Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Anne M. Nardacci
Nominee to the U.S. District Court for the Northern District of New York

1. **In the context of federal case law, what is super precedent?**

   Response: To the best of my knowledge, neither the Supreme Court nor the Second Circuit has used the term "super precedent." If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

2. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: Private parties, including law firms, may not prosecute federal crimes. *Linda R. v. Richard V.*, 410 U.S. 614, 619 (1973) ("In American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *see also Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 86-87 (2d Cir. 1972) ("It is a truism, and has been for many decades, that in our federal system crimes are always prosecuted by the Federal Government, not as has sometimes been done in Anglo-American jurisdictions by private complaints.").

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

   Response: I am not familiar with that quotation or its context. Black's Law Dictionary defines living constitutionalism as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I have never referred to myself as a "living constitutionalist," or by any other label related to constitutional interpretation. The Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding constitutional interpretation.

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

   Response: Federal judicial decisions should apply the law, including the Constitution, federal statutes, and any binding precedent, as appropriate, to the facts of particular cases.

5. **Is threatening Supreme Court Justices right or wrong? Please explain your answer.**

Response: It is wrong to threaten a Supreme Court Justice and it may also constitute a federal crime.

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

   Response: The Supreme Court reaffirmed in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), that certain substantive rights, although not enumerated in the Constitution, are nevertheless protected by the Due Process Clause where those rights are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id*. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, (1997) (internal quotation marks omitted)). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding fundamental rights protected by the Constitution.

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

   Response: 18 U.S.C. § 3553(a) details the factors to be considered in imposing a sentence, including the "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In addition, Chapter 5H of the U.S. Sentencing Guidelines "addresses the relevance of certain specific offender characteristics in sentencing."

8. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**
   a. **How often have you cited to either of these tomes during the course of your work?**
   b. **How often have you had an opportunity to work within these constructs during the course of your career?**

   Response: My practice for the past twenty years has focused on complex civil litigation. This has included handling motions and objections under the Federal Rules of Evidence, which apply in federal criminal cases. Although it has not comprised a large portion of my practice, I also have some experience in criminal matters and I have general familiarity with the Federal Rules of Criminal Procedure and the U.S. Sentencing Commission's Advisory Sentencing Guidelines. To the best of my recollection, I have not cited to them often, if at all, during the course of my career. If confirmed, I would ensure that I was fully versed in both, and utilize all resources available to me from the Federal Judicial Center, the U.S. Sentencing Commission, and elsewhere to do so.

9. **What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?**

Response: The power to issue injunctions is an equitable power of the court and Federal Rule of Civil Procedure 65 sets forth the procedures for issuing an injunction. Injunctions are considered an extraordinary remedy and courts generally grant them sparingly. The facts of the case at issue are a primary consideration in determining the scope of the injunction. To the best of my knowledge, the Supreme Court has not squarely addressed the legal basis for nationwide injunctions. In fact, Justice Gorsuch has noted that the Supreme Court has not yet addressed "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). In *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1370 (2021), and *cert. dismissed*, 141 S. Ct. 1292 (2021), the Second Circuit stated that it had "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree that such injunctions may be an appropriate remedy in certain circumstances." However, the Court went on to exercise its discretion to narrow the scope of the injunction at issue. *Id*. I would follow binding Supreme Court and Second Circuit precedent on this issue.

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

Response: The Supreme Court's recent decision in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), provides the relevant legal standard. The Court in *Bruen* held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." 142 S. Ct. at 2126 (internal quotation omitted). The Supreme Court's other binding precedent regarding the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), would also apply.

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

Response: Yes, parents have a constitutional right to direct the education of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (reaffirming *Meyer*).

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

Response: Under 18 U.S.C. § 1507, among other things, the act of picketing or parading in or near a federal court building or a residence occupied by a judge, juror, witness or court officer, "with the intent of interfering with, obstructing or impeding the

administration of justice, or with intent of influencing" such a person in the discharge or his or her duty, is a misdemeanor criminal offense.

13. **Under Supreme Court precedent, is 18 USC § 1507 constitutional on its face?**

    Response: To the best of my knowledge, the Supreme Court has not addressed the constitutionality of 18 U.S.C. § 1507. However, the Supreme Court held in *Cox v. Louisiana*, 379 U.S. 559 (1965), that a state statute with similar language was facially valid and applied it. Likewise, in *Picard v. Magliano*, 2022 WL 2962548, at *11 (2d Cir. July 27, 2022), the Second Circuit recently rejected a facial challenge to the constitutionality of a New York statute with similar language. As a judicial nominee, it would be inappropriate for me to opine on whether 18 U.S.C. § 1507 is constitutional on its face. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent on this issue.

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

    Response: The Sixth Amendment of the Constitution guarantees the "assistance of counsel" to defendants in federal criminal cases and in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that the Sixth Amendment right to assistance of counsel extends to defendants in state criminal cases via the Fourteenth Amendment. The Constitution does not expressly guarantee the right to assistance of counsel in civil cases, nor has the Supreme Court held that the Constitution provides such a right.

15. **Do you think law firms should allow their paying clients to influence which pro bono clients they take?**

    Response: This question is left to the discretion of each law firm, so long as the law firm complies with all applicable ethical rules. Once attorneys at a law firm accept a pro bono representation, however, those attorneys owe their pro bono client a duty of zealous representation. *See* American Bar Association Model Rule 1.3.

16. **Do you think law firms should allow their paying clients to influence the positions they assert on behalf of other clients?**

    Response: No. This situation would likely constitute a violation of the duty of undivided loyalty and present a conflict of interest under the applicable ethical rules. *See, e.g.,* American Bar Association Model Rule 1.7.

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, there are certain Supreme Court cases that are so fundamental and widely accepted that the issues presented in those cases are unlikely to be litigated in the future. On that basis, I can state that I believe *Brown v. Board of Education* was correctly decided.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, there are certain Supreme Court cases that are so fundamental and widely accepted that the issues presented in those cases are unlikely to be litigated in the future. On that basis, I can state that I believe *Loving v. Virginia* was correctly decided.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: The Supreme Court, in *Dobbs v. Jackson Women's Health Org.*, explicitly overruled *Roe v. Wade*. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: The Supreme Court, in *Dobbs v. Jackson Women's Health Org.*, explicitly overruled *Planned Parenthood v. Casey*. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

18. **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.

19. **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.

20. **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.

21. **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.

22. **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.

23. **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.

24. **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.

25. **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.

26. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**

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

    Response: No.

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

    Response: No.

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

    Response: No.

27. **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.

28. **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.

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

    Response: On February 12, 2021, I submitted an application for a position on the United States District Court for the Northern District of New York to Senator Charles Schumer's Judicial Screening Committee, as well as to Senator Kirsten Gillibrand. On April 6, 2021 and April 12, 2021, I interviewed with Senator Gillibrand's staff. On June 3, 2021, I interviewed with Senator Schumer's Screening Committee. On October 10, 2021, I interviewed with Senator Schumer. On November 13, 2021, Senator Schumer informed me that he would recommend me to the White House for the vacancy in the Northern District of New York. On November 16, 2021, I interviewed with attorneys from the White House Counsel's Office. Since November 18, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On April 27, 2022, the President announced his intent to nominate me. On May 19, 2022, my nomination was submitted to the Senate.

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

Response: I received these questions on August 3, 2022, and prepared responses based on my personal knowledge, legal research, and analysis. Officials at the Office of Legal Policy at the Department of Justice offered feedback on some of my responses, which I considered. I finalized my responses and submitted them on August 12, 2022.

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

Questions for the Record for Anne Nardacci, Nominee for the United States District Court for the Northern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Congress has acknowledged as much by prohibiting racial discrimination in various statutes, including Title VI and Title VII of the Civil Rights Act of 1964, among others, and generally speaking the Supreme Court has held that laws or policies containing racial classifications are subject to strict scrutiny.

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 reaffirmed in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), that certain substantive rights, although not enumerated in the Constitution, are nevertheless protected by the Due Process Clause where those rights are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id*. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, (1997) (internal quotation marks omitted)). As judicial nominee, it would be inappropriate for me to comment on whether there are any unenumerated rights in the Constitution that are as yet unarticulated by the Supreme Court.

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: In my twenty years of federal court practice, I have been fortunate to appear before excellent federal district court judges who have set an example of being fair minded, respectful, and faithful and diligent in their application of the law to the facts of the case. They prepared thoroughly by reading the parties' papers, engaged with the parties on their arguments, came to each new issue in the case with an open mind, and worked to efficiently and fairly resolve cases under the controlling law. If confirmed, I would follow this example and seek to apply the same approach. I would uphold the rule of law, and my personal beliefs would not play a role in my decision-making. While I have often reviewed and applied Supreme Court precedent in my role as a litigator, I have not studied the philosophies of the justices on the Warren, Burger, Rehnquist, and Roberts Courts and could not say which philosophy is most analogous to mine.

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). I have never referred to myself as an "originalist," or by any other label related to constitutional interpretation. The Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v.*

Bruen, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding constitutional interpretation.

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

Response: Black's Law Dictionary defines living 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." Black's Law Dictionary (11th ed. 2019). I have never referred to myself as a "living constitutionalist," or by any other label related to constitutional interpretation. The Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding 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: The Supreme Court has provided guidance concerning the interpretation of most constitutional provisions, even if it has not addressed the specific issue in question. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding the interpretation of the provision at issue. In addition, if confirmed and asked to interpret a constitutional provision or question for which there was no binding precedent, I would analyze the text of the provision and, if the text was ambiguous, look to the most analogous precedent.

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 stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). Likewise, the Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to

the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning interpretation of federal statutes and constitutional provisions.

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

Response: Please see the response to Question 7.

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

   a. **Was it correctly decided?**

   Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), is binding precedent. As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

   a. **Was it correctly decided?**

   Response: The Supreme Court's decision in *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), is binding precedent. As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

   a. **Was it correctly decided?**

   Response: The Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), is binding precedent. As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, there are certain Supreme Court cases that are so fundamental and widely accepted that the issues presented in those cases are unlikely to be litigated in the future. On that basis, I can state that I believe *Brown v. Board of Education* was correctly decided.

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

Response: Under 18 U.S.C. § 3142(e)(3), various offenses trigger a rebuttable presumption in favor of detention, including drug offenses carrying a maximum sentence of ten years or more, crimes involving slavery or human trafficking, certain terrorism offenses, certain offenses involving minor victims, as well as certain other enumerated offenses.

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

Response: The stated rationale or objective is "reasonably assur[ing] the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). Beyond that, I am unaware of the policy rationales underlying such a presumption.

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. The First Amendment and the Religious Freedom Restoration Act (RFRA) create identifiable limits on what government may impose on, or require of, private institutions including religious organizations and small businesses operated by observant owners. For example, under the Free Exercise Clause, a government regulation that discriminates against religious organizations or religious people, and thus is not neutral and generally applicable, is subject to strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020)). Likewise, the RFRA prohibits the "'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, 682 (2014) (quoting 42 U.S.C. §§ 2000bb-1(a), (b)).

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

Response: A government regulation that discriminates against religious organizations or religious people, and thus is not neutral and generally applicable, is subject to strict scrutiny. "'[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

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: In *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that the religious entity-applicants had met the requirements for a preliminary injunction because they had demonstrated: (1) likelihood of success on the merits, in that they "made a strong showing that the challenged restrictions violate[d] the minimum requirement of neutrality to religion" and that the restrictions were unlikely to satisfy strict scrutiny, *id*. at 66 (quotation omitted); (2) that the restrictions would cause irreparable harm by preventing individuals from worshipping in person for a period of time, *id*. at 67; and (3) there was an insufficient showing that the public interest would be harmed by increasing the spread of Covid-19 if the preliminary injunction were granted, *id*. at 68.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that the State of California's restrictions on private gatherings during the Covid-19 pandemic were not neutral and generally applicable because they treated secular gatherings more favorably than religious gatherings and therefore triggered strict scrutiny under the Free Exercise Clause and, moreover, the Court held that the restrictions could not survive strict scrutiny. *Id*. at 1297. For this reason, the Court further held that the plaintiffs had met the requirements for a preliminary injunction and were entitled to relief. *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: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission had failed to comply with the Free Exercise Clause's requirement of religious neutrality when it treated the baker-owner of Masterpiece Cakeshop with overt hostility because of his sincerely held religious beliefs. *Id*. at 1723-24. The baker had refused to make a wedding cake for a same-sex couple due to his religious opposition to same-sex marriage and the couple filed a discrimination charge with the Colorado Civil Rights Commission, which ruled in the couple's favor. *Id*. at 1723. The Court found that disparaging comments made by members of the Commission about the baker's religious beliefs demonstrated the Commission's overt hostility to him, as did the difference between the treatment of his case and the cases of other bakers who had objected to making a requested cake on similar grounds and prevailed. *Id*. at 1729-30. The Court held that the

baker was "entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection," that he had not received such consideration, and that the Commission's ruling must be invalidated on that ground. *Id*. at 1732.

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: Generally, yes. In *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989), the Supreme Court held that an individual's sincerely held religious belief is protected even if the belief is not "the command of a particular religious organization." Likewise, in *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981), the Court noted that religious beliefs need not be "logical, consistent or comprehensible to others" in order to be protected, *id*. at 714, and noted that "[i]ntrafaith differences [in belief] are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses," *id*. at 715.

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

Response: Courts have a "narrow function" to determine whether a religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715 (1981)). As a general matter, the question of whether a religious belief is protected by the First Amendment should not "turn upon a judicial perception of the particular belief or practice in question" and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. However, the Supreme Court in *Thomas* suggested that there is some outer limitation on beliefs that would be protected by the Free Exercise Clause. *Id*. at 715 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ."). If confirmed, I would follow binding Supreme Court and Second Circuit precedent on this issue.

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

Response: Please see the response to Question 13(a).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the official position of the Catholic Church or any other religious organization.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception," which bars on First Amendment grounds employment discrimination claims brought by certain employees against their religious employers, barred certain Catholic school teachers' employment discrimination claims against their Catholic school employers. *Id*. at 2055. The Court noted that "the First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *id*. at 2052 (quotation omitted), and that for this reason it had previously held that "the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher . . . against the religious school where she taught" under the ministerial exception, *id*. (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, (2012)). The Court held that although the teachers at issue in this case were not given the title "minister," and they had less religious training than the teacher in *Hosanna-Tabor*, they still fell within the ministerial exception and their employment discrimination claims were barred. *Id*.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that "[t]he refusal of Philadelphia to contract with [Catholic Social Services (CSS)] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id.* at 1882. The Court found that Philadelphia's "contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable" given that the city had created a system of exceptions under the contract, *id*. at 1881, and that it could not survive strict scrutiny, *id*. at 1881-82.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's "nonsectarian" requirement for participation in its tuition assistance program had the effect of "'disqualify[ing] some private schools' from funding 'solely because

they are religious.'" *Id*. at 1997 (quoting *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020)). Because the program was not neutral and discriminated against religion, it was subject to strict scrutiny, and the Court held that it could not survive such scrutiny. *Id*.

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. 2047 (2022), the Supreme Court held that a school district violated the First Amendment rights of a high school football coach when it fired him "because he knelt at midfield after games to offer a quiet prayer of thanks." *Id*. at 2415. The Court found that the school district's policies prohibiting such conduct "were neither neutral nor generally applicable," given that they treated religious and secular conduct differently. *Id*. at 2422-23. As such, the policies were subject to strict scrutiny, and the Court held that they could not survive such scrutiny. *Id*. at 2426. The Court stated that "engaging in a brief, quiet, personal religious observance [is] doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment" and "the Constitution neither mandates nor tolerates [] discrimination" against such observances. *Id*. at 2433.

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: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), an Amish community in Minnesota claimed that Fillmore County, Minnesota's septic-system mandate violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Supreme Court held that judgment against the Amish community should be vacated and the case should be remanded for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). *Id*. at 2430. In his concurrence in *Mast*, Justice Gorsuch set forth his view of the errors the state court had made in applying the RLUIPA including (1) treating the County's general interest in sanitation regulations as a compelling government interest without reference to the specific application of those rules to the Amish community at issue; (2) failing to give due weight to exemptions other groups besides the Amish community enjoy; (3) failing to give sufficient weight to rules in other jurisdictions; and (4) rejecting a potential septic-system alternative based on assumptions without considering how the alternative would work on the farms at issue. *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, it would be inappropriate for me to comment on this

issue. If confirmed, I would follow binding Supreme Court and Second Circuit precedent with respect to 18 U.S.C. § 1507, which makes illegal the act of picketing or parading in or near a federal court building or a residence occupied by a judge, juror, witness or court officer, "with the intent of interfering with, obstructing or impeding the administration of justice, or with intent of influencing" such a person in the discharge or his or her duty.

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;**

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

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

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

Response: I am not familiar with any employment trainings offered by the United States District Court for the Northern District of New York or other federal courts. Any such trainings should comply with the Constitution and federal law.

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: Please see the response to Question 26.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on political appointments. If confirmed, I would follow binding Supreme Court and Second Circuit precedent in any case presenting this issue.

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

Response: If confirmed, I would treat all parties equally without regard to race. Whether the criminal justice system is systemically racist is a question for policymakers to

consider.

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: The size of the Supreme Court is a question for policymakers to consider.

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 discussed the original public meaning of the Second Amendment in its jurisprudence, including in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id*. at 635. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that, "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*" and struck down the handgun bans and related ordinances at issue. *Id*. at 791. In *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court held "consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home" and struck down New York State's "may issue" licensing laws, which required a showing of special need to carry a handgun publicly. *Id*. at 2122.

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

Response: Yes, the Second and Fourteenth Amendments protect the individual right to keep and bear arms for self-defense. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

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

Response: No. The Supreme Court recognized the Second Amendment right to possess a handgun for self-defense in the home as "fundamental from an American perspective" in holding that the Due Process Clause of the Fourteenth Amendment incorporates that Second Amendment right. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *see also New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022) (holding that the Second and Fourteenth Amendment also protect the right to carry a handgun for self-defense outside the home).

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

Response: No.

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

Response: The decision to pursue a particular prosecution generally lies within the discretion of officials in the executive branch. *See United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent on this issue.

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

Response: As the Supreme Court discussed in *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-06 at 302 (1979), substantive administrative rules are promulgated by executive branch agencies, but must be "rooted in a grant of such power by the Congress and subject to limitations which that body imposes." By contrast, the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case." *See United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning these issues.

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

Response: No. 18 U.S.C. § 3591 authorizes the use of capital punishment for certain offenses and the President cannot unilaterally abolish a federal statute.

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court granted an application to vacate the stay of an order holding that the Center for Disease Control and Prevention's (CDC) Covid-19 eviction moratorium exceeded its statutory authority. *Id*. at 2486. The Court held that the applicants "were virtually certain to succeed" on the merits of their claim

that the CDC had exceeded its authority. *Id.*

42. **You received an American Bar Association (ABA) rating of "Majority Qualified" but also "Minority Not Qualified," meaning a significant portion of your raters, although not a majority, deemed you not to have the requisite skills and experience for the federal district court bench. You are the first judicial nominee—of 104 judicial nominees that have been rated by the ABA during this Congress—that received any "not qualified" votes.**

   a. **Why do you have the adequate skills and experience to be a federal district court judge, especially considering that you were the lowest ABA rated judicial nominee put forward by the Biden Administration?**

   b. **Do you believe the ABA rating system is flawed or otherwise unhelpful to evaluating judicial nominees?**

   Response: As a federal court litigator for the past twenty years, I have gained extensive experience in federal court practice. I have gained expertise in not only substantive areas of federal law, including antitrust law, but also a number of complex procedural areas, including multidistrict litigation, consolidated proceedings, and class actions. In connection with the matters I have litigated in federal district courts throughout the country, I have prepared pleadings; briefed and litigated motions to dismiss; led large-scale electronic discovery; taken and defended depositions; briefed and argued discovery motions; worked with economists and industry experts and prepared them for testimony at deposition and in court; briefed, litigated, and participated in evidentiary hearings on motions for class certification; litigated *Daubert* and other expert motions; briefed and argued summary judgment motions; prepared cases for trial, including by preparing motions in limine and other pre-trial submissions; served as lead counsel in a bench trial; and participated in settlement and mediation sessions. I have also litigated multiple appeals in federal circuit courts. It is this extensive experience that I believe qualifies me to serve as a federal district judge. The ABA Standing Committee stated in the letter they submitted to the Senate Judiciary Committee that their official rating is "Qualified" and the Standing Committee found that I "satisf[y] [their] very high standards with respect to integrity, professional competence, and judicial temperament" and that I am "qualified to perform all the duties and responsibilities required of a federal judge." I have no insight into or comment on the Standing Committee's internal processes.

43. **You indicated in your Senate Judiciary Questionnaire that five percent of your practice is comprised of criminal cases. This same questionnaire, indicates that you have only conducted a single bench trial, and that was a pro bono civil tort case for a prisoner. You listed and described your workhistory on this same questionnaire, however it did not appear to reveal any criminal work. Please point out the portion of your questionnaire that would support your statement**

that five percent of your work load is, or was, focused on criminal cases. Conversely, if your statement regarding your work history was in any way inaccurate, please state so now.

Response: As detailed in my response to Question 16(b)(i) in my Senate Judiciary Questionnaire, although my practice for the past twenty years has focused almost exclusively on complex civil litigation, I have had meaningful exposure to federal criminal law and procedure, as well. Additionally, as referenced in my response to Question 18, as part of my antitrust practice, I have represented individuals and entities in connection with criminal investigations and proceedings. As also noted in my response to Question 16(b)(i), I have occasionally been involved in criminal matters as part of my pro bono practice. While criminal matters have not comprised a large portion of my practice, my best estimate is that that they represent 5% of my practice over the course of my career.

Senator Josh Hawley
Questions for the Record

Anne Nardacci
Nominee, Northern District of New York

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    c. **The enhancement for offenses involving the use of a computer**

    d. **The enhancements for the number of images involved**

    Response: If confirmed, I would consider and apply the factors set forth in 18 U.S.C. § 3553(a) in sentencing individuals and also consider and apply enhancements in the Sentencing Guidelines as appropriate on a case-by-case basis.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

    Response: As a judicial nominee, it would be inappropriate for me to comment on this issue, which is a policy issue for Congress to consider.

3. **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?**

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

Response: I am not familiar with that quotation or its context. If confirmed, I would uphold the rule of law, and my personal beliefs would not play a role in my decision-making.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), is binding precedent.

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

Response: The Supreme Court and the Second Circuit have recognized a number of abstention doctrines. Below is a brief summary of the primary abstention doctrines:

Pullman abstention doctrine: Under the *Pullman* abstention doctrine, federal courts may abstain from deciding a federal constitutional challenge to a state law if a state court might interpret the law in a way that avoids the federal issue. *See R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 498–501 (1941). Abstention under this doctrine is appropriate "when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible to an interpretation by a state court that would avoid or modify the federal constitutional issue." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (citing *Younger v. Harris,* 401 U.S. 37, 99 (1971)). Even when these conditions are met, federal courts "are not required to abstain, and, to the contrary, important federal rights can outweigh the interests underlying the *Pullman* doctrine." *Id.* (internal quotation omitted).

Younger abstention doctrine: The *Younger* abstention doctrine "forbids federal courts from enjoining ongoing state proceedings." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (citing *Younger v. Harris,* 401 U.S. 37, 91 (1971)). Under this doctrine, abstention is "mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Id.* at 100-01 (quoting *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003)).

Burford abstention doctrine: Under the *Burford* abstention doctrine, "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 649–50 (2d Cir. 2009) (quotation omitted); *see also Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

Colorado River abstention doctrine: "Under the *Colorado River* [abstention doctrine] 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.'" *Woodford v. Cmty. Action Agency of Greene Cnty., Inc.*, 239 F.3d 517, 522 (2d Cir. 2001) (quoting *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813, 817 (1976) (internal quotation marks omitted)).

Rooker-Feldman doctrine: "The *Rooker-Feldman* doctrine bars federal district courts from hearing cases that in effect are appeals from state court judgments, because the Supreme Court is the only federal court with jurisdiction over such cases." *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021) (citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482–83 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-16 (1923)). The Second Circuit "has articulated four requirements that must be met for *Rooker-Feldman* to apply: (1) the federal-court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by a state-court judgment; (3) the plaintiff must invite district court review and rejection of that judgment; and (4) the state-court judgment must have been rendered before the district court proceedings commenced." *Id.* (internal quotations and alterations omitted).

6. **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.**

7. **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 stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding constitutional interpretation.

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

   Response: If there is precedent from the Supreme Court or the Second Circuit interpreting a federal statutory provision, that precedent would be binding. If there is no binding precedent, a court starts with the text of the statutory provision. As the Supreme Court has stated, "the authoritative statement is the statutory text, not the legislative

history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). For this reason, if the text of a law is clear, then the text is generally dispositive. If the text is ambiguous, a court may employ "the canons of statutory interpretation" and "other interpretive aids (like legislative history)." *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). However, the Supreme Court has cautioned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent on how to interpret legal texts.

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

Response: The Supreme Court has indicated that certain sources of legislative history are generally more probative than others. For example, in *Garcia v. United States*, 469 U.S. 70, 76 (1984), the Supreme Court explained that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . ." and in *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017), the Court warned that "floor statements by individual legislators rank among the least illuminating forms of legislative history." If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning legislative history.

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

Response: It is my understanding that the Supreme Court rarely, if ever, consults the laws of foreign nations when interpreting the provisions of the U.S. Constitution. *But cf. New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2122, 2135-42 (2022) (consulting historical English law when interpreting the Second Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 592-95 (2008) (same). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent on whether and when it is ever appropriate to consult the laws of foreign nations when interpreting provisions of the U.S. Constitution.

9. 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: To successfully challenge an execution protocol under the Eighth Amendment, a prisoner must (1) "establish that the State's method of execution presents a 'substantial risk of serious harm'— severe pain over and above death itself" and (2) "'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 868 (2015) (internal citations omitted)). The prisoner "is not confined to proposing a method

authorized by the executing State's law; he may instead ask for a method used in other States." *Id*. at 2219 (citing *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019)).

10. 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: In *Glossip v. Gross*, 576 U.S. 863, 878 (2015), the Supreme Court held that a claimant challenging an execution protocol under the Eighth Amendment must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain. *See also Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022); *Bucklew v. Precythe*, 139 U.S. 1112, 1126 (2019).

11. 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: In *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that the Due Process Clause does not confer a right to access DNA evidence. *See also Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015) (explaining that *Osborne* held that there is "no freestanding substantive due process right to DNA evidence").

12. 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.

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 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: A government regulation must be neutral and generally applicable; if it is not, it is subject to strict scrutiny. "'[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). A law that has facially neutral text is nevertheless not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Lukumi Babalu Aye*, 508 U.S. at 533. Additionally, a law is not generally applicable "whenever [it] treat[s] any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296; *see also Fulton v. City of Philadelphia*,

141 S. Ct. 1868, 1877 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020).

14. 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 the response to Question 13. A government regulation that discriminates against religious organizations or religious people, and is thus not neutral and generally applicable, is subject to strict scrutiny.

15. 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: Courts have a "narrow function" to determine whether a religious belief is "an honest conviction." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715 (1981)). As a general matter, the question of whether a religious belief is protected by the First Amendment should not "turn upon a judicial perception of the particular belief or practice in question" and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. The Second Circuit likewise has held that a court's "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003) (quoting *Jolly v. Coughlin,* 76 F.3d 468, 476 (2d Cir.1996)). If confirmed, I would follow binding Supreme Court and Second Circuit precedent on this issue.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."

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

Response: No.

17. 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 this statement, Justice Holmes appears to be criticizing the majority's use of a particular economic theory in its decision. Justice Holmes went on to state that the Constitution "is not intended to embody a particular economic theory . . . ." *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 Supreme Court has abrogated *Lochner v. New York*, 198 U.S. 45 (1905). *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("the doctrine that prevailed in *Lochner* . . . has long since been discarded").

18. 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: I cannot currently identify any Supreme Court opinions that have not been formally overruled but are no longer good law.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

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

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

Response: Monopoly power is "the power to control prices or exclude competition in the relevant market." *Broadway Delivery Corp. v. United Parcel*

Service of America, Inc., 651 F.2d 122, 126-27 (2d Cir. 1981). Courts typically assess the defendant's market share as part of its analysis as to whether the defendant possesses monopoly power. The monopoly power analysis is fact-specific.

The Second Circuit's decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), has not been overruled and is therefore binding precedent in this jurisdiction. In *Broadway Delivery Corp.,* 651 F.2d at 127, the Second Circuit stated the following with respect to the use of market share to analyze monopoly power and Judge Hand's opinion in *Alcoa*:

> The significance of particular market shares has evoked varied comment in antitrust law. The cases have considered many different percentages, and the Courts' observations cannot readily be compared because they were made in [a variety of] contexts . . . . In most instances, however, the courts seem to be assessing only the significance of the share possessed by a particular defendant in a particular market, rather than endeavoring to extrapolate a general rule. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), for example, Judge Learned Hand considered Alcoa's share under three possible market definitions and thought it "doubtful" whether a share of 60-64%, yielded by one of the definitions, would constitute a monopoly. *Id*. at 424. It seems unlikely that Judge Hand was doubting that any defendant with a 60-64% share of any market, regardless of its structure, could ever be found to possess monopoly power. Even if his doubts ranged beyond the case he was considering, it is significant that he expressed a doubt, not a rule of preclusion.

Other Supreme Court and Second Circuit precedent is also relevant to the question of monopoly power. *See, e.g., Eastman Kodak Co. v. Image Technical Service*, 504 U.S. 451, 481 (1992) (finding 85-90% sufficient); *United States v. Grinnell Corp,* 384 U.S. 563, 571 (1966) (87%); *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956) (75%); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (finding over two-thirds of the market sufficient); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107 (2d Cir. 2002) ("Absent additional evidence, such as an ability to control prices or exclude competition, a 64 percent market share is insufficient to infer monopoly power.") *(citing, inter alia, Tops Mkts., Inc. v. Quality Mkts., Inc*., 142 F.3d 90, 99 (2d Cir. 1998) (holding that "a share between 50% and 70% can occasionally show monopoly power," but only if other factors support the inference)).

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

Response: In *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020), the Supreme Court stated the following with respect to federal common law:

> Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's "legislative Powers" in Congress and reserves most other regulatory authority to the States. *See* Art. I, § 1; Amdt. 10. As this Court has put it, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). These areas have included admiralty disputes and certain controversies between States. *See, e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied . . . . [O]ne of the most basic [is:] In the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'" *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

21. 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: With respect to questions of state constitutional interpretation, federal courts must defer to the decisions of the highest court in the state at issue. *See Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938); *see also 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: With respect to questions of U.S. constitutional interpretation, federal courts must apply binding federal precedent. With respect to questions of state constitutional interpretation, federal courts must defer to the decisions of the highest court in the state at issue. *See Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938); *see also 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."). Thus, it is possible that identical federal and state constitutional provisions could be interpreted differently.

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

Response: Yes, under our federalist system, a state constitution may provide greater protections that the federal Constitution, but it may not interfere with the protections provided by the federal Constitution.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on whether any Supreme Court case was correctly decided. However, there are certain Supreme Court cases that are so fundamental and widely accepted that the issues presented in those cases are unlikely to be litigated in the future. On that basis, I can state that I believe *Brown v. Board of Education* was correctly decided.

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

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

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

Response: The power to issue injunctions is an equitable power of the court and Federal Rule of Civil Procedure 65 sets forth the procedures for issuing an injunction. Injunctions are considered an extraordinary remedy and courts generally grant them sparingly. The facts of the case at issue are a primary consideration in determining the scope of the injunction. To the best of my knowledge, the Supreme Court has not squarely addressed the legal basis for nationwide injunctions. In fact, Justice Gorsuch has noted that the Supreme Court has not yet addressed "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). In *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1370 (2021), and *cert. dismissed*, 141 S. Ct. 1292 (2021), the Second Circuit stated that it had "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree that such injunctions may be an appropriate remedy in certain circumstances." However, the Court went on to exercise its discretion to narrow the scope of the injunction at issue. *Id*. I would follow all binding Supreme Court and Second Circuit precedent on this issue.

24. 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 the response to Question 23.

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

Response: The Constitution establishes a federalist system of government in which power is divided between the state and federal governments. In *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), the Supreme Court recognized that "a healthy balance of power between the States and the Federal Government…reduce[s] the risk of tyranny and abuse from either front." *Id*.

26. 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 the response to Question 5.

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

Response: The availability of damages and/or injunctive relief depends upon the claims, the applicable law, and the facts in a particular case. Generally speaking, injunctive relief is an extraordinary remedy and typically courts will only award injunctive relief where monetary damages are inadequate to compensate the plaintiff. Certain federal statutes provide for the availability of injunctive relief in addition to damages in appropriate cases.

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

Response: The Supreme Court reaffirmed in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), that certain substantive rights, although not enumerated in the Constitution, are nevertheless protected by the Due Process Clause where those rights are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id*. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, (1997) (internal quotation marks omitted)). The Court in *Dobbs* cited to a number of its cases holding that particular substantive rights are protected under the Due Process Clause. *Id*. at 2257-58.

29. 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: A government regulation that discriminates against religious organizations or religious people, and is thus not neutral and generally applicable, is subject to strict scrutiny. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: "Freedom of worship" is one component of the right to free exercise, which also includes "freedom of conscience." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: Please see the responses to Questions 13 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 the response to Question 15.

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

Response: The Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). "RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

30. 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 that quotation or its context. Based on reading it here, I would interpret it to mean that judges should not rule based on their personal views, but rather in accord with the law.

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

a. If yes, please provide appropriate citations.

Response: To the best of my recollection, I have not taken the position that a federal or state statute was unconstitutional.

32. 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.

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

Response: If confirmed, I would treat all parties equally without regard to race. Whether America is a systemically racist country is a question for policymakers to consider.

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

Response: Yes.

35. How did you handle the situation?

Response: I zealously advocated for my client, despite my personal views, which is the duty of every advocate.

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

Response: Yes.

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

Response: No particular Federalist Paper has shaped my view of the law more than any other Federalist Paper.

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

Response: As a judicial nominee, it would be inappropriate for me to comment on this issue. If confirmed, I would follow binding Supreme Court and Second Circuit precedent in any case presenting this issue.

39. 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: No.

40. 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.

41. 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.

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

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

Response: As a litigator in private practice for twenty years, I have assisted lawyers both in my firm and outside of my firm with numerous briefs filed in court on which I am not listed as counsel. My assistance on those briefs ranged from light editing to assisting in drafting portions of briefs. Because of the ad hoc nature of this work, as well as the large number of briefs on which I have assisted, I am unable to provide a list of all the briefs.

43. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: To the best of my recollection, no.

44. 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: It is the duty of nominees to testify truthfully, as well as in accordance with the applicable judicial and legal ethics. For example, Canon 3(A)(6) of the U.S. Judicial Code of Conduct, which applies to judicial nominees, provides that a judge "should not make public comment on the merits of a matter pending or impending in any court."

Questions for the Record for Anne Marie Nardacci
From Senator Mazie K. Hirono

1. **As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:**

   a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

      Response: No.

   b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

      Response: No.

Senator Mike Lee
Questions for the Record
Anne M. Nardacci, Nominee to the United States District Court for the Northern District of New York

1. How would you describe your judicial philosophy?

Response: In my twenty years of federal court practice, I have been fortunate to appear before excellent federal district court judges who have set an example of being fair minded, respectful, and faithful and diligent in their application of the law to the facts of the case. They prepared thoroughly by reading the parties' papers, engaged with the parties on their arguments, came to each new issue in the case with an open mind, and worked to efficiently and fairly resolve cases under the controlling law. If confirmed, I would follow this example and seek to apply the same approach. I would uphold the rule of law, and my personal beliefs would not play a role in my decision-making.

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

Response: If there is precedent from the Supreme Court or the Second Circuit interpreting a federal statutory provision, that precedent would be binding. If there is no binding precedent, a court starts with the text of the statutory provision. As the Supreme Court has stated, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). For this reason, if the text of a law is clear, then the text is generally dispositive. If the text is ambiguous, a court may employ "the canons of statutory interpretation" and "other interpretive aids (like legislative history)." *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). However, the Supreme Court has cautioned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning interpretation of federal statutes.

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

Response: The Supreme Court has provided guidance concerning the interpretation of most constitutional provisions, even if it has not addressed the specific issue in question. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding the interpretation of the provision at issue. In addition, if confirmed and asked to interpret a constitutional provision or question for which there was no binding precedent, I would analyze the text of the provision and, if the text was ambiguous, look to the most analogous precedent.

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

Response: The Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding constitutional interpretation.

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

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: Please see the responses to Questions 2 and 4. The Supreme Court has stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning interpretation of federal statutes and constitutional provisions.

6. What are the constitutional requirements for standing?

Response: Article III, Section 2 of the Constitution limits federal court jurisdiction to cases or controversies. To have Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the Necessary and Proper Clause of Article I, Section 8 of the Constitution grants Congress "implied powers" to carry out its enumerated powers. *Id*. at 323-24 ("[E]mpowering 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."). The question of whether a particular implied power may be attributed to Congress "must depend upon how far such limited power is ancillary or incidental to the power granted to Congress[.]" *Marshall v. Gordon*, 243 U.S. 521, 537 (1917). The Supreme Court has identified a number of implied powers of Congress, including, among others, the

power to create a national bank, 17 U.S. at 425; the power to enact criminal laws, *United States v. Fox*, 95 U.S. 670, 672 (1877); and the power to imprison, *United States v. Comstock*, 560 U.S. 126, 129–30, 146 (2010).

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

Response: The Supreme Court has held that the "'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948)). If confirmed, I would not only analyze the text of the law at issue, but also follow all binding Supreme Court and Second Circuit precedent in evaluating the constitutionality of such a law.

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

Response: The Supreme Court reaffirmed in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), that certain substantive rights, although not enumerated in the Constitution, are nevertheless protected by the Due Process Clause where those rights are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id*. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, (1997) (internal quotation marks omitted)). The Court in *Dobbs* cited to a number of its cases holding that particular substantive rights are protected under the Due Process Clause. *Id*. at 2257-58.

10. What rights are protected under substantive due process?

Response: Please see the 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 Org.*, 142 S. Ct. 2228 (2022), the Supreme Court held that the right to abortion is not protected by the Constitution. The Supreme Court has also abrogated *Lochner v. New York*, 198 U.S. 45 (1905). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent.

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

Response: The Supreme Court has stated that under the Commerce Clause, Congress may regulate three broad categories of activity. "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that

substantially affect interstate commerce." *Gonzales v. Raich,* 545 U.S. 1, 16-17 (2005).

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 race, religion, national origin, and alienage are suspect classifications. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971). In determining whether a particular group of people is a suspect class, the Supreme Court has considered whether the group has an "immutable characteristic determined solely by the accident of birth," or if the group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974); *see also Graham*, 403 U.S. at 371-72 (considering whether the members of the class constitute a "discrete and insular minority").

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

Response: Our constitutional system of checks and balances and separation of powers protects liberty by preventing the excessive accumulation of power in any one branch of the government. As the Supreme Court has stated, "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) (internal quotation omitted); *see also Seila Law v. CFPB*, 140 S. Ct. 2183, 2202 (2020) ("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.") (internal quotation and 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, I would analyze the constitutional provision(s) at issue, as well as all binding Supreme Court and Second Circuit precedent, to determine whether one branch had overstepped its constitutional bounds.

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

Response: A judge should treat all parties with respect and fairness, but a judge's decision should be based on an objective application of the law to the facts of the case, rather than any personal views or feelings.

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

Response: Both outcomes are improper and undesirable.

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 studied any trends in the Supreme Court's exercise of its power to invalidate federal statutes and I have not formed any views as to those trends. As a general matter, and as alluded to in Question 17, aggressive exercise of judicial review could conceivably result in the invalidation of a statute that is, in fact, constitutional, and judicial passivity could conceivably result in the validation of a statute that is, in fact, unconstitutional.

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

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

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: Pursuant to Article VI of the Constitution, elected officials are bound by an oath to support the Constitution. Lawmakers must also follow the decisions of the Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Beyond that, as a judicial nominee, it would be inappropriate for me to comment on how elected officials should fulfill their duties.

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: I view this as a statement concerning the limited role of the judicial branch—to interpret and apply the law to cases or controversies, not to make policy.

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

Response: If confirmed, I would apply all binding Supreme Court and Second Circuit precedent to the facts of the cases that come before me. Only the Supreme Court can overrule its prior decisions. Additionally, the Second Circuit and lower courts within the Second Circuit remain bound "by a decision of a prior panel unless and until its rationale is overruled, implicitly or explicitly, by the Supreme Court or [the Second Circuit] *en banc*." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000). If a precedent does not appear to speak directly to the issue at hand, a court must determine whether another precedent does or whether there is analogous precedent that is appropriately applied to the facts of the case.

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

Response: None. The court should consider only those factors set forth in 18 U.S.C. §3553(a). Moreover, the Sentencing Guidelines explicitly state that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sentencing Guidelines Manual §5H1.10 (policy statement) (2018).

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

Response: Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). I do not have a personal definition of equity.

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

Response: As noted above, Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." Black's Law Dictionary (11th ed. 2019). It defines equality as "[t]he quality, state, or condition of being equal; especially, likeness in power or political status." *Id.*

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

Response: The Fourteenth Amendment guarantees "equal protection of the laws."

27. How do you define "systemic racism?"

Response: Black's Law Dictionary does not define systemic racism. The Oxford English Dictionary defines systemic racism as "[d]iscrimination or unequal treatment on the basis of membership in a particular racial or ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution." Oxford English Dictionary (3rd ed. 2022).

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

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

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

Response: Please see the responses to Questions 27 and 28.

Senator Ben Sasse
Questions for the Record for Anne M. Nardacci
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 27, 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: In my twenty years of federal court practice, I have been fortunate to appear before excellent federal district court judges who have set an example of being fair minded, respectful, and faithful and diligent in their application of the law to the facts of the case. They prepared thoroughly by reading the parties' papers, engaged with the parties on their arguments, came to each new issue in the case with an open mind, and worked to efficiently and fairly resolve cases under the controlling law. If confirmed, I would follow this example and seek to apply the same approach. I would uphold the rule of law, and my personal beliefs would not play a role in my decision-making.

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

   Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). I have never referred to myself as an "originalist," or by any other label related to constitutional interpretation. The Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding constitutional interpretation.

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

   Response: Black's Law Dictionary defines "textualism" as a "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Black's Law Dictionary (11th ed. 2019). I have never referred to myself as a "textualist," or by any other label related to constitutional or statutory interpretation. I do, however, believe that the text plays an important role in such interpretation. *See* the response to Question 9. If confirmed, I would follow all

binding Supreme Court and Second Circuit precedent regarding constitutional and statutory interpretation.

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

   Response: The Supreme Court has stated that the meaning of the Constitution is fixed, absent changes made through the Article V amendment process. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022), ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding constitutional interpretation.

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

   Response: While I have often reviewed and applied Supreme Court precedent in my role as a litigator, I have not studied the jurisprudence of the individual Supreme Court Justices appointed since January 20, 1953 and I could not say whose jurisprudence I admire the most. If confirmed, I would apply all binding Supreme Court and the Second Circuit precedent regardless of admiration for the jurisprudence of any particular Justice or Justices.

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: As the Second Circuit has stated, it remains bound "by a decision of a prior panel unless and until its rationale is overruled, implicitly or explicitly, by the Supreme Court or this court *en banc*." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000). Federal Rule of Appellate Procedure 35(a) sets forth when a hearing or rehearing en banc may be ordered. A circuit court sitting *en banc* is bound by Supreme Court precedent.

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 the 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: If there is precedent from the Supreme Court or the Second Circuit interpreting a federal statutory provision, that precedent would be binding. If there is no

binding precedent, a court starts with the text of the statutory provision. As the Supreme Court has stated, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). For this reason, if the text of a law is clear, then the text is generally dispositive. If the text is ambiguous, a court may employ "the canons of statutory interpretation" and "other interpretive aids (like legislative history)." *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). However, the Supreme Court has cautioned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning interpretation of federal statutes. As I understand the term "general principles of justice," it would be inappropriate to consider or apply such principles in statutory interpretation.

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: No. The court should consider only those factors set forth in 18 U.S.C. §3553(a). Moreover, the Sentencing Guidelines explicitly state that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sentencing Guidelines Manual §5H1.10 (policy statement) (2018).

Questions from Senator Thom Tillis
for Anne M. Nardacci
Nominee to be United States District Judge for the Northern District of New York

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

   Response: Yes. If confirmed, I would uphold the rule of law, and my personal beliefs would not play a role in my decision-making.

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

   Response: Black's Law Dictionary defines judicial activism as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I do not consider judicial activism appropriate.

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

   Response: I believe it is an expectation. If confirmed, the oath I would take as a United States District Court Judge requires impartiality.

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

   Response: No. Judges should not second-guess policy decisions by Congress or state legislatures and should instead faithfully apply the law to the facts of the case.

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

   Response: Judges may not consider their personal views, if any, about the desired outcome of a case and should instead faithfully apply the law to the facts of the case.

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

   Response: No. Judges should not interject their own politics or policy preferences when interpreting and applying the law and should instead faithfully apply the law to the facts of the case.

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

Response: If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning the Second Amendment, including *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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, I would evaluate the facts of the case and apply all relevant and binding Supreme Court and Second Circuit precedent concerning Second Amendment rights and pandemic restrictions. *See, e.g., New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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 law enforcement personnel and departments 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. '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." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotations and citations omitted); *see also Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning 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: If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning qualified immunity. Whether the qualified immunity standard should be altered in some way is an important issue for policymakers to consider.

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

Response: Please see the response to Question 10.

12. **Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in**

abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: If confirmed, in any case involving patent eligibility, I would apply the Patent Act, 35 U.S.C. § 101, and all binding Supreme Court and Second Circuit precedent, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014). Whether the state of the Supreme Court's eligibility jurisprudence merits amendment to the Patent Act, 35 U.S.C. § 101, is an important question for lawmakers to consider.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

Response: If confirmed, in any case involving patent eligibility, I would apply the Patent Act, 35 U.S.C. § 101, and all binding Supreme Court and Second Circuit precedent, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014). However, as a judicial nominee, it would be inappropriate for me to comment on hypothetical fact patterns or apply the law to them.

a. ***ABC Pharmaceutical Company*** **develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

b. ***FinServCo*** **develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?**

c. ***HumanGenetics*** **Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?**

d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

e. ***Natural Laws and Substances, Inc.*** **specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

f. **A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?**

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

h. **Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

i. ***Hantson Pharmaceuticals*** **develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

j. ***Stoll Laboratories*** **discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: Please see the responses to Questions 12 and 13. Whether current law provides the clarity and consistency needed to incentive innovation is an important policy issue for lawmakers to consider in determining whether to amend the Patent Act, 35 U.S.C. § 101.

15. 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: I have litigated complex commercial matters in federal courts for the past twenty years, but I have not had occasion to litigate copyright matters.

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

Response: I have not had experience involving the Digital Millennium Copyright Act.

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

Response: I have not had experience addressing intermediary liability for online service providers that host unlawful content posted by users.

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

Response: I have experience with intellectual property issues, particularly where they intersect with antitrust issues, for example with respect to *Walker Process* claims and pharmaceutical "pay-for-delay" claims. *See Walker Process Equipment, Inc. v. Food Machinery Corp.*, 382 U.S. 178 (1965); *FTC v. Actavis*, 570 U.S. 136 (2013). I do not recall experience with First Amendment and free speech issues.

16. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and

created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

Response: If there is precedent from the Supreme Court or the Second Circuit interpreting a federal statutory provision, that precedent would be binding. If there is no binding precedent, a court starts with the text of the statutory provision. As the Supreme Court has stated, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). For this reason, if the text of a law is clear, then the text is generally dispositive. If the text is ambiguous, a court may employ "the canons of statutory interpretation" and "other interpretive aids (like legislative history)." *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). However, the Supreme Court has cautioned that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. The Second Circuit has considered legislative history in interpreting at least one provision of the DMCA. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36-37 (2d Cir. 2012). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning the use of legislative history to interpret statutes.

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: Courts must give *Chevron* deference to an agency's interpretations arrived at via formal adjudications or notice-and-comment rulemaking. By contrast, an agency's opinion letters, policy statements, agency manuals, and enforcement guidelines "do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade[.]'" *Id*. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent on this issue.

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: In discussing the DMCA's statutory scheme, and specifically 17 U.S.C. § 512(c)(1), the Second Circuit has stated that "actual knowledge of infringing material, awareness of facts or circumstances that make infringing activity apparent,

or receipt of a takedown notice will each trigger an obligation to expeditiously remove the infringing material." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27–28 (2d Cir. 2012). If confirmed, I would apply the DMCA and follow all binding Supreme Court and Second Circuit precedent on this issue.

17. 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?

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

Response: If confirmed, I would apply the DMCA and follow all binding Supreme Court and Second Circuit precedent concerning the DMCA. Whether the DMCA should be amended in light of today's digital environment is an important policy question for lawmakers to consider.

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on litigants' use of specific litigation strategies and/or procedural devices or the practices of current federal district court judges. I note that, to the best of my knowledge, in the Northern District of New York cases are randomly assigned. If confirmed and confronted with this issue, I would follow all binding Supreme Court and Second Circuit precedent concerning venue issues, as well as all applicable procedural rules.

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

Response: See the response to Question 18(a).

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: If confirmed, I commit that I would not proactively take steps to attract a particular type of case or litigant.

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

Response: See the response to Question 18(c).

19. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?

Response: In the first instance, this is an issue for the circuit court to consider. Complaints concerning a federal district judge's conduct may be made pursuant to the Judicial Conduct and Disability Act (Act), 28 U.S.C. §§ 351–364, and considered by the appropriate authorities within the circuit court, including the chief judge of the circuit.

b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

Response: Please see the response to Question 19(a).

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

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

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?

Response: The issue of concentration of patent cases in a particular venue or venues is one for the appropriate judicial authorities, including the U.S. Judicial Conference and the district court at issue, to consider. I understand that the U.S. Judicial Conference is reviewing the issue of judicial assignment and venue for patent cases in federal trial court, *see* Year-End Report on the Federal Judiciary, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf, and that the chief judge of one of the districts at issue recently issued an order requiring new patent cases to be randomly assigned to judges throughout the district, *see* Order Assigning the Business of the Court as it Relates to Patent Cases, available at https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf.

Lawmakers may also consider whether a change in the law is necessary. As a general matter, I believe it is important for the judiciary to foster public confidence in the federal court system by ensuring fairness and the evenhanded administration of justice.

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

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

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

Response: Please see the response to Question 19.