorney and presided over as a judge?**

    Response: I have served as an Associate Justice on the Connecticut Supreme Court since 2017. The Connecticut Supreme Court hears appeals from the Connecticut Appellate Court which has jurisdiction over appeals from the civil, family, criminal, juvenile and probate divisions of the Superior Court. As your question notes, I have authored dozens of opinions as an Associate Justice in a wide range of criminal and civil matters. From June to October 2017, I served as a judge on the Connecticut Appellate Court and authored approximately 8 majority opinions.

    In addition to my work as an appellate judge, I served as a trial judge on the Connecticut Superior Courts for eleven years, where I presided over thousands of cases in criminal and juvenile courts. During the last five years that I served at the trial court level, I presided over approximately 50 criminal trials, many of which resulted in a verdict. Prior to my assignment to Part A criminal court, I served as a trial judge at the lower-level criminal courts in Bridgeport and New Britain where I presided over dozens of trials. In addition to my work on criminal matters, I also presided over numerous civil court trials involving child protection matters and several administrative appeals.

    During my tenure as an Assistant United States Attorney in the District of Connecticut from 1997 to 2006, I had the pleasure of working on both civil and criminal cases. I was a health care fraud prosecutor in the Civil Division for approximately two years. In that capacity, I prosecuted both civil and criminal health care fraud cases, including handling a case that resulted in a $74 million settlement under the False Claims Act and represented what was, at the time, the second largest national health care fraud recovery by the United States against a Medicare contractor. I then transferred to the general crimes section of the Criminal Division

and handled a variety of criminal investigations and prosecutions, including complex white collar matters involving theft of intellectual property, identity theft, computer crimes, healthcare fraud, tax fraud, and bank fraud.

Prior to becoming a federal prosecutor, I handled all aspects of civil rights litigation on behalf of individuals with disabilities in my role as a staff attorney at the Office of Protection and Advocacy for Persons with Disabilities. In that role represented individuals with disabilities in administrative, state, and federal courts on a wide range of matters dealing with employment, housing, criminal matters, patients' rights, and reasonable accommodations under the Americans with Disabilities Act.

I also had the pleasure of serving as a Deputy Assistant Public Defender for the State of Connecticut. I represented indigent individuals, primarily juveniles, who were charged with state criminal offenses.

b. How have your experiences representing both prosecution and defense helped shape your approach to judicial decisionmaking?

Response: My experiences both as a public defender and as a federal prosecutor were invaluable to my transition to the bench. It enabled me to look at the criminal cases and the criminal justice system from the perspective of the various roles, defense, prosecution, and victim, which in turn informed my approach to evaluating criminal matters as a judge. This understanding assisted me in approaching cases even handedly. It enabled me to more efficiently assess the relative strength and weaknesses of the parties' arguments and the legal issues that arose in criminal matters. It also gave me a deep understanding of the need for appellate court decisions to clearly and concisely provide guidance to lower courts and litigants.

c. What further lessons have you learned from your service as a state trial and appellate judge that will serve you best on a federal court of appeals?

Response: My service as a trial judge has given me a wealth of experience and information about the demands of effectively managing a trial level docket, conducting pre-trial hearings; jury selection and conducting trials. I know firsthand the need for trial judges and litigants to have practical, clear, and consistent guidance from appellate court decisions.

My experience as an appellate judge has taught me the importance of collaborative judging. I am fortunate to work with an exceptional group of colleagues who are all deeply committed to working together, listening to each other's approach and, where possible, reaching a consensus on cases. Although all seven justices do not always agree on every case, we do not allow our disagreements to affect the deep affection and respect that we have for one another. The collegiality and friendships that we share are critical to our decision-making process, the quality of the decisions of our court and the tone of civility that we model for our staff, lower courts, and litigants. I look forward to forging similar bonds and relationships with the colleagues I would join on the Second Circuit, if I am fortunate enough to be confirmed.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Justice Maria Araujo Kahn
Judicial Nominee to the U.S. Court of Appeals for the Second Circuit

1. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: The Supreme Court has held that the due process clause of the Fifth and Fourteenth Amendments protects unenumerated rights "which 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, 720–21 (1997) (internal citations omitted).

2. **Should you be confirmed, what specific factors will you take into consideration when deciding whether to overturn circuit precedent?**

   Response: The Second Circuit has held that a panel is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.), cert. denied, 543 U.S. 908 (2004). Additionally, the doctrine of stare decisis, which requires adherence to earlier decisions absent special justification, is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entm't, LLC,* 576 U.S. 446, 455 (2015).

3. **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 do not agree with that statement.

4. **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 the statement and do not agree with that approach to judicial decision making. If confirmed to the Second Circuit Court of Appeals, I would be bound by and faithfully follow all Supreme Court and Second Circuit precedent.

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

   Response: The term "living constitution" is defined in Black's Law Dictionary as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." *Living Constitution*, Black's Law

Dictionary (11th ed. 2019). It 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." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019).

6. **Do you think that election integrity is a problem in this country? Please explain.**

   Response: The issue of election integrity is one that is best suited for policymakers to determine after appropriate study and investigation. As a circuit court nominee and a sitting justice, it would not be prudent for me to express an opinion on this subject.

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 not familiar with Justice Jackson's statement. I would not describe myself as having any particular judicial ideology. If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

8. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: There is no specific Supreme Court decision from the last 50 years that exemplifies my judicial philosophy. My judicial philosophy over the past 16 years as a trial and appellate judge has been to approach each case with an open mind, to listen carefully to the parties' arguments and positions, to review the briefs and record thoroughly, to faithfully apply the law to the facts of the case, to fairly and impartially decide the issues before me, and then to issue a decision that is both clear and concise.

9. **Please identify a Second Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: There is no specific Second Circuit decision from the last 50 years that exemplifies my judicial philosophy. My judicial philosophy over the past 16 years as a trial and appellate judge has been to approach each case with an open mind, to listen carefully to the parties' arguments and positions, to review the briefs and record thoroughly, to faithfully apply the law to the facts of the case, to fairly and impartially decide the issues before me, and then to issue a decision that is both clear and concise.

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

    Response: The issue of allocation of funds by local governments is one that is best suited for policymakers to determine. As a circuit court nominee and a sitting justice, it would not be prudent for me to express an opinion on this subject.

11. **Is the right to petition the government a constitutionally protected right?**

Response: Yes. The First Amendment guarantees, among other things, "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

12. Do you agree with the following statement: "Not everyone deserves a lawyer, there is no civil requirement for legal defense"?

Response: The right to counsel is guaranteed in criminal cases but not in civil cases. It is my understanding that under Rule 83.10 of the Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, which was approved by the Second Circuit Judicial Council, a Civil Pro Bono Panel and a Volunteer Panel of attorneys was established to represent indigent litigants in civil cases.

13. 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 circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. However, because the holding in this case is so well settled and, therefore, unlikely to come before me as a judge, I am comfortable expressing my view that *Brown v. Board of Education* was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. However, because the holding in this case is so well settled and, therefore, unlikely to come before me as a judge, I am comfortable expressing my view that *Loving v. Virginia* was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: *Roe v. Wade* has been overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: *Planned Parenthood v. Casey* has been overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

14. Is threatening Supreme Court justices right or wrong?

Response: Any conduct that constitutes a threat under the law is wrong.

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

Response: 18 U.S.C. § 1507 provides that, "[w]hoever, 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."

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

Response: As a circuit court nominee and a sitting justice, it is not proper for me to comment or offer an opinion on an issue that might come before the courts. If confirmed to the Second Circuit and presented with this issue, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent.

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

Response: The fighting words exception to First Amendment protection was first articulated in the seminal case of *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), where the Supreme Court held that statements were unprotected if "by their very utterance" those statements "inflict injury or tend to incite an immediate breach of the peace." *Id.* at 573–574. In subsequent cases, the Supreme Court has defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen* v. *California*, 403 U.S. 15, 20 (1971), or amount to "a direct personal insult or an invitation to exchange fisticuffs." *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989). Courts must examine all the circumstances surrounding the statement to determine whether a reasonable person in the position of the actual addressee would have been likely to respond with violence.

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

Response: The true threats doctrine is an exception to the First Amendment freedom of speech protection which "encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Virginia v. Black*, 538 U.S. 343, 359–360 (2003) (citation omitted); *see also Watts v. United States*, 394 U.S. 705, 708 (1969) (noting that "vehement, caustic, and sometimes unpleasantly sharp" speech does not always constitute a threat).

19. Is the state judiciary afflicted with implicit bias?

Response: In my experience as a state judge, my colleagues and I are deeply committed to judging cases free from bias and to serving as neutral arbiters of justice. I have not closely studied the state judiciary system sufficiently to provide a more informed response.

20. Is the federal judiciary afflicted with implicit bias?

Response: In my experience as a state judge, I and my colleagues are deeply committed to judging cases free from bias and to serving as neutral arbiters of justice. I have not closely studied the federal judiciary system sufficiently to provide a more informed response.

21. Please define judicial activism.

Response: The term "judicial activism" is defined in Black's Law Dictionary 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." *Judicial Activism*, Black's Law Dictionary (11th ed. 2019).

22. You have admitted that you hold implicit bias. How can any individual appearing before you be assured that you will be neutral arbiter of justice when you have already admitted that you hold bias?

Response: My record as a judge over the past 16 years will reflect that I approach each case with an open mind, that I treat everyone with dignity and respect, and that I faithfully apply the law to the facts of each case and reach a decision fairly and impartially. My understanding is that implicit bias (also known as unconscious bias) is part of the human condition and, as such, I cannot say that I am immune from unconscious assumptions. However, as a judge, my commitment has been and remains to

judge all cases fairly and impartially without favor or prejudice to anyone and to provide equal justice.

23. During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?

Response: No.

24. 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.

25. 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.

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

Response: No.

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

Response: No.

28. 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.

29. The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."

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

Response: No.

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

Response: No.

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

Response: No.

30. 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.

31. **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 Foundations 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.

32. **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.

33. The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.

a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response: No.

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

Response: On February 28, 2022, I submitted an application to Senators Blumenthal and Murphy for a vacancy on the United States Court of Appeals for the Second Circuit. On March 19, 2022, I was interviewed for that position by an advisory committee, which

forwarded my name to the Senators for their consideration. I met with the Senators on March 29, 2022. On April 28, 2022, the White House Counsel's office contacted me concerning my application, and I met with attorneys from that office the following day. Since April 29, 2022, I have been in contact with officials from Office of Legal Policy at the Department of Justice. On August 1, 2022, my nomination was submitted to the Senate.

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

Response: On September 28, 2022, I received these questions from the Office of Legal Policy. I reviewed the questions and drafted my responses relying on my Senate Judiciary Questionnaire, my preparation notes, my own recollection, and my own legal research as needed. I asked one of my law clerks to proofread and check my citations prior to submitting them to the Office of Legal Policy. After receiving minor feedback from staff at the Office of Legal Policy, I finalized these answers, which are my own.

Senator Mike Lee
Questions for the Record
Maria Kahn, Nominee to be United States Circuit Judge for the Second Circuit

1. How would you describe your judicial philosophy?

Response: My judicial philosophy over the past 16 years as a trial and appellate judge has been to approach each case with an open mind, to listen carefully to the parties' arguments and positions, to review the briefs and record thoroughly, to faithfully apply the law to the facts of the case, to fairly and impartially decide the issues before me, and then to issue a decision that is both clear and concise.

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

Response: In deciding cases involving statutory interpretation, I would faithfully apply Supreme Court and Second Circuit precedent. If there were no applicable precedents, I would first review the text of the statute and any statutory definitions. If the text of the statute was clear, that would end the inquiry. If the text was not clear, I would apply the canons of statutory construction or other interpretive principles. I would consider persuasive authority from other jurisdictions that may have interpreted the statute. As a last resort, I would consider the types of legislative history that the Supreme Court has identified as being more reliable.

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

Response: In deciding cases involving statutory interpretation, I would faithfully apply Supreme Court and Second Circuit precedent. If there were no applicable precedents, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Second Circuit.

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

Response: The Supreme Court has recognized the importance of the original public meaning of the Constitution's text when interpreting its provisions. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation"); *see also, New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2136 (2022). If confirmed, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Second Circuit.

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

Response: Please see my response to Question 2.

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 held that the text and original meaning of a provision is an important and first consideration but it has on occasion considered contemporary community standards in interpreting the Constitution. *See, e.g.*, *Miller v. California,* 413 U.S. 15, 33–34 (1973) (definition of obscenity based on contemporary community standards). If confirmed, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Second Circuit.

6. What are the constitutional requirements for standing?

Response: To have standing to bring a case, a plaintiff must: 1) have suffered an injury in fact; 2) that is fairly traceable to the alleged conduct of the defendant; and 3) that the injury is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

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

Response: The Supreme Court has recognized that, in addition to the powers enumerated in Article I of the Constitution, Congress has implied powers with the implementation authority of the Necessary and Proper Clause. *See McCullogh v. Maryland*, 17 U.S. 316, 323–24 (1819) (finding Congress had implied power to incorporate a bank because "[e]ven without the aid of the general clause of in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted.").

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

Response: If confirmed, I would evaluate Congress' authority to enact a law under the relevant precedents of the Supreme Court and the Second Circuit. The Supreme Court has held that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012).

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

Response: The Supreme Court has set forth a test to be applied when determining whether an unenumerated right is protected by the due process clause of the Fifth and Fourteenth Amendments and it includes those fundamental rights "which 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, 720–21 (1997). The Supreme Court has recognized some fundamental rights protected by substantive due process including for example: the right to interracial marriage; *Loving v. Virginia*, 388 U.S. 1 (1967); the right to have children; *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

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: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey.* In addition, "[t]he doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Second Circuit.

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

Response: The Supreme Court has recognized that Congress' power under the Commerce Clause include: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and 3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). However, the Commerce Clause does not allow Congress to compel "individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 552 (2012).

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 held that classifications on the basis of race, national origin, or alienage are inherently suspect and trigger strict scrutiny review. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971).

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

Response: The system of checks and balances and separation of powers under our Constitution's structure play a critical role in ensuring that no one branch of government gained excessive power. "The system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988). "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Their solution to governmental power and its perils was simple: divide it." *Seila Law v. Consumer Financial Protection Bureau,* 140 S. Ct. 2183, 2202 (2020) (citation omitted).

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: If confirmed and presented with the issue of whether one branch of government assumed an authority not granted by the text of the Constitution, I would rely on Supreme Court and Second Circuit precedent in determining whether the challenged action exceeded that branch's authority.

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

Response: The only factors that should play a role in a judge's consideration of a case are the law and facts applicable to the particular case. Although empathy may be a normal reaction, it should play no role in a judge's consideration of a case.

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

Response: Both are not desirable results and courts should strive to avoid either invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional.

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 had occasion to research or analyze this issue to be able to provide an informed response as to what trends exist, if any, and what causes those trends. If confirmed, I would adjudicate each case before me based on the law and facts applicable to each case.

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

Response: Judicial review refers to the role of the judicial branch to review and determine whether actions by the legislative or executive branch are constitutionally valid. *See Marbury v. Madison*, 5 U.S. 137 (1803). Judicial supremacy refers to the principle that Supreme Court decisions are binding on coequal branches of the federal government; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); lower courts; *Hicks v. Miranda*, 422 U.S. 332, 345 (1975); and the states. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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: Federal and state elected officials take an oath to support and uphold the Constitution. U.S. Const. art VI, § 3. As a judicial nominee and a sitting justice, it is not proper for me to comment on how elected officials should fulfill their obligations.

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: The role of the judiciary is limited to deciding cases by applying the rule of law. The judiciary does not make or enforce laws. It is important to keep in mind that the public's adherence to or compliance with the courts' decisions depends on the public's trust and confidence in the judiciary.

22. 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: Lower court judges must follow binding precedent from both the Supreme Court and their circuit court. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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: Sentencing decisions should not be based on a defendant's group identity (e.g., race, gender, nationality, sexual orientation, or gender identity). The factors to be considered at sentencing are set forth in 18 U.S.C. § 3553(a) and include the nature

and seriousness of the offense, the need to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. In imposing a sentence, judges should consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The United States Sentencing Commission Guidelines Manual states that the following factors are not relevant in the determination of a sentence: race, sex, national origin, creed, religion, and socio-economic status. United States Sentencing Commission, Guidelines Manual, § 5H1.10 (Nov. 2021).

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: I am not familiar with the statements contained above. The term may mean different things to different people. Black's Law Dictionary defines the term "equity" as "[f]airness; impartiality; evenhanded dealing." *Equity*, Black's Law Dictionary (11th Ed. 2019).

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

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

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

Response: The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. If confirmed, I will faithfully apply the binding precedents of the Supreme Court and Second Circuit.

27. How do you define "systemic racism?

Response: I do not have a personal definition for the term. Black's Law Dictionary defines "racism" as the "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." *Racism*, Black's Law Dictionary (11th ed. 2019) Cambridge Dictionary defines the term as "policies and practices that exist throughout a whole society or organization, and that result in and

support a continued unfair advantage to some people and unfair or harmful treatment of others based on race." *Systemic Racism,* Cambridge Dictionary (2022).

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

Response: I do not have a personal definition for the term. Black's Law Dictionary defines "critical race theory" as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Critical Race Theory*, Black's Law Dictionary (11th ed. 2019).

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

Response: Please see my response to Questions 27 and 28.

30. In the questionnaire you submitted after your nomination to the Connecticut Supreme Court you said the following about a judge's responsibility to interpret the Constitution, "The original intent of the drafters is very important. However, I believe our State and Federal Constitutions should be interpreted in light of advances and changes in our society and history." Please explain what you meant by this statement.

Response: As I explained during my confirmation hearing, in that statement, which was in response to a written questionnaire relating to my nomination as a State Supreme Court Justice, what I was referring to is first, the text of the Constitution and the intent of the founders is primary and very important. But we also must recognize that the Constitution is an enduring document and that our forefathers could not have envisioned some changes—for example, advances in technology that would impact Fourth Amendment analysis of unreasonable searches and seizures. Indeed, the Supreme Court specifically recognized in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), 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." *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 404–405 (2012) (holding that installation of a tracking device was a "physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted"). In *Bruen*, the Supreme Court cites specifically to the type of technological advance that I was referring to in my statement. If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

31. When asked about this quote in your hearing, you said, "[W]e must recognize that the Constitution is an enduring document, and that our forefathers could not have envisioned some of the changes, for example in technology, that would affect Fourth Amendment issues." What does it mean that the Constitution is an "enduring document"?

Response: Please see my response to Question 30.

32. Is it impossible to apply the founder's original intent to modern-day issues – such as the original intent of the Fourth Amendment to the new technologies – simply because the founders did not foresee that technology?

Response: No. Please see my response to Question 30.

33. Has the Constitution's meaning changed over time?

Response: The Constitution can only change through the amendment process set forth in Article V. The Constitution is an enduring document and, "[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 & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

Questions for the Record for Maria Araújo Kahn, Nominee to the United States Court of Appeals for the Second Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Under the Fourteenth Amendment's Equal Protection Clause states may not deny any person within its jurisdiction "the equal protection of the laws." U.S. Const. amend. XIV, § 1. In addition, several federal statutes prohibit racial discrimination. *See, e.g.*, Title VI of the Civil Rights Act of 1964, § 42 U.S.C. 2000d; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); Fair Housing Act of 1968, 42 U.S.C. § 3605(a); Civil Rights Act of 1866, 42 U.S.C. § 1981. The Supreme Court has applied the highest level of scrutiny, strict scrutiny, to race-based classifications and held that they are only permitted when narrowly tailored to achieve a compelling state interest. Policies or practices that do not satisfy this heightened standard would be illegal and, as such, wrong.

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 that the due process clause of the Fifth and Fourteenth Amendments protects unenumerated rights "which 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, 720–21 (1997) (internal citations omitted). If confirmed to the Second Circuit, I would faithfully apply binding Supreme Court and Second Circuit precedent.

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 have not studied the individual philosophies of all of the Supreme Court Justices and there is no specific Supreme Court Justice's philosophy that I would characterize as most analogous to my own. My judicial philosophy over the past 16 years as a trial and appellate judge has been to approach each case with an open mind, to listen carefully to the parties' arguments and positions, to review the briefs and record thoroughly, to faithfully apply the law to the facts of the case, to fairly and impartially decide the issues before me, and then to issue a decision that is both clear and concise.

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

Response: The term "originalism" is defined in Black's Law Dictionary as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." *Originalism*, Black's Law Dictionary (11th ed. 2019). I would not describe myself as having any particular judicial ideology. If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

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

Response: The term "living constitution" is defined in Black's Law Dictionary as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." *Living Constitution*, Black's Law Dictionary (11th ed. 2019). It 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." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I would not describe myself as having any particular judicial ideology. If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

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: Yes.

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

Response: The Supreme Court has held that the text and original meaning of a provision is an important and first consideration but it has on occasion considered contemporary community standards in interpreting the Constitution. *See, e.g.*, *Miller v. California,* 413 U.S. 15, 33–34 (1973) (definition of obscenity based on contemporary community standards). If confirmed, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Second Circuit.

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

Response: The Constitution can only change through the amendment process set forth in Article V. The Constitution is an enduring document and, "[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 & Pistol Ass'n, Inc. 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: Yes, if confirmed I would follow this binding precedent.

a. **Was it correctly decided?**

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: Yes, if confirmed I would follow this binding precedent.

a. **Was it correctly decided?**

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: Yes, if confirmed I would follow this binding precedent.

a. **Was it correctly decided?**

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. However, because the holding in this case is so well settled, and therefore unlikely to come before me as a judge, I am comfortable expressing my view that *Brown v. Board of Education* was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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. § 3142(e)(3), provides for a 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 as victims.

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

Response: I am not aware of cases generally examining all the policy rationales underlying the application of the presumption to all of the listed offenses. *See United State v. Jessup,* 757 F.2d 378, 384 (1st Cir. 1985) ("[a]fter hearing evidence, Congress concluded that 'flight to avoid prosecution is particularly high among persons charged with major drug offenses.' It found that 'drug traffickers often have established ties outside the United States . . . [and] have both the resources and foreign contacts to escape to other countries . . . .'" (citations omitted)). The statute itself provides that if the judicial officer finds there is probable to believe the person committed the offense, then "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community . . . ." 18 U.S.C. § 3142(e)(3).

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: Yes. Both the Free Exercise Clause of the First Amendment, as it is applied to states through the Fourteenth Amendment, as well as the Religious Freedom Restoration Act, place limitations on what the government may impose or require of private institutions or small businesses.

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

Response: The Supreme Court has held that actions that incidentally burden the free exercise of clause are subject to rational basis test if they are neutral and generally applicable. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993). However, if the government actions are not facially neutral and generally applicable, they are subject to strict scrutiny. *Id.* If the enactment or enforcement of the facially neutral act is found be motivated by religious animus, it is subject to strict scrutiny. *See Masterpiece Cakeshop, LTD v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–31 (2018). Further, in cases where the Religious Freedom Restoration Act applies, then the government action is subject to strict scrutiny if it substantially burdens the free exercise of religion even if the action is facially neutral and generally applicable. *See Burwell v. Hobby Lobby Stores Inc.,* 573 U.S. 682, 694–95 (2014).

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 plaintiffs had "shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). The court concluded that the religious organizations were entitled to a preliminary injunction because the regulations were not neutral to religion and had "single[d] out houses of worship for especially harsh treatment," and did not meet the strict scrutiny test because the regulations were not narrowly tailored to achieve the compelling state interest to reduce the spread of COVID-19. *Id.* at 67.

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

Response: Plaintiffs, who wished to gather for at-home religious exercise, brought an action alleging that the state's restrictions on private gatherings during the COVID-19 pandemic violated their First Amendment rights to free exercise of religion, free speech, and freedom of assembly, as well as their Fourteenth Amendment substantive due process and equal protection rights. The Supreme Court held that restrictions on private gatherings contained a myriad of exceptions for secular activities that were comparable to in-home religious activities and therefore the regulations were not neutral and generally applicable, triggering strict scrutiny. As a result, the Supreme Court concluded that the plaintiffs were likely to succeed on the merits of their free exercise claim, and were entitled to an injunction prohibiting enforcement of the restrictions during the pendency of appeal. *See Tandon v. Newsom,* 141 S. Ct. 1294, 1297 (2021). The Court noted that the state was not

excused from explaining why it could not safely permit at home worshippers to gather in large numbers while using precautions used in secular activities. *Id.*

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

Response: Yes.

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

Response: A cakeshop owner sought review of the Colorado Civil Rights Commission's decision to issue a cease and desist order as a result of his refusal to sell a wedding cake to a same-sex couple due to his religious beliefs. The Supreme Court held that the Colorado Civil Rights Commission had failed to neutrally apply a facially neutral public accommodations law because the commission members had showed elements of clear and impermissible hostility towards the cakeshop owner's sincerely held religious beliefs. *See Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018).

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: The Supreme Court has held that an individual's religious beliefs, even if not consistent with any particular faith tradition, are protected as long as they are sincerely held. *See Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989).

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 above.

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

Response: Please see response to Question 19 above.

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

Response: As a judicial nominee and a sitting justice, it would not be proper for me to comment on any particular church's doctrine. If confirmed to the Second Circuit, I would faithfully apply binding Supreme Court and Second Circuit precedent.

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: Two elementary school teachers brought employment discrimination claims against their respective employers alleging discrimination on the basis of age and disability. The employers raised the ministerial exception under the First Amendment's

Religion Clauses, claiming that courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious entities. The Supreme Court held that the teachers' employment discrimination claims were barred by the ministerial exception because "they both performed vital religious duties." *See Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049, 2066 (2020).

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: Applying the strict scrutiny, the Supreme Court held that the City's refusal to contract with Catholic Social Services (CSS) on the basis of its religious affiliation violated the Free Exercise Clause. The court noted that "[t]he creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (citation omitted).

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: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), Maine had enacted a program of tuition assistance for parents who live in school districts that neither operate a secondary school of their own or contract for a particular school in another district to defray the costs by selecting participating schools. Maine limited the tuition assistance to non-sectarian schools. The Supreme Court found that the program's non-sectarian requirement conditioned benefits solely due to a school's religious character and was subject to strict scrutiny. The Court held that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 2002.

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

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), a high school football coach lost his job because of his practice to kneel at midfield after games to offer a quiet person prayer. After finding the district policy was neither neutral nor generally applicable, the Supreme Court applied the strict scrutiny test to find that burdening an employee's rights under the free exercise clause could not be justified on the ground that his suspension was essential to avoid establishment clause violations. *Id.* at 2426.

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: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), involved the application of Religious Land Use and Institutionalized Persons Act ("RLUIPA") to the enforcement of regulations requiring that Amish homes to have septic systems. Although Justice Gorsuch agreed with the majority that the case should be remanded, in his concurrence he noted that under RLUIPA strict scrutiny should apply and the government "must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." *Id.* at 2433.

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: As a judicial nominee and a sitting justice, it would not be proper for me to give my opinion on this issue which might come before the courts. If confirmed to the Second Circuit, I would faithfully apply binding Supreme Court and Second Circuit precedent.

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: Yes. I am not aware that such training exists.

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. My hiring decisions will be based on qualifications of the candidates for the position.

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

Response: As a judicial nominee and sitting justice, it is not proper for me to comment on the constitutionality of an executive branch decision to consider skin color or sex in political appointments.

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

Response: In my experience as a state judge, my colleagues and I are deeply committed to judging cases free from bias and to serving as neutral arbiters of justice. I have not studied the criminal justice system to provide an informed response. If confirmed and faced with a claim of disparate treatment on the basis of race, I would evaluate the claim based on the facts of the case before me and the binding precedents of the Supreme Court and Second Circuit.

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

Response: As a judicial nominee and a sitting justice, it would not be proper for me to comment on this matter. Article III, § 1, of the Constitution sets forth Congress' power to establish the courts.

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: The Supreme Court has held that "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 554, U.S. 570, 595 (2008).

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: The Supreme Court has prohibited the banning of possession of handguns in the home for self-defense, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the Second Amendment right to keep and bear arms extends to states through the Fourteenth Amendment's due process clause, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). More recently the Supreme Court has prohibited restrictions on an individual's right to carry a handgun for self-defense outside of the home. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: Yes, The Supreme Court has held that the right to bear arms is a fundamental right. See *District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *New York v. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S. Ct. 2111 (2022).

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

Response: No, I am not aware of any precedent that compares the right to own a firearm to other enumerated rights.

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

Response: Please see response to Question 36 above.

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

Response: Article II, § 3, of the Constitution provides that the President "shall take Care that the Laws be faithfully executed," and the Supreme Court has held that the "exclusive authority and absolute discretion to decide whether to prosecute a case" lies with the Executive. *United States v. Nixon*, 418 U.S. 683, 693 (1974). Prosecutors have wide discretion to determine whether to prosecute a case based on the facts and circumstances of the case and the guidance and priorities set by the United States Attorneys and the Attorney General. As a judicial nominee and a sitting justice, it is not proper for me to comment generally on whether it is appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns. If confirmed to the Second Circuit and presented with such an issue, I would faithfully apply binding Supreme Court and Second Circuit precedent.

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

Response: An act of prosecutorial discretion refers to a prosecutor's decision whether to prosecute an individual case and it is my general understanding that a substantive administrative rule change would be governed by the Uniform Administrative Procedures Act. *See* 5 U.S.C. § 553.

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

Response: No. The death penalty is established by statute. See 18 U.S.C § 3591 (a). The President may not unilaterally abolish it.

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

Response: The plaintiffs, associations of real estate agents and rental property managers, brought action against Department of Health and Human Services (HHS) seeking challenging and seeking a stay of a nationwide eviction moratorium imposed by the Center for Disease Control and Prevention (CDC) in response to COVID-19 pandemic. The CDC relied on § 361(a) of the Public Health Service Act for authority to promulgate and extend the eviction moratorium. See 58 Stat. 703, as amended, 42 U.S.C. § 264(a). In granting the stay, the Supreme Court held that the CDC did not have the authority under Section 361 (a) to impose a nationwide eviction moratorium and that it "expect[ed] Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'" *Alabama Association of Realtors v. HHS,* 141 S. Ct. 2485, 2489 (2021).

42. **You previously expressed support for a living constitution. You said, "The original intent of the drafters is very important. However, I believe our State and Federal Constitutions should be interpreted in light of advances and changes in our society and history, including technology and science." Is it correct that you do not believe that the words in the Constitution have a fixed meaning?**

Response: No. As I explained during my confirmation hearing, in that statement, which was in response to a written questionnaire relating to my nomination as a State Supreme Court Justice, what I was referring to is first, the text of the Constitution and the intent of the founders is primary and very important. But we also must recognize that the Constitution is an enduring document and that our forefathers could not have envisioned some changes—for example, advances in technology that would impact Fourth Amendment analysis of unreasonable searches and seizures. Indeed, the Supreme Court specifically recognized in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), 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." *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 404–405 (2012) (holding that installation of a tracking device was a "physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted"). In *Bruen*, the Supreme Court cites specifically to the type of technological advance that I was referring to in my statement. If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

43. **If judges are not bound by the fixed meaning of the Constitution, what constrains judicial power under a theory of living constitutionalism?**

Response: If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

44. **Is America a systemically racist country?**

Response: America is a great country and I am fortunate that my parents chose to and were able to immigrate to the United States. Only in the United States could someone like me have been able to obtain the education and the opportunities to achieve my goals. I cannot begin to express the pride that I felt representing the United States as an Assistant United States Attorney and to serve the State of Connecticut as a jurist. I am keenly aware and deeply grateful for the outstanding opportunities I have had. It would be the greatest honor of my professional career, if fortunate to be confirmed, to serve as a Judge on the Second Circuit Court of Appeals.

Senator Ben Sasse
Questions for the Record for Maria Araújo Kahn
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 21, 2022

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

   Response: No.

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

   Response: My judicial philosophy over the past 16 years as a trial and appellate judge has been to approach each case with an open mind, to listen carefully to the parties' arguments and positions, to review the briefs and record thoroughly, to faithfully apply the law to the facts of the case, to fairly and impartially decide the issues before me, and then to issue a decision that is both clear and concise.

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

   Response: I would not describe myself as having any particular judicial ideology. If confirmed to the Second Circuit, I would faithfully follow Supreme Court and Second Circuit precedent when it comes to questions of constitutional interpretation.

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

   Response: Please see response to Question 3. The Supreme Court has held that the relevant text should be the starting point to analyzing questions of constitutional or statutory interpretation. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (interpretation of Article III of the Constitution); *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (interpretation of Sixth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (interpretation of Second Amendment); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (in case of statutory interpretation noting that "precedents make clear that the starting point for [court's] analysis is the statutory text").

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

   Response: Please see response to Question 3. The Constitution can only change through the amendment process set forth in Article V. The Constitution is an enduring document and, "[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 & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

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

   Response: There is no specific Supreme Court Justice or Justices appointed since January 20, 1953, whose jurisprudence I admire most. I have deep respect for the Supreme Court and, if confirmed, I will faithfully apply all Supreme Court and Second Circuit precedent, regardless of my admiration for any specific Justice or Judge.

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

   Response: The Second Circuit has held that a panel is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Additionally, the doctrine of stare decisis, which requires adherence to earlier decisions absent special justification, is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Ent., LLC,* 576 U.S. 446, 455 (2015).

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

   Response: Please see response to Question 7.

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

   Response: In deciding cases involving statutory interpretation, I would faithfully apply Supreme Court and Second Circuit precedent. If there were no applicable precedents, I would first review the text of the statute and any statutory definitions. If the text of the statute was clear, that would end the inquiry. If the text was not clear, I would apply the canons of statutory construction or other interpretive principles. I would consider persuasive authority from other jurisdictions that may have interpreted the statute. As a last resort, I would consider the types of legislative history that the Supreme Court has identified as being more reliable.

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

Response: Sentencing decisions should not be based on a defendant's race or ethnicity. The factors to be considered at sentencing are set forth in 18 U.S.C. § 3553(a) and include the nature and seriousness of the offense, the need to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. In imposing a sentence, judges should consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The United States Sentencing Commission Guidelines Manual states that the following factors are not relevant in the determination of a sentence: race, sex, national origin, creed, religion, and socio-economic status. United States Sentencing Commission, Guidelines Manual, § 5H1.10 (Nov. 2021).

Senator Josh Hawley
Questions for the Record
Maria Kahn
Nominee, U.S. Court of Appeals for the Second Circuit

1. **In a July 2020 presentation, you responded to a question asking why you think some people opposed the "national movement" following the killing of George Floyd. You responded that "some of it is intentional racism of course, but some of it comes just from a complete lack of understanding or experience of what somebody else's life is like." Ibram Kendi is a prominent activist in the referenced national movement. He has said, "The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."**

    a. **Do you agree with Kendi's statement?**

    Response: I am not familiar with the statement made by Ibram Kendi or the context in which it was made. The Supreme Court has applied the highest level of scrutiny, strict scrutiny, to race-based classifications and held that they are only permitted when narrowly tailored to achieve a compelling state interest. If confirmed to the Second Circuit, I would faithfully apply binding Supreme Court and Second Circuit precedent.

    b. **Do you think that people who disagree with his statement do so because of "a complete lack of understanding or experience of what somebody else's life is like"?**

    Response: Please see response to Question 1a above. In the presentation on July 2020, I was speaking generally about how important it is for people with different perspectives or points of view to engage in meaningful and respectful discussions with one another and, more broadly, the need to understand the perspectives of other people.

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

    a. **Do you agree with that philosophy?**

    Response: No. My judicial philosophy over the past 16 years as a trial and appellate judge has been to approach each case with an open mind, to listen carefully to the parties' arguments and positions, to review the briefs and record thoroughly, to faithfully apply the law to the facts of the case, to fairly and impartially decide the issues before me, and then to issue a decision that is both clear and concise.

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

Response: As a judicial nominee and a sitting justice, it would not be proper for me to comment on whether another judge or justice has violated their judicial oath.

3. **Do you believe that the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is settled law?**

Response: Yes, if confirmed I would follow this binding precedent.

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

Response: Younger Abstention Doctrine: This doctrine generally requires federal courts to abstain from exercising jurisdiction over federal constitutional claims that call into question ongoing state proceedings. In *Sprint*, the Supreme Court instructed us that a district court should abstain under *Younger* "only in three 'exceptional circumstances' involving (1) 'ongoing state criminal prosecutions,' (2) 'certain civil enforcement proceedings,' and (3) 'civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Falco v. Justices of the Matrimonial Parts of Supreme Court of Suffolk County*, 805 F.3d 425, 427 (2d Cir. 2015) (quoting *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)), cert. denied, 579 U.S. 904 (2016). "These three exceptions define *Younger*'s scope. To be sure, before invoking *Younger* a federal court may 'appropriately [consider]' three additional factors laid out in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), that further counsel in favor of abstention: Whether 'there is (1) an ongoing state judicial proceeding [that] (2) implicates important state interests and (3) provides an adequate opportunity to raise federal challenges.' But these conditions '[are] not dispositive; they [are], instead, additional factors appropriately considered by the federal court before invoking Younger.'" *Cavanaugh v. Geballe*, 28 F.4th 428, 432 (2d Cir. 2022) (citations omitted) (quoting *Sprint*, 571 U.S. at 81).

Rooker-Feldman Doctrine: This doctrine requires federal courts to abstain if the exercise of jurisdiction will result in a reversal or modification of a state judgement. *See D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 482–83 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). "The *Rooker–Feldman* doctrine provides that, in most circumstances, the lower federal courts do not have subject matter jurisdiction to review final judgments of state courts." *Morrison v. City of New York*, 591 F.3d 109, 112 (2d Cir. 2010). The Supreme Court has clarified that the doctrine is "confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 284 (2005); *see also Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77, 85 (2d Cir. 2005).

Pullman Abstention Doctrine: This doctrine allows courts to avoid premature decisions on questions of federal law and also from issuing erroneous decisions relating to state law. "Abstention under the *Pullman* doctrine may be appropriate when three conditions

are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.' *Greater New York Metro. Food Council v. McGuire,* 6 F.3d 75, 77 (2d Cir. 1993) (per curiam). Satisfaction of all three criteria does not automatically require abstention, however." *Vermont Right. to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000).

Colorado River Abstention: This doctrine permits a federal court to abstain from exercising jurisdiction when there is a parallel state proceeding and rests on considerations of conservation of judicial resources. "Under the *Colorado River* exception the court may abstain in order to conserve federal judicial resources only in 'exceptional circumstances,' where the resolution of existing concurrent state-court litigation could result in 'comprehensive disposition of litigation. In determining whether this exception is applicable, the court should consider (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction, (2) whether the federal forum is less inconvenient than the other for the parties, (3) whether staying or dismissing the federal action will avoid piecemeal litigation, (4) the order in which the actions were filed and whether proceedings have advanced more in one forum than in the other, (5) whether federal law provides the rule of decision and (6) whether the state procedures are adequate to protect the plaintiff's federal rights. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal." *Woodford v. Community Action Agency of Greene County, Inc*., 239 F.3d 517, 522 (2d Cir. 2001) (emphasis omitted) (citations omitted) (internal quotation marks omitted).

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

   Response: No.

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

      Response: Please see my response to Question 5.

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

   Response: The Supreme Court has recognized the importance of the original public meaning of the Constitution's text when interpreting its provisions. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) ("the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation"); *see also New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2136 (2022). If confirmed, I would follow the interpretive

methods set out in the binding precedent of the Supreme Court and the Second Circuit.

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

   Response: In deciding cases involving statutory interpretation, I would faithfully apply Supreme Court and Second Circuit precedent. If there were no applicable precedents, I would first review the text of the statute and any statutory definitions. If the text of the statute was clear, that would end the inquiry. If the text was not clear, I would apply the canons of statutory construction or other interpretive principles. I would consider persuasive authority from other jurisdictions that may have interpreted the statute. As a last resort, I would consider the types of legislative history that the Supreme Court has identified as being more reliable.

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

      Response: Based on Supreme Court precedent, not all types of legislative history have the same probative value. *See, e.g., United States v. Craft,* 535 U.S. 274, 287 (2002) (failed legislative proposals not probative legislative intent); *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 832 n.28 (1983) (noting that a report of the entire conference committee would carry greater weight than a manager's statement).

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

      Response: I am not aware of cases where the Supreme Court has consulted the laws of foreign nations to interpret the provisions of the Constitution. If confirmed, I would follow Supreme Court and Second Circuit guidance and precedent on the appropriate sources of Constitutional interpretation.

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

   Response: Under Supreme Court precedent, the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment is the method presents "a substantial risk of serious harm" and whether there is "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (internal quotations marks omitted).

9. **Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

Response: Yes. Please see my response to Question 8.

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

Response: No. The Supreme Court has held that there is not a substantive due process right to DNA evidence in post-conviction proceedings. *See District Attorney's Office for Third Judicial District. v. Osborne*, 557 U.S. 52, 72 (2009).

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

Response: No.

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

Response: The Supreme Court has held that government actions which incidentally burden the free exercise of religion are subject to rational basis review if they are neutral and generally applicable. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993). However, if the government actions are not facially neutral and generally applicable, they are subject to strict scrutiny. *Id.* If the enactment or enforcement of the facially neutral act is found to be motivated by religious animus, it is subject to strict scrutiny. *See Masterpiece Cakeshop, LTD v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–31 (2018). Further, in cases where the Religious Freedom Restoration Act applies, then the government action is subject to strict scrutiny if it substantially burdens the free exercise of religion even if the action is facially neutral and generally applicable. *See Burwell v. Hobby Lobby Stores Inc.,* 573 U.S. 682, 694–95 (2014).

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

Response: Please see my response to Question 12.

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

Response: The Supreme Court has held that an individual's religious beliefs, even if not consistent with any particular faith tradition, are protected as long as they are sincerely held. *See Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989).

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

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

Response: The Supreme Court has held that "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 554, U.S. 570, 595 (2008). The Court prohibited banning the possession of handguns inside of the home for self-defense.

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

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

16. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. **What do you believe Justice Holmes meant by that statement, and do you agree with it?**

Response: In his dissenting opinion, Justice Holmes expressed his concern over the majority's reliance on the Constitution to limit government economic regulations by stating the "Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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

Response: "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—*has long since been discarded*. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (emphasis added).

As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

17. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

Response: None that comes to mind.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed, I would be duty bound to follow all Supreme Court and Second Circuit precedent. I do not have a personal view on the statement made by Judge Learned Hand.

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

Response: Please see my response to Question 18a.

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

Response: The Supreme Court has held that when a company "controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes," that is sufficient to support a finding of monopoly power to survive summary judgment on the first element of the monopoly offense. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 452, 481 (1992). In *Eastman Kodak Co.*, the Supreme Court cited additional examples of what constitutes monopoly power. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87% of market shares is sufficient to establish monopoly power); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over two-thirds of the market is sufficient to establish a monopoly).

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

Response: Unlike state courts, in the context of diversity jurisdiction, federal courts must apply the law of the state and there is no federal common law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

Response: The Supreme Court has recognized that the states' highest courts should interpret state law and federal courts should defer to state court's interpretation of state law. See *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts").

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

Response: Please see my response to Question 20.

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

Response: The federal Constitution affords certain rights and protections which are binding on the states. States may, if they choose to, provide greater protections under their state constitutions. See *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555–56 (1940) (state courts should be free to interpret their constitutions).

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

Response: As a circuit court nominee and a sitting justice, it is not generally proper for me to comment on whether a Supreme Court decision was correctly decided. However, because the holding in this case is so well settled and, therefore, unlikely to come before me as a judge, I am comfortable expressing my view that *Brown v. Board of Education* was correctly decided. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent, irrespective of any personal opinions about their correctness.

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

Response: Rule 65 of the Federal Rules of Civil Procedure sets forth the procedures for the issuance of injunctions. The Supreme Court has stated that the scope of injunctive relief is "dictated by the extent of the violation established" and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The issue of nationwide injunctions is not only the subject of recent litigation but also public debate. As a circuit court nominee and a sitting justice, it is not proper for me to comment on an issue that might come before the courts. If confirmed to the Second Circuit, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent.

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

Response: Please see my response to Question 22.

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

Response: Please see my response to Question 22.

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

Response: Please see my response to Question 22.

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

Response: The role of federalism in our constitutional system is to divide the power between the federal and state governments. It is a structural framework that keeps a check on the accumulation of power of the federal government and ensures that states retain the ability to protect individual rights and liberties.

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

Response: Please see my response to Question 4.

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

Response: Please see my response to Question 22.

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

Response: The Supreme Court has held that the due process clause of the Fifth and Fourteenth Amendments protects unenumerated rights "which 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, 720–21 (1997) (internal citations omitted).

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

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

Response: Please see my response to Question 12.

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

Response: Yes, the Supreme Court stated that the Free Exercise Clause of the First Amendment "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421 (2022).

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

Response: Please see my responses to Questions 12 and 14.

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

Response: Please see my response to Question 14.

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

Response: The Religious Freedom Restoration Act prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores Inc.,* 573 U.S. 682, 705 (2014) (internal quotation marks omitted).

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

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

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

a. What do you understand this statement to mean?

Response: I am not familiar with the statement by Justice Scalia or the context in which it was made. As a judge, I understand the role of the judge is to apply the law to the facts of each case whether the judge personally agrees or disagrees with the law and the result of the faithful application of the law.

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

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

a. If yes, please provide appropriate citations.

Response: Please see response to Question 30.

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

Response: No.

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

Response: America is a great country and I am fortunate that my parents chose to and were able to immigrate to the United States. Only in the United States could someone like me have been able to obtain the education and the opportunities to achieve my goals. I cannot begin to express the pride that I felt representing the United States as an Assistant United States Attorney and to serve the State of Connecticut as a jurist. I am keenly aware and deeply grateful for the outstanding opportunities I have had. It would be the greatest honor of my professional career, if fortunate to be confirmed, to serve as a Judge on the Second Circuit Court of Appeals.

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

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

34. How did you handle the situation?

Response: Please see response to Question 33.

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

Response: Yes.

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

Response: There is no particular Federalist Paper that has shaped my views of the law.

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

Response: As a circuit court nominee and a sitting justice, it is not proper for me to comment or offer an opinion on an issue that might come before the courts. If confirmed to the Second Circuit and presented with this issue, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent.

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

Response: Yes. Other than my hearing before the Senate Judiciary Committee, I have testified on five occasions under oath before the State of Connecticut Judiciary Committee in connection with my appointment to the Superior, Appellate and Supreme Courts. All of these hearings are listed under my response to Question 12c. of the Senate Judiciary Questionnaire. To the extent transcripts were available and or a recording, they were submitted as attachments to my SJQ as listed below:

On February 28, 2018, I testified before the State of Connecticut Judiciary Committee as a nominee to be an Associate Justice on the Connecticut Supreme Court. Video available at https://ct.com/ctnplayer.asp?odID=10011 (my portion of the hearing is from approximately 12:12 to 12:18). Responses to questions for the record were supplied in conjunction with my SJQ.

On November 1, 2017, I testified before the State of Connecticut Judiciary Committee as a nominee to be an Associate Justice on the Connecticut Supreme Court on an interim basis as the legislature was not in session. Testimony and responses to questions for the record were supplied in conjunction with my SJQ.

On May 22, 2017, I testified before the State of Connecticut Judiciary Committee as a nominee to be a Judge on the Connecticut Appellate Court. Testimony and responses to questions for the record were supplied in conjunction with my SJQ.

On February 19, 2014, I testified before the State of Connecticut Judiciary Committee as a nominee for reappointment for a second eight-year term as a Superior Court Judge for the State of Connecticut. Testimony and responses to questions for the record were supplied in conjunction with my SJQ.

On March 21, 2006, I testified before the State of Connecticut Judiciary Committee as a nominee for reappointment for a second eight-year term as a Superior Court Judge for the State of Connecticut. Testimony and responses to questions for the record were supplied in conjunction with my SJQ.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: No.

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

Response: Please see response to Question 41.

42. Have you ever confessed error to a court?

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

a. If so, please describe the circumstances.

Response: Please see response to Question 42.

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

Response: Judicial nominees take an oath to testify truthfully before the committee and to respond to the committee's questions to the best of their ability. I understand that oath and have upheld it.

Questions from Senator Thom Tillis
for Maria Araujo Kahn
Nominee to be United States Circuit Judge for the Second Circuit

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

   Response: Yes.

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

   Response: The term "judicial activism" is defined in Black's Law Dictionary 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." *Judicial Activism*, Black's Law Dictionary (11th ed. 2019). Judicial activism refers to judges deciding cases based on their personal opinions rather than the applicable law and facts. I do not think such an approach would be appropriate and Canon 3 of the Code of Conduct for United States Judges requires that judges "perform the duties of the office fairly, impartially and diligently."

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

   Response: As I noted above the Code of Conduct requires that judges decide cases impartially, and it is both the expectation and the duty of every judge to uphold their oath "to administer justice without respect to persons, and to do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [the judge]… under the Constitution and the laws of the United States."

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

   Response: No. Judges are not policymakers.

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

   Response: The role of the judge is to apply the law to the facts of each case and reach a decision without regard to the desirability of the outcome. The rule of law depends on judges' faithful application of the law.

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

   Response: No.

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

Response: The Supreme Court has held that "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 554, U.S. 570, 595 (2008) (prohibited the banning of possession of handguns in the home for self-defense). The Second Amendment right to keep and bear arms extends to states through the Fourteenth Amendment's due process clause. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010). More recently the Supreme Court has prohibited restrictions on an individual's right to carry a handgun for self-defense outside of the home. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). If confirmed, I will faithfully apply binding Supreme Court and Second Circuit precedent.

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

Response: If confirmed, in evaluating a case involving the Second Amendment rights to bear arms and whether those rights may be limited during a pandemic, I would apply binding Supreme Court precedent such as *Heller*, *McDonald*, and *Bruen*, as cited in response to Question 7, as well as Supreme Court precedent related to pandemic restrictions such as *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). I would also follow any binding Second Circuit precedent.

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

Response: The Supreme Court has held that "officers are entitled to qualified immunity … unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time [and] … Clearly established means that, at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful ... This demanding standard protects all but the plainly incompetent or those who knowingly violate the law. . . To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. . ., which means it is dictated by controlling authority . . . The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (quotation marks and citations omitted).

If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

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 current qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question best addressed by policymakers. If confirmed, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent.

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 best addressed by policymakers. If confirmed, I am duty bound and will faithfully apply all binding Supreme Court and Second Circuit precedent.

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

a. What experience do you have with copyright law?

Response: During my tenure as a federal prosecutor, I was part of a multinational investigation of an underground online community consisting of individuals and organized groups who used the Internet to engage in large-scale, illegal distribution of copyrighted software, such as video games, movies, and MP3 files. This investigation led to the simultaneous execution of approximately 120 search warrants in 12 countries including the United States, Belgium, Denmark, France, Germany, Hungary, Israel, the Netherlands, Singapore, Spain, Sweden, and the United Kingdom. Several participants in the United States were prosecuted in the District of Connecticut. For example, on March 5, 2005, a prominent member of the group waived indictment, and pled guilty to one count of conspiracy to commit criminal copyright infringement. Most of the defendants received sentences under one year of incarceration or home confinement and community service which included education of teens on the risks of engaging in this type of conduct.

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

Response: Please see my response to Question 12a.

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

Response: None. The Copyright infringement cases that I worked on did not involve any online service providers.

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: None. I do not recall working on any cases, either as a federal prosecutor or judge, involving First Amendment and free speech issues in the context of intellectual property issues, including copyright law.

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

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

Response: In deciding cases involving statutory interpretation, I would faithfully apply Supreme Court and Second Circuit precedent. If there were no applicable precedents, I would first review the text of the statute and any statutory definitions. If the text of the statute was clear, that would end the inquiry. If the text was not clear, I would apply the canons of statutory construction or other interpretive principles. I would consider persuasive authority from other jurisdictions that may have interpreted the statute. As a last resort, I would consider the types of legislative history that the Supreme Court has identified as being more reliable.

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: In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that, where the statutory language is unclear, courts must defer to the agency's interpretation of the statutory language provided it is a reasonable interpretation and conclusion. "Although an opinion expressed by the Copyright Office in [a report interpreting a provision of the copyright statute] does not receive *Chevron* deference of the sort accorded to rulemaking by authorized agencies, we do recognize the Copyright Office's intimate

familiarity with the copyright statute and would give appropriate deference to its reasonably persuasive interpretations of the Copyright Act." *Capitol Recs., LLC v. Vimeo*, *LLC*, 826 F.3d 78, 93 (2d Cir. 2016) (the court ultimately rejected the Copyright Office's interpretation as being flawed).

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

Response: If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent to any matters relating to any claim that a service provider was on notice.

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

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

Response: I recognize that application of the law in the digital and to constantly evolving technology can present challenges for judges and is something that courts deal with regularly. If confirmed, I will faithfully apply Supreme Court and Second Circuit precedent.

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: Please se my response to Question 14a.

15. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: I have not studied or researched this issue to provide an informed response. As a general matter, forum shopping and/or judge shopping would undermine public confidence in the judiciary. I am aware that in the District of Connecticut cases are assigned randomly. Litigants cannot file cases within a

particular division of the District in order to effectively "select the judge who will hear their case."

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

Response: As a state court trial judge, I never encouraged such conduct.

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: I am not familiar with the practice of "forum selling." As a state court judge, I never engaged in any kind of practice that would attract a particular case or litigant.

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

Response: Please see my response to Question 15a.

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

Response: Please see my response to Question 15a.

b. 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? Should such a rule apply only where a single judge sits in a division?

Response: Please see my response to Question 15a.

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

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

Response: As a circuit court nominee and a sitting justice, it is not proper for me to comment on an issue that might come before the courts.

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

Response: Please see my response to Question 17a.