Senator Lindsey Graham, Ranking Member
Questions for the Record
Ms. Margaret Garnett
Nominee to be United States District Judge for the Southern District of New York

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

   Response: I do not agree with this statement. A district court judge is duty-bound to reach the answer that follows Supreme Court and Circuit precedent, as applied to the facts of the particular case before him or her.

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

   Response: I am not familiar with the context of this statement, but as presented here I do not believe this is an appropriate approach for a federal judge to take. In particular, a district court judge is duty-bound to faithfully follow Supreme Court and Circuit precedent, as applied to the facts of the particular case before him or her.

3. **Does the president have the power to remove United States Attorneys at his pleasure?**

   Response: Yes. Under the Appointments Clause of the Constitution, most presidential appointees are at-will employees who serve at the pleasure of the President. *See Seila Law v. Consumer Fin'l Protection Bur.*, 140 S. Ct. 2183, 2191-92 (2020).

4. **You previously praised the United States Attorney's Office for the Southern District of New York for standing "independent of political and personal interests of the Executive branch."**

   a. **Do you believe all United States Attorney's Offices should stand "independent of political and personal interests of the Executive branch?"**

      Response: The quote referenced above was included as part of a letter that I did not draft; I signed the letter along with 158 other former Assistant United States Attorneys and United States Attorneys who had served in SDNY. The full sentence reads: "Founded in 1789, the U.S. Attorney's Office for the Southern District of New York was the first federal attorney's office in the young country and for over 200 years has stood for the independence of the administration of Justice—independent of political and personal interests of the Executive branch of

the Government and independent of other special interests." While the Department of Justice is part of the Executive Branch, and each Attorney General and Deputy Attorney General may have general policies and policy priorities that bind United States Attorneys serving under them, pursuant to DOJ policy United States Attorneys should conduct the investigation and prosecution of individual criminal cases independent of the political and personal interests of the Executive branch and independent of any other special interests. *See, e.g.*, Justice Manual §§ 1-4.010, 1-8.100.

b. **How should a United States Attorney respond when the political and personal interests of the president conflict with a criminal investigation within his or her jurisdiction?**

Response: The political or personal interests of the President should play no role, either favorable or unfavorable, in the conduct of a criminal investigation or prosecution being conducted by a United States Attorney. *See, e.g.*, Justice Manual §§ 1-4.010, 1-8.100.

c. **Is it always wrong for a president to pressure a United States Attorney to influence an investigation that could impact his political or personal interests or those of his family? Please explain why or why not.**

Response: In order to ensure the impartial administration of justice, a President's political or personal interests, or those of his family, should play no role, either favorable or unfavorable, in a United States Attorney's conduct of a criminal investigation or prosecution. *See, e.g.*, Justice Manual §§ 1-4.010, 1-8.100, 1-8.600.

5. **Have you previously advocated that all Assistant United States Attorneys undergo "implicit bias" training?**

Response: No. As part of a draft outline prepared for a panel that I spoke on in February 2023 in my capacity as Deputy United States Attorney (a copy of which I provided as an attachment to my Senate Judiciary Questionnaire), one of the potential questions for which I and the other panelist (the First Assistant United States Attorney for the EDNY) prepared answers was "How are you [the two Offices] thinking about/approaching training for less experienced prosecutors generally?" My bulleted list for SDNY included, among numerous other things, a reference to implicit bias training for all AUSAs. The list was a factual recitation of training that either had been offered or was on the calendar to be offered in the future; it was not an advocacy statement. The draft outline covered significantly more material than the panel itself; I do not recall whether the question about training was actually asked by the moderator at the panel or, if so, whether my answer to it included any reference to the planned implicit bias training for SDNY AUSAs.

6. **If confirmed, will you advocate for or require judges, court employees, or law clerks to undergo "implicit bias" training?**

   Response: I do not plan to advocate for or require this training for judges, court employees, or law clerks.

7. **In 2019, you co-authored an opinion piece where you stated that it took "remarkable courage" for a whistleblower to allege wrongdoing by President Trump.**

   a. **Have any of the whistleblowers who reported wrongdoing by members of the Biden family demonstrated "remarkable courage"?**

      Response: I do not know enough about the facts of these matters to reach a conclusion as to who is included in this question or the personal situation of any such individuals. In my experience as a prosecutor and inspector general charged with overseeing New York City's whistleblower program, I know that whistleblowers who come forward publicly can risk potential personal and professional consequences for doing so.

   b. **Did Joseph Zeigler and Gary Shapley, the IRS whistleblowers who testified before the House Committee on Oversight about misconduct regarding the Hunter Biden criminal investigation, display "remarkable courage"?**

      Response: I do not know enough about the facts of these matters to reach a conclusion as to the personal situation of either of these individuals. In my experience as a prosecutor and inspector general charged with overseeing New York City's whistleblower program, I know that whistleblowers who come forward publicly can risk potential personal and professional consequences for doing so. As I have previously stated publicly, it is an important feature of honest and effective government that there be lawful channels for government employees to report allegations of wrongdoing, as well as measures to ensure that employees who proceed through those lawful channels are protected from professional retaliation in accordance with the relevant law.

   c. **Should all whistleblower allegations be taken seriously and efforts made to corroborate their testimony?**

      Response: As I have previously stated publicly, including at my confirmation hearing, it is an important feature of honest and effective government that there be lawful channels for government employees to report allegations of wrongdoing, fraud, or abuse of authority, that those channels include mechanisms to investigate credible allegations, and that government employees who proceed

through those lawful channels be protected from professional retaliation for such reports in accordance with the relevant law.

8. **Please describe the relevant law governing when a federal court may entertain and grant a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court.**

Response: The relevant statutory scheme governing federal habeas petitions for persons in custody under a state court judgment is set out in 28 U.S.C. §§ 2241-2254. There is an extensive body of law governing such petitions, so I have endeavored in this answer to summarize some of the key provisions. First, such petitions must allege that the custody is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The statute sets out a strict one-year time limit to file such a petition, *see* 28 U.S.C. § 2244(d)(1), and places various other limitations on relief, such as the requirement that a petitioner exhaust available state remedies or demonstrate that such remedies are insufficient or unavailable, *see* 28 U.S.C. § 2254(b); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (to exhaust a federal claim, petitioner must "fairly present his claim in each appropriate state court. . . thereby alerting that court to the federal nature of the claim"); *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005) (exhaustion requires that the petitioner "apprise the highest state court of both the factual and legal premises of the federal claims ultimately asserted in the habeas petition."). Section 2254(d) sets out a two-pronged standard for granting habeas petitions on issues that have been adjudicated on the merits in state court. Under the first prong, a state court decision is contrary to federal law only if it "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if it decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Under the second prong, the factual findings of state courts are presumed to be correct and the petitioner must rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Nelson v. Walker*, 121 F.3d 828, 833 (2d Cir. 1997).

9. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

Response: The relevant statutory scheme governing federal habeas petitions for persons in custody under a federal sentence is set out primarily in 28 U.S.C. § 2255, with reference to sections 2241 through 2254 of the same chapter. There is an extensive body of law governing such petitions, so I have endeavored in this answer to summarize some of the key provisions. Under section 2255, federal prisoners may challenge their custody on the grounds that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Such petitions must be filed with the

sentencing court, and, as with state prisoner habeas petitions, must comply with a strict one-year time limitation. *See* 28 U.S.C. § 2255(a) and (f). The statute also significantly limits second or successive motions under section 2255 to claims based either on newly discovered evidence that would have resulted in acquittal, or on a new and previously unavailable rule of constitutional law that has been made retroactive by the Supreme Court. 28 U.S.C. § 2255(h). In this past term, the Supreme Court clarified that the "savings clause" of section 2255(e), which preserves access to a traditional petition for habeas corpus under section 2241 under some circumstances, does not permit the filing of a second or successive section 2255 motion based on an intervening change in the interpretation of a criminal statute. *See Jones v. Hendrix*, 599 U.S. ___, 143 S. Ct. 1857 (2023).

10. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

    Response: Both Harvard College and the University of North Carolina employed admissions processes for students that, at various stages and in various ways, explicitly considered the race of the applicant. In decisions issued in June 2023, the Supreme Court held that both programs violated the Fourteenth Amendment's Equal Protection Clause, and that accordingly colleges and universities can no longer use racial categories as a factor in admissions decisions.

11. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

    If yes, please list each job or role where you participated in hiring decisions.

    Response: Yes. While an associate at Wachtell Lipton Rosen & Katz from 2000 to 2004, I participated in interviewing candidates for summer associate positions. As a law clerk to the Honorable Gerard E. Lynch from 2004 to 2005, I participated in the initial screening of law clerk applications. As an Assistant United States Attorney, I began participating in interviewing AUSA applicants in 2010, and continued to be involved in the AUSA hiring process until I left the U.S. Attorney's Office in 2017. As the Executive Deputy Attorney General for Criminal Justice at the New York Attorney General's Office from 2017 to 2018, I interviewed all applicants for attorney or investigator positions in the Criminal Division and had final approval on such hires. As the Commissioner of the New York City Department of Investigation from 2018 to 2021, I interviewed applicants for supervisory or executive roles, and had final approval on such hires or promotions. As the Deputy United States Attorney and then Special Counsel to the United States Attorney from 2021 to the present, I participate in "executive round" interviewing for all AUSA applicants; I also participate in interviewing and selection for supervisory roles across the Office.

12. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

    Response: I have never given preference to a candidate for employment, promotion, or employment benefit on account of that candidate's race, ethnicity, religion, or sex.

    In 2020, I was one of the co-founders of the When There Are Nine Scholarship Project, and then served on the Project's Steering Committee until I became the Deputy United States Attorney in November 2021. The Project was established by alumnae of the SDNY U.S. Attorney's Office to provide law school scholarships and professional mentoring to women in law school, and accordingly awards its scholarships based on sex. I have not been involved in the Project since November 2021.

13. **Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?**

    Response: No.

14. **Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

    Response: No, not to my knowledge.

    If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

15. **Under current Supreme Court and Second Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?**

    Response: Yes. *See, e.g.*, *Students for Fair Admissions v. Harvard College*, 143 S. Ct. 2141, 2162 (2023); *Pyke v. Cuomo*, 567 F.3d 74, 77 (2d Cir. 2009).

16. **Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.**

    Response: The Free Speech clause of the First Amendment (as applied to states through the Fourteenth Amendment) prohibits a state from using the threat of penalty in its anti-

discrimination laws to compel a website designer to create expressive designs containing messages or speech with which she disagrees.

17. **In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."**

Is this a correct statement of the law?

Response: *Barnette* remains good law and was cited favorably by the Supreme Court in *303 Creative LLC*. As such, it is binding precedent, which I would apply as a district court judge in any applicable cases, if I were to be confirmed.

18. **How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?**

Response: If I were presented with this question as a district court judge, I would apply the standards set forth in binding precedent of the Supreme Court and Second Circuit. For example, in *City of Austin v. Reagan National Advertising of Austin*, the Supreme Court provided guidance on when a municipal ordinance should be deemed content neutral, as well as the appropriate inquiry when a facially content neutral regulation is animated by an impermissible purpose or justification. 142 S. Ct. 1464, 1474-76 (2022). *See also Brokamp v. James*, 66 F.4th 374, 392-94 (2d Cir. 2023) (applying Supreme Court and Second Circuit precedent to evaluate whether licensing requirements for mental health professionals engaged in "talk therapy" are content-based or content-neutral).

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

Response: This past term, the Supreme Court addressed this question in *Counterman v. Colorado*, 600 U.S. ___, 143 S. Ct. 2106 (2023), and held that the speaker must have some subjective understanding of the threatening nature of his statements, but that a mental state of recklessness is sufficient. In other words, for speech to fall outside the protections of the First Amendment as "true threats of violence," the government must prove "that the defendant consciously disregarded a substantial risk that his communication would be viewed as threatening violence." *Id*. at 2111-12.

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

Response: Black's Law Dictionary (11th ed. 2019) defines a "fact" as "(1) something that actually exists; an aspect of reality. . . . (2) An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." The Supreme Court has not devised a firm rule "that will unerringly distinguish a factual finding from a legal conclusion." *Miller v. Fenton*, 474 U.S. 104, 113 (1985); *see also id*. at 117 (providing as examples of "facts" things like the length of an interrogation and the tactics used by the police conducting the questioning, and "voluntariness" as a necessarily legal conclusion). As guidance, the Supreme Court has noted that "facts" can include "a recital of external events" and a court's determination of "what happened." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995). The sources courts consider in determining whether something is a question of fact or a question of law can vary depending on the context in which the question is presented (*e.g.* reviewing the decision of an arbitrator vs. evaluating a state court judgment in a habeas petition vs. deciding an appeal from an immigration judge's order), and can include caselaw, statutes, rules, or treatises. In making such a determination in any case that might come before me as a district court judge, I would research and faithfully apply binding precedent from the Supreme Court and Second Circuit, including guidance as to what sources should be consulted in that type of case.

21. **Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?**

Response: The law governing sentencing is set forth primarily in 18 U.S.C. § 3553, which, among other things, directs judges to consider each of the above-listed purposes of sentencing in fashioning an appropriate sentence for a particular defendant, *see* 18 U.S.C. § 3553(a)(2). Congress has not ranked or weighted these factors, and it would not be appropriate for a judge to substitute his or her personal views, if any, on the ranking of these factors as an overarching policy matter in all cases. The sentencing process for an individual defendant is a fact-intensive process that includes the preparation of a Presentence Report by the Probation Department, the opportunity for the government and the defendant to note any objections to that Report, the consideration of the parties' sentencing submissions, the opportunity for any victims and the defendant to be heard, the calculation of the Sentencing Guidelines, and, finally, the imposition of sentence in accordance with all of the factors set forth in Section 3553(a). If I am confirmed, I will approach each sentencing with thoroughness and diligence, following the appropriate procedures as prescribed by statute and rule, giving due regard to the relevant individual facts for the defendant before me, and making any legal judgments in accord with binding precedent from the Second Circuit and Supreme Court.

22. **Please identify a Supreme Court decision from the last 50 years that you think is particularly well-reasoned and explain why.**

Response: As a judicial nominee, it would be inappropriate under the canons of judicial ethics for me to comment on the correctness or quality of reasoning of any Supreme Court decision, with very limited exceptions that are not responsive to this question. If I am confirmed, I would endeavor to draft my own opinions in a way that faithfully applies binding Supreme Court and Second Circuit precedent, and provides clear and well-reasoned guidance to the parties, the bar, and the public.

23. **Please identify a Second Circuit judicial opinion from the last 50 years that you think is particularly well-reasoned and explain why.**

Response: As a judicial nominee, it would be inappropriate under the canons of judicial ethics for me to comment on the correctness or quality of reasoning of any Second Circuit decision, with very limited exceptions that are not responsive to this question. If I am confirmed, I would endeavor to draft my own opinions in a way that faithfully applies binding Supreme Court and Second Circuit precedent, and provides clear and well-reasoned guidance to the parties, the bar, and the public.

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

Response: 18 U.S.C. § 1507 is a criminal statute that provides for punishment of a fine or less than one year of imprisonment for a person who "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence."

25. **Is 18 U.S.C. § 1507 constitutional?**

Response: It would not be appropriate for me, as a judicial nominee, to opine as to the constitutionality of this statute, because a prosecution under the statute (or a civil suit arising from an arrest or prosecution under the statute) could come before me as a judge if I am confirmed. If I were confronted by this question in the context of a particular case in the future, I would carefully consider the facts of the case and faithfully apply binding Supreme Court and Second Circuit precedent to those facts.

26. **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: Yes. The question of *de jure* segregation of children by race in public schools is extremely unlikely to be litigated in federal courts in my lifetime; accordingly opining on the correctness of *Brown v. Board of Education* can be consistent with the canons of judicial ethics.

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

Response: Yes. The question of whether states may prohibit interracial marriage is extremely unlikely to be litigated in federal courts in my lifetime; accordingly opining on the correctness of *Loving v. Virginia* can be consistent with the canons of judicial ethics.

c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**
k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**
l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**
m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response to subparts c through m: Canons of judicial ethics prohibit judicial nominees and sitting judges from commenting on matters that could come before them in litigation. All of the above-listed cases address issues that are currently being litigated in federal courts or could be in the foreseeable future. Accordingly, it would not be appropriate for me to opine as to the correctness of these Supreme Court decisions, other than to note that *Roe* and *Casey* are no longer binding precedent, having been overturned by *Dobbs*. If any of the other above-listed cases were relevant precedent in a case that came before me as a judge, I would faithfully apply them, as well as any other relevant Supreme Court or Second Circuit precedent, to the particular facts of the case before me.

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

Response: I would apply the standard prescribed by binding Second Circuit and Supreme Court precedent. If such an issue were to come before me today, I would begin with the standard set forth in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), which 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.'" *Id*. at 2126.

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

       Response: No, not to my knowledge.

    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, not to my knowledge. I do not believe I know any of the listed individuals, and I have not had contact with anyone whom I know to be associated with this organization.

    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, not to my knowledge. I do not believe I know any of the listed individuals, and I have not had contact with anyone whom I know to be associated with this organization.

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

       Response: No, not to my knowledge.

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, not to my knowledge. I do not believe I know either of the listed individuals, and I have not had contact with anyone whom I know to be associated with this organization.

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, not to my knowledge. I do not believe I know either of the listed individuals, and I have not had contact with anyone whom I know to be associated with this organization.

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

    Response: No, not to my knowledge.

    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, not to my knowledge.

    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, not to my knowledge. I have no familiarity with any of these organizations and I have not had contact with anyone whom I know to be associated with any of these organizations.

    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, not to my knowledge. I have no familiarity with any of these organizations and I have not had contact with anyone whom I know to be associated with any of these organizations.

31. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society 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, not to my knowledge.

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

       Response: No, not to my knowledge.

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

       Response: No, not to my knowledge.

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

       Response: No, not to my knowledge.

    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, not to my knowledge. I do not believe I know any of the listed individuals, and I have not had contact with anyone whom I know to be associated with this organization.

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, not to my knowledge. I do not believe I know any of the listed individuals, and I have not had contact with anyone whom I know to be associated with this organization.

33. **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: In April 2015, I submitted an application to Senator Charles Schumer's judicial screening committee. I interviewed with the Committee in May 2015. On May 10, 2020, I interviewed with Senator Schumer and members of his staff for a vacancy in the Eastern District of New York, but I did not proceed further in the process at that time. In December 2020, I communicated with the Chair of Senator Schumer's screening committee, who asked me to re-submit and update my application materials through a new electronic portal, which I did on February 4, 2021. On March 19, 2021, I interviewed with the Committee. On April 21, 2023, I interviewed with Senator Schumer and members of his staff and, on April 24, 2023, had a follow-up interview with the Senator's staff. On April 25, 2023, Senator Schumer's office told me that the Senator was recommending my name to the White House for further consideration. On April 26, 2023, I interviewed with attorneys from the White House Counsel's Office. Since April 27, 2023, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 28, 2023, the President announced his intent to nominate me, and my nomination was formally transmitted to the Senate on July 11, 2023.

34. **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, not to my knowledge.

35. **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, not to my knowledge.

36. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If**

so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No, not to my knowledge.

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

Response: No, not to my knowledge.

38. **During your selection process did you talk with any officials from or anyone directly associated with Fix the Court, or did anyone do so on your behalf? If so, what was the nature of those discussions?**
Response: No, not to my knowledge.

39. **Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?**

Response: No.

a. **If yes,**
   i. **Who?**
   ii. **What advice did they give?**
   iii. **Did they suggest that you omit or include any particular case or type of case in your questionnaire?**

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

Response: I was interviewed by attorneys from the White House Counsel's Office on April 26, 2023. Since that date, I have communicated at various times with the Office of Legal Policy at the Department of Justice and with the White House Counsel's Office about the nomination and confirmation process.

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

Response: I received these questions from the Office of Legal Policy, along with questions submitted by a number of other Senators. I prepared responses to each question, conducting legal research or reviewing my own files and materials, as necessary. I then sent those responses to the Office of Legal Policy, and subsequently

received comments on my initial draft. I considered those comments and made the revisions that I deemed appropriate or advisable. I then returned my final answers to the Office of Legal Policy for transmittal to the Committee.

Senate Judiciary Committee
Nominations Hearing
July 26, 2023
Questions for the Record
Senator Amy Klobuchar

For Margaret Garnett, nominee to be U.S. District Court Judge for the Southern District of New York

Since 2005, you have served in the U.S. Attorney's Office for the Southern District of New York, the same judicial district to which you have been nominated to serve as judge. During your tenure you have served as the Deputy U.S. Attorney, the Chief of Appeals for the Criminal Division, the Chief of the Violent & Organized Crimes Unit, and you currently serve as a Special Counsel.

- **How have these experiences shaped your career and how will they guide your service as a federal district court judge?**

  Response: I am incredibly grateful for the opportunities to serve the public that I have had during my career in the U.S. Attorney's Office for the Southern District of New York, as well as my service as head of the Criminal Division in the New York Attorney General's Office and as Commissioner of the New York City Department of Investigation, positions that I held in between leaving the U.S. Attorney's Office in 2017 and returning as Deputy U. S. Attorney in 2021. I believe these experiences have provided a strong foundation to guide my service as a district court judge if I am lucky enough to be confirmed.

  First, the culture of the SDNY U.S. Attorney's Office emphasizes integrity and excellence in everything we do, even when no one is watching—it is common to hear the refrain that the duty of an SDNY AUSA is to strive to "do the right thing, in the right way, for the right reasons, every day." This culture has shaped me as a lawyer and as a person, and I would hope to bring that same commitment to integrity and excellence to the bench. Second, my experiences as a prosecutor have taught me how to connect with people from all walks of life and backgrounds that may be very different from my own, and to win their trust and respect, which is a valuable skill for a trial court judge, particularly in a district as diverse as the Southern District of New York. Third, in my experience, a prosecutor is not only an advocate in an adversarial system, but also an institutional player charged with seeking justice and not merely victories, with acting in the public interest at all times, and with balancing the interests of public safety and the rule of law with protecting and respecting defendants' constitutional rights. These are habits of mind that I believe have prepared me well for the judicial role. Fourth, the variety of roles I have had in my career has given me many opportunities to learn new things or become familiar with new areas of the law, experience that I believe will serve me well in tackling the broad docket of the district court in SDNY. Finally, the management experience and experience in effective public communication that I have had both at the U.S. Attorney's Office and as DOI Commissioner will be valuable as I set up and run my chambers, and begin to hold court appearances and issue opinions.

- **How has your work on criminal cases in the district and appellate courts informed your view of the legal system?**

  Response: I have been proud to do work in a court and a legal system that upholds the rule of law, vindicates the rights of victims, holds wrongdoers accountable, and protects public safety. I have also been able to observe firsthand the outstanding work of our criminal defense bar in SDNY, both appointed and retained, and to appreciate how vital effective representation for criminal defendants is to protecting the constitutional rights of all Americans. Finally, I have observed and learned from a wide range of judges, including some things I would strive to emulate and some things I would strive to avoid, if I were confirmed. I have seen how a judge's approach can influence the administration of justice and the public's perception of the legal system. That experience has influenced my own goals, if I am confirmed, to work hard, to be prepared for all court appearances, to resolve disputes and issues as efficiently and expeditiously as possible, to keep an open mind, to be thorough and thoughtful in my decisions, to remain curious about the law and the facts of each case, and to treat everyone in my courtroom with dignity and respect.

Senator Mike Lee
Questions for the Record
Margaret M. Garnett, Nominee to the United States District Court for the Southern District of New York

1. How would you describe your judicial philosophy?

Response: I do not consider myself an adherent of, or committed to advancing, any broader ideological project in the law. Having said that, I would describe my judicial philosophy as follows: to treat every person and party with dignity and with equality before the law, and to approach each case with an open mind, thorough preparation, careful consideration of each parties' arguments, and total fidelity to the law. In civil cases that also means resolving the dispute that is presented to you, as efficiently and expeditiously as possible, consistent with appropriate thoughtfulness and due process. In criminal cases that also means carefully balancing the interests of public safety and the rule of law with protecting and enforcing every defendant's constitutional rights.

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

Response: In any case involving statutory interpretation, I would begin by assessing whether there is any binding or relevant Supreme Court, Second Circuit, or (where applicable) Federal Circuit precedent that resolves the issue. If there is no such precedent, I would consider the plain meaning of the text of the statute. *See, e.g., Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005). If the meaning of the text was not clear on its face, I would then look to Supreme Court and Circuit precedent for guidance on the types of other sources authorized, which can include recognized canons of statutory construction and other interpretive principles, as well as interpretations by regulatory agencies under certain circumstances, s*ee, e.g., WPIX v. ivi*, 691 F.3d 275, 279-80 (2d Cir. 2012) (deferring to interpretation of U.S. Copyright Office). If these methods and sources still did not resolve the ambiguity in the text, I would consult the categories of legislative history that have been identified by the Supreme Court and Second Circuit as most reliable. *See, e.g., United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) (identifying committee reports as "among the most authoritative and reliable materials of legislative history").

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

Response: In any case involving constitutional interpretation, I would begin by assessing whether there is binding Supreme Court or Second Circuit precedent that resolves the issue, and, if so, faithfully apply that precedent to the particular facts of the case before me. If there were no binding precedent, or the precedent did not squarely resolve the issue, I would look to the precedent of the Courts of Appeal in other Circuits on the issue, as well as how the Supreme Court or Second Circuit had analyzed analogous provisions of the Constitution, including the interpretive methods and canons of construction employed in those precedents, and then faithfully apply

that guidance to the issue before me. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (describing the interpretive method of "the public understanding of a legal text" at the time of its adoption and immediately thereafter, and applying that method to ascertaining the meaning of the Second Amendment).

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

Response: The Supreme Court has emphasized the importance of the text and the original public meaning of constitutional provisions in numerous contexts, including the Free Exercise Clause of the First Amendment and the Second Amendment. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2411 (2022); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136-37 (2022). In other contexts, the governing precedents direct the use of additional interpretive tools or analytical approaches where the text itself does not resolve the question. *See, e.g., Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (evaluating obscenity regulations under the First Amendment by reference to "contemporary community standards"); *Moore v. Texas*, 581 U.S. 1 (2017) (evaluating Eighth Amendment claims by reference to "evolving standards of decency"). If confirmed, I would faithfully follow binding Supreme Court and Second Circuit precedent on the interpretation and application of the Constitution, including as to interpretive methods.

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

Response: Please see my response to Question 2, above.

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

Response: The Supreme Court has held that the relevant inquiry as to the meaning of words or provisions is the meaning that would have been understood by the public at the time of enactment, or in the period immediately thereafter. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (applying "the public understanding of a legal text" at the time of its adoption and immediately thereafter to ascertaining the meaning of the Second Amendment); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (applying "the ordinary public meaning of its terms at the time of its enactment" to ascertaining the meaning of a statute). If I were confirmed as a district judge, I would faithfully apply all binding precedent of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods.

6. What are the constitutional requirements for standing?

Response: To satisfy the constitutional requirements for standing, a plaintiff must demonstrate an injury in fact that is concrete, particularized, and actual or imminent, that is caused by the defendant, and that is redressable by a court order. *See, e.g., United States v. Texas*, 143 S. Ct. 1964, 1970 (2023); *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

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

Response: Congress' powers are limited to those enumerated in the Constitution; however, among the powers enumerated in the Constitution, in Article I, Section 8, is the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing power, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Since the earliest days of the Republic, the Supreme Court has held that this clause empowers Congress to legislate on matters "by all means which are appropriate, which are plainly adapted to [an end that is 'within the scope of the Constitution'], which are not prohibited, but consistent with the letter and spirit of the Constitution." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see also, e.g., Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1779 (2022) (the Necessary and Proper Clause cannot override the terms of the Constitution's specific grants of power (here, the power to create uniform bankruptcy laws)); *United States v. Kebodeaux*, 570 U.S. 387, 400-03 (2013) (Roberts, C.J., concurring in the judgment) (discussing scope, and limitations, of the Necessary and Proper Clause).

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

Response: If confirmed, I would evaluate the constitutionality of such a law, as with all others, by faithfully applying binding Supreme Court and Second Circuit precedent to the particular facts of the case before me. Specifically regarding the lack of reference to an enumerated power, the Supreme Court has held that the constitutionality of a federal statute does not depend on the presence or absence of such recitals. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).

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

Response: The Supreme Court has articulated a test to determine whether unenumerated rights are nonetheless protected by the Constitution's Due Process clauses: the asserted right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Some specific unenumerated rights that the Supreme Court has identified include the right to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967), and

the right to bear children and to direct their education and upbringing, *see Skinner v. Oklahoma*, 316 U.S. 53 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9, above.

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: Binding Supreme Court precedent holds that neither abortion nor economic liberties like those at issue in *Lochner* are fundamental rights protected by substantive due process. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *Ferguson v. Skrupa*, 372 U.S. 726 (1963). If I were confirmed as a district court judge, I would be bound by, and would faithfully apply, binding Supreme Court precedent on questions of substantive due process, and my personal beliefs, if any, would be irrelevant to that analysis.

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

Response: The power of Congress under the Commerce Clause includes regulating "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce [including] persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This power is not limitless even within these categories. For example, the Supreme Court has held that Congress cannot shape an interstate market by requiring individuals "to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 522 (2012). Similarly, the Court has limited Congress' ability to use its Commerce Clause authority to compel state governments to take enforcement or regulatory actions. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

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 summarized the "traditional indicia of suspectedness" as a class that possesses "an immutable characteristic determined solely by the accident of birth," or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). The Court has identified race, color, national origin, alienage, and religion as suspect classes; government action that relies on such classifications are subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest.

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

Response: Checks and balances and the separation of powers are an inherent, and vital, part of the structure and design of the Constitution. They confine each branch of government to the proper role, and serve 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). *See also United States v. Texas*, 143 S. Ct. 1964, 1969, 1973, 1975 (2023) (discussing separation of powers and proper limits of judicial power, whether through Article III standing principles or by avoiding matters properly delegated to the executive branch or to Congress).

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: As with all matters, I would assess the binding Supreme Court and Second Circuit precedent addressing the proper scope of constitutional authority for that branch of government or the relevant constitutional provisions, and then faithfully apply that precedent to the particular facts of the case before me.

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

Response: I think empathy can play a role in judicial demeanor and temperament, and can be a valuable quality for ensuring that judges treat everyone in their courtroom, whether parties, attorneys, witnesses, jurors, victims, or the public, with dignity and respect. It should play no role, however, in the outcome of a case, which must be decided solely by a neutral and impartial application of the governing law to the particular facts of the case.

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

Response: Both outcomes would be bad, even if made through unintentional error. If made intentionally, either outcome would be a violation of a judge's duty and oath to uphold the law and the Constitution.

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 the historical statistics or trends in the Supreme Court's invalidation of federal statutes, although I am certainly aware of the significant increase in the complexity and number of federal laws in the period since the Civil

War as compared to the period from the Founding through the Civil War. I do not believe it would be appropriate for me, as a nominee for a lower federal court, to comment or opine on the wisdom of Supreme Court cases either invalidating or upholding particular federal statutes. As to the duty of judges more generally, I believe judges should strive neither for passivity nor aggression vis-à-vis other branches of government, but rather to faithfully uphold their oath to support and defend the Constitution by carrying out the judicial review function fairly, neutrally, and impartially, applying binding precedent to the particular facts of the case before them.

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

Response: Judicial review is the duty of the judicial branch to review actions of the legislative or executive branch to determine whether they comport with the Constitution. *See Marbury v. Madison*, 5 U.S. 137 (1803). Judicial supremacy generally refers to the notion that the Supreme Court is the authoritative interpreter of the Constitution and that its judgments bind other branches and levels of government unless and until overruled by subsequent Supreme Court decisions or amendment as set forth in Article V of the Constitution. *See, e.g.,* Black's Law Dictionary (11th ed. 2019) ("the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review . . . are binding"). Judicial supremacy is not unlimited, however, and is constrained by, for example, the requirements of Article III standing and judicial doctrines like the political question doctrine.

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: As a general matter, elected officials have a number of options when they disagree with a judicial decision, including, for example, appeal (where the decision is rendered by a lower court), amendment or alteration of statutes or the Constitution through the lawful channels of the political or legislative process, or the appropriate exercise of the discretionary powers delegated solely to their branch by the Constitution. *Cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("the federal judiciary is supreme in the exposition of the law of the Constitution . . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."). It would not be appropriate for me, as a judicial nominee, to opine as to any specific step that an elected official could or should hypothetically take to carry out his or her own oath to the Constitution and laws of the United States. If I were presented with a case that claimed an elected official was not

complying with a judicial decision or other lawful duty, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of that case, without regard to my personal views, if any, on this question.

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: Each of the three branches of the federal government has a prescribed role in our constitutional system. The role of judges is to decide "cases or controversies" under the principles of Article III standing, and to do so fairly and impartially so as to uphold the rule of law.

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 an applicable Supreme Court or Second Circuit precedent did not "seem to be rooted in constitutional text, history, or tradition," it would nonetheless be binding on a district court judge in the Southern District of New York, who would be duty-bound to follow it regardless of his or her personal views as to the quality of the reasoning or the validity of the interpretive method used. The proper avenue to revisit questionable precedents is through litigants presenting those arguments to the appellate courts, not district court judges substituting their own judgment for that of higher courts. At times it may be unclear which precedent applies to a novel factual issue; if a precedent "does not appear to speak directly to the issue at hand," a district court judge must seek out the precedent that *is* applicable, indicating why the court believes one line of binding precedent is more applicable to the facts of the case than another. In situations where there is no clear binding precedent on the substantive question, a district court judge must follow the binding precedent of the Supreme Court and Second Circuit as to the proper interpretive methods and sources to be consulted in conducting its analysis. In no case may a district judge substitute his or her own policy preferences, ideological views, or personal opinions for the authority of binding precedent from the Supreme Court or the Second Circuit.

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: A defendant's group identity or identities should play no role whatsoever in a judge's sentencing analysis. *See, e.g.,* U.S.S.G. § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status are "not relevant in the determination of a sentence"); 28 U.S.C. § 994(d).

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

Response: I am not familiar with the quoted passage or the context in which the definition was issued. "Equity" has a legal meaning that stands in contrast to the legal meaning of "law," but the Merriam-Webster definition that seems responsive to the question is "justice according to natural law or right, *specifically*: freedom from bias or favoritism." I would agree that judges must strive to dispense justice that is free from bias or favoritism of any kind.

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

Response: Merriam-Webster defines "equality" as "the quality or state of being equal," which is then defined in relevant part as "regarding or affecting all objects in the same way: impartial." In the context of judicial duties and obligations, judges must be impartial and render equal treatment under the law to all persons. In this particular sense of "equality," it is not meaningfully different from the sense of "equity" identified in my response to Question 24, above (to be free from bias or favoritism).

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

Response: As noted above in my response to Question 24, I am not familiar with the quoted statement or the context in which it was made. The Fourteenth Amendment provides in relevant part that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." There is a vast body of Supreme Court caselaw interpreting and applying the Equal Protection Clause to various circumstances, but I am not aware of any federal court applying the quoted definition above in that context. If confirmed, I will decide cases presenting an Equal Protection Clause issue in accordance with the binding precedent of the Supreme Court and the Second Circuit.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of systemic racism. Black's Law Dictionary (11th ed. 2019) does not contain a specific definition of this term, but defines "racism" as "1. the belief that some races are inherently superior to other races. 2. Unfair treatment of people, often including violence against them, because they belong to a different race from one's own;" and defines "systemic discrimination" as "an ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location."

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

Response: I do not have a personal definition of critical race theory. Black's Law Dictionary (11th ed. 2019) 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," as well as "the body of work produced by adherents to this theory."

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

Response: Please see my responses to Questions 27 and 28, above. I have no further expertise in this area.

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

Questions for the Record for Margaret Merrell Miller Garnett, nominated to be United States District Judge for the Southern 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: Invidious racial discrimination is always wrong. The Fourteenth Amendment to the Constitution and various federal and state statutes also make racial discrimination illegal in various contexts, including in employment, in public accommodation, and in housing. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e; Fair Housing Act of 1968, 42 U.S.C. § 3605(a). Furthermore, both the Supreme Court and the Second Circuit apply strict scrutiny to any law, regulation, or other government action that employs race-based classifications for any purpose. If confirmed, I would faithfully follow binding precedent on these issues from the Supreme Court and Second Circuit, applying them to the facts of the particular case before me.

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

Response: The Supreme Court has articulated a test to determine whether unenumerated rights are nonetheless protected by the Constitution's Due Process clauses: the asserted right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If I were confronted with a claim that rested on an unenumerated right, I would evaluate that claim under the *Glucksberg* test, along with any other applicable Supreme Court or Second Circuit precedent, and faithfully apply those precedents to the facts of the particular case before me. My personal beliefs, if any, would be irrelevant to that process.

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

Response: I do not consider myself an adherent of, or committed to advancing, any broader ideological project in the law. Having said that, I would describe my judicial philosophy as follows: to treat every person and party with dignity and with equality before the law, and to approach each case with an open mind, thorough preparation, careful consideration of each parties' arguments, and total fidelity to the law. In civil cases that also means resolving the dispute that is presented to you, as efficiently and expeditiously as possible, consistent with appropriate thoughtfulness and due process. In criminal cases that also means carefully balancing the interests of public safety and the rule of law with protecting and enforcing every defendant's constitutional rights. I have not studied the Justices of the last 50 years closely enough to identify which Justice's views might most closely align with these values, and few Justices in the modern era have served as district court or state trial court judges so as to be a model for how a prospective district court judge might approach the job.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as "1. The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect. . . . 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding." The latter meaning is a subjective test and is sometimes referred to in common parlance as "intent of the framers" or "intent of the drafters." The first definition is an objective test.

Under either meaning, "originalism" can be both an interpretive method and an ideology or legal philosophy. As noted in my response to Question 3, above, I do not consider myself an adherent of any broader ideological project in the law. As relevant here, however, I am fully familiar with the Supreme Court's jurisprudence and guidance regarding employing original public meaning, or original public understanding, as an interpretive method when analyzing both Constitutional provisions and statutes. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (applying "the public understanding of a legal text" at the time of its adoption and immediately thereafter to ascertaining the meaning of the Second Amendment); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (applying "the ordinary public meaning of its terms at the time of its enactment" to ascertaining the meaning of a statute). If I were confirmed as a district judge, I would faithfully apply all binding precedent of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods.

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 (11th ed. 2019) defines "living constitutionalism" as "The doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." As with originalism, living constitutionalism can be both an interpretive method and an ideology or legal philosophy. As noted above in my response to Questions 3 and 4, I do not consider myself an adherent of, or committed to advancing, any broader ideological project in the law. If I were confirmed as a district judge, I would faithfully apply all binding precedent of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods.

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: It is unlikely that a district court judge would be presented with an issue of Constitutional interpretation that is truly one of "first impression," as even relatively obscure constitutional provisions have been addressed at one time or another by appellate courts or the Supreme Court. *See, e.g.*, *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) (considering a claim that the housing of National Guardsmen in correctional staff residential facilities while they covered for striking correctional officers violated the Third

Amendment's prohibition on quartering of soldiers in peacetime). However, if I were presented with a constitutional issue whose resolution was not clearly "controlled" by binding precedent, I would begin by researching how the Supreme Court and Second Circuit had analyzed analogous provisions of the Constitution, including the interpretive methods and canons of construction that those precedents applied, because the Supreme Court has not universally applied exclusively "original public meaning" methods to every part of the Constitution without further analysis. *Cf. Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (evaluating obscenity regulations under the First Amendment by reference to "contemporary community standards"); *Moore v. Texas*, 581 U.S. 1 (2017) (evaluating Eighth Amendment claims by reference to "evolving standards of decency"). In this circumstance, as in all others, I would endeavor to faithfully apply the binding precedent of the Supreme Court and Second Circuit to the particular facts of the case before me.

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 given primacy to original public meaning on many constitutional issues, *see, e.g., Heller*, 554 U.S. at 605, but in other contexts the governing precedents direct the use of additional interpretive tools or analytical approaches, *see, e.g., Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (evaluating obscenity regulations under the First Amendment by reference to "contemporary community standards"); *Moore v. Texas*, 581 U.S. 1 (2017) (evaluating Eighth Amendment claims by reference to "evolving standards of decency"). If presented with an argument from a litigant that relied on claims of current public understanding of the Constitution or a statute, I would conduct my own legal research into the question and faithfully apply the binding precedent of the Supreme Court and Second Circuit, including as to interpretive methods, to the particular facts of the case before me.

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

Response: No, although judges are at times confronted with applying the Constitution to factual situations that could not have been anticipated by the Framers or the American public at the time of ratification. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("the Founders created a Constitution . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." (internal quotations and citations omitted)).

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

Response: *Dobbs* is binding Supreme Court precedent and if confirmed I would faithfully apply it to cases before me. The ruling in *Dobbs* is "settled law" in the sense that it could only be altered by a subsequent decision of the Supreme Court or through the amendment process set out in Article V of the Constitution.

a. **Was it correctly decided?**

Response: Please see my response to Question 9, above. Canons of judicial ethics prohibit judicial nominees and sitting judges from commenting on matters that could come before them in litigation. *Dobbs* deals with issues that are currently being litigated in federal courts, or could be in the foreseeable future. Accordingly, it would not be appropriate for me to opine as to the correctness of this Supreme Court decision.

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

Response: *Bruen* is binding Supreme Court precedent and if confirmed I would faithfully apply it to cases before me. The ruling in *Bruen* is "settled law" in the sense that it could only be altered by a subsequent decision of the Supreme Court or through the amendment process set out in Article V of the Constitution.

a. **Was it correctly decided?**

Response: Please see my response to Question 10, above. Canons of judicial ethics prohibit judicial nominees and sitting judges from commenting on matters that could come before them in litigation. *Bruen* deals with issues that are currently being litigated in federal courts, or could be in the foreseeable future. Accordingly, it would not be appropriate for me to opine as to the correctness of this Supreme Court decision.

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

Response: *Brown v. Board* is binding Supreme Court precedent and if confirmed I would faithfully apply it to cases before me. The ruling in *Brown v. Board* is "settled law" in the sense that it could only be altered by a subsequent decision of the Supreme Court or through the amendment process set out in Article V of the Constitution.

a. **Was it correctly decided?**

Response: Yes. The question of *de jure* segregation of children by race in public schools is extremely unlikely to be litigated in federal courts in my lifetime; accordingly opining on the correctness of *Brown v. Board* can be consistent with the canons of judicial ethics.

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

Response: Pretrial detention of federal criminal defendants is governed by the Bail Reform Act, 18 U.S.C. § 3142. The statute sets forth a list of crimes that carry a rebuttable presumption that pretrial detention is warranted, including certain narcotics offenses, certain enumerated violent firearms crimes and terrorism offenses, certain human trafficking offenses, and certain crimes with minor victims. *See* 18 U.S.C. § 3142(e)(3).

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

Response: The policy rationale offered by the Congress that passed the Bail Reform Act was to identify defendants who, based on their charged conduct, were deemed to present a particular risk of continued danger to the community if granted pretrial release. *See United States v. Salerno*, 481 U.S. 739, 742 (1987) (discussing S. Rep. No. 98-225 at 3 (1984)); S. Rep. No. 98-147 at 22 (1983).

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. There are constitutional limits imposed by the Free Exercise Clause of the First Amendment, as well as statutory limits imposed by federal laws such as the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act.

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

Response: Government actions that burden or discriminate against "sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable'" must survive strict scrutiny review. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2421-22 (2022). While each case must be assessed on its particular facts, the Supreme Court has noted that it expects actions discriminating against religion "will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye 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: The Supreme Court held that the religious organizations were entitled to a preliminary injunction because they had demonstrated likelihood of success on the merits of their First Amendment claim, that the challenged restrictions would cause irreparable harm through the loss of First Amendment freedoms, and that granting the injunctive relief would not harm the public interest. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020). The Court concluded that the religious organizations were likely to succeed on the merits because the challenged regulations "single out houses of worship for especially harsh treatment" and there was little evidence to support a finding that the restriction was sufficiently narrowly tailored (such as by, for example, tying maximum attendance restrictions to the size or capacity of the gathering space). *Id*. at 67.

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

Response: The Supreme Court granted a preliminary injunction to block California's COVID-19-related restrictions on at-home religious gatherings, finding that the plaintiffs were likely to succeed on the merits of their First Amendment challenge to these restrictions. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). The Court based this conclusion on the fact that the restrictions were not "neutral and generally applicable," *id*. at 1296, because they treated comparable secular activities (including "hair salons, retail stores, . . . and indoor restaurants," *id*. at 1297) more favorably than the religious gatherings sought by the plaintiffs, and the restrictions were not narrowly tailored to the specific identified public health concerns (such as, for example, by allowing for the use of other public health mitigation measures when gathering in larger numbers), *id*.

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

Response: Yes.

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

Response: A baker in Colorado declined to bake a wedding cake for a same-sex couple, citing his religious objections to same-sex marriage. The couple filed an anti-discrimination claim with the Colorado Civil Rights Commission, which found in favor of the couple. The Supreme Court set aside the enforcement order, finding that the record was replete with "official expressions of hostility" to the baker's religious objections, which hostility is always "inconsistent with [the neutrality that] the Free Exercise Clause requires." *Masterpiece Cakeshop v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1732 (2018).

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

Response: Yes. The Supreme Court has held that, to be protected by the Free Exercise Clause, beliefs must be "rooted in religion," *Thomas v. Review Board of Indiana Employment Security Div.*, 450 U.S. 707, 713 (1981), but they need not align with "the commands of a particular religious organization" so long as they are "sincerely held," *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829, 834 (1989). In other words, courts have a narrow function, which is not to assess whether asserted beliefs are reasonable or in line with the doctrine of any established religion, but rather only whether the asserted beliefs represent a claimant's "honest conviction." *Thomas*, 450 U.S. at 716.

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

Response: Please see my response to Question 19, above.

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

Response: Please see my response to Question 19, above.

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

Response: I know from my own religious education that the Catechism of the Catholic Church states: "Since the first century the [Catholic] Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law." *Catechism of the Catholic Church*, para. 2271. However, I am aware of no circumstance or occasion in which it would be appropriate for a federal judge to determine or rule upon the "official position" of any religious organization. Indeed, the Supreme Court has repeatedly cautioned that courts should not interfere in doctrinal matters of religious organizations. *See, e.g.*, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("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." (internal quotations and citations omitted)).

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: The Court's holding and reasoning are based on its prior ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), in which it had held that certain federal anti-discrimination employment laws did not apply to "the employment relationship between a religious institution and its ministers." *Id*. at 188. In *Our Lady of Guadalupe School*, the Court held that this "ministerial exception" was not dependent on the particular job title of the employee, but should be applied to any employee of a religious organization whose job function involves conducting worship services or important religious ceremonies or rituals, or serving "as a messenger or teacher of its faith." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (internal quotations and citations omitted). Here, the Court found that the respondents fell within the *Hosanna-Tabor* exception because, among other things, the Catholic elementary schools at issue required their teachers to "provide instruction in the Catholic faith . . ., pray[] with their students, attend[] Mass with the students, and prepare[] the children for participation in other religious activities." *Id*. at 2066. The Court concluded: "When a school with a religious mission entrusts a teacher

with the responsibility of educating and forming students in the faith, judicial intervention in disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id*. at 2069.

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: The City of Philadelphia refused to contract with Catholic Social Services for foster care placements because the agency would not place children with same-sex couples. The Supreme Court held that the City's actions were an impermissible violation of the First Amendment's Free Exercise Clause. Because the City's foster care procurement policies included a mechanism for individualized exemptions from those policies, the refusal to grant such an exemption to Catholic Social Services could not be deemed a "neutral and generally applicable" policy. 141 S. Ct. 1868, 1876-77 (2021). Accordingly, the government action must be analyzed using strict scrutiny, and the Court held that Philadelphia's refusal to contract with Catholic Social Services unless it agreed to certify same-sex couples as foster parents was not narrowly tailored to achieve a compelling state interest. *Id*. at 1881-82.

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

Response: Maine had a program to pay tuition at private high schools if there were no public high school option in the student's school district. However, the program was limited to "nonsectarian" schools. 142 S. Ct. 1987, 1993 (2022). The Court held that Maine's program violated the Free Exercise Clause of the First Amendment because generally available government programs cannot exclude religious organizations merely because of their religious exercise. *Id*. at 2002. Moreover, allowing tuition payments to religious schools would not violate the Establishment Clause of the First Amendment under these circumstances, because "neutral benefit programs" in which public funds may flow to religious organizations through the private choices of individuals does not violate the Establishment Clause. *Id*. at 1997.

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

Response: Kennedy was a football coach at a public high school who was dismissed from his position for his practice of praying on the school's football field after games, which the Court described as a "brief, quiet, personal religious observance." 142 S. Ct. 2407, 2432 (2022). The Court determined that the school district's actions were neither neutral nor generally applicable and therefore the burden on Kennedy's religious

exercise must survive strict scrutiny to satisfy the First Amendment. Here, the school district failed to demonstrate that its policies or actions were narrowly tailored to serve a compelling state interest, where the only justification offered "rested on a mistaken view that [the school district] had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination." *Id*. at 2433.

24. **Explain your understanding of Justice Gorsuch's concurrence in *Mast v. Fillmore County*, where the U.S. Supreme Court's granted certiorari and vacated the lower court's decision.**

Response: In the wake of its decision in *Fulton v. City of Philadelphia*, the Court remanded this case for further consideration in light of *Fulton*. The case concerned claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") brought by Amish families objecting to regulations that would have required them to install septic systems in their homes to dispose of "gray water," which the Amish claimants asserted would violate their religious beliefs. Justice Gorsuch wrote a separate concurrence to explain his view, for the benefit of the lower court on remand, that in conducting a strict scrutiny analysis under RLUIPA, the government must demonstrate not only that it has a compelling state interest *in general* that is served by the challenged regulation, but rather that it has a particular compelling state interest in enforcing its regulation on specific religious claimants. In other words, in applying strict scrutiny to actions challenged under RLUIPA, courts "must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." 141 S. Ct. 2430, 2432 (2021) (internal quotations and citations omitted).

25. **Some people claim that Title 18, United States Code Section 1507 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: Under the canons of judicial ethics, it would not be appropriate for me, as a judicial nominee, to opine as to the constitutionality or proper interpretation of this statute, because a prosecution under the statute (or a civil suit arising from an arrest or prosecution under the statute) could come before me as a judge if I am confirmed. If I were confronted by this question in the context of a particular case in the future, I would carefully consider the facts of the case and faithfully apply binding Supreme Court and Second Circuit precedent to those facts.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: Yes.

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: Federal political appointments are governed by the Appointments Clause of the Constitution, *see* U.S. Const. art II, § 2, cl. 2, and by various federal statutes. Claims of discrimination in hiring, both in government and in private industry, are frequently litigated in the Southern District of New York. It would be inappropriate for me to opine as to the circumstances, if any, in which it would be permissible under statute or the Constitution to consider skin color or sex in hiring, lest any future litigants believe I had pre-judged the issues in their case. If I am presented with a case that raises these issues, I will carefully consider the facts of the case and the arguments of the parties, and decide the matter based on a faithful application of Supreme Court and Second Circuit precedent to those facts.

30. **If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?**

Response: Supreme Court and Second Circuit precedent identifies some circumstances where showing that a program or policy has a racially disparate impact can be used as evidence of illegal discrimination. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 577-78

(2009) (discussing the evolution of "disparate treatment" and "disparate impact" claims under 42 U.S.C. § 2000e). If I were presented with a case that raised a claim of racially disparate impact, I would faithfully apply Supreme Court and Second Circuit precedent on the relevant law to the particular facts of the case before me.

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

Response: The appropriate size of the Court is a policy matter for Congress to determine, and it would not be appropriate for me as a judicial nominee to opine on the issue. If I were confirmed as a district court judge, I would be duty-bound to faithfully apply the decisions of the Supreme Court to cases before me, regardless of the number of justices on the Court.

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: Supreme Court precedent holds that the Second Amendment protects an individual right to bear arms for self-defense, both in the home and in public. *See District of Columbia v. Heller*, 554 U.S. 50 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n 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 *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), which builds on the Court's prior holdings in *Heller* and *McDonald*, the Supreme Court 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.'" *Id*. at 2126.

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

Response: Yes, consistent with the Supreme Court precedent described in my responses to Questions 33 and 34, above.

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

Response: No. *See Bruen*, 142 S. Ct. at 2156 (the right to bear arms "is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

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

Response: Please see my response to Question 36, above.

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

Response: The Supreme Court has repeatedly held that the Constitution delegates to the Executive Branch the discretion to determine enforcement priorities in a variety of areas. *See, e.g.*, *United States v. Texas*, 599 U.S. ___, 143 S. Ct. 1964, 1970-72 (2023) (reviewing Supreme Court precedents on court challenges to executive branch discretion on enforcement). As a judicial nominee, it would not be appropriate for me to opine on how these precedents might apply to hypothetical circumstances. If I were presented with a case that raised this issue, I would faithfully apply relevant Supreme Court and Second Circuit precedent to the facts of the case before me.

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

Response: An act of prosecutorial discretion typically refers to the decision by a prosecutor as to whom to charge with criminal offenses and what specific charges to bring. A substantive administrative rule change typically refers to a change in an administrative rule or rules that is substantive in nature, which would be subject to the restrictions and requirement imposed by applicable law, such as binding precedent from the Supreme Court and Second Circuit and statutes such as, for example, the Administrative Procedures Act.

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

Response: No.

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

Response: In response to the COVID-19 pandemic, the Centers for Disease Control & Prevention ("CDC") issued a nationwide moratorium on residential evictions, relying on a "decades-old statute that authorize[d] it to implement measures like fumigation and

pest extermination." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct 2485, 2486 (2021). The district court hearing a challenge to the moratorium preliminarily enjoined its enforcement, the injunction was stayed and then the stay was subsequently vacated by the Supreme Court. In doing so, the Supreme Court held that "the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority," *id.*, in part because the statute in question did not provide the clear or specific authorization from Congress that would permit the agency to "exercise powers of vast economic and political significance," *id*. at 2489 (internal quotations and citations omitted).

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

Response: No. *See generally* Justice Manual §§ 1-7.400, 1-7.410, 1-7.610, 9-27.200 (relevant rules of conduct for federal prosecutors); New York Rules of Professional Conduct, Rule 3.8 (relevant rules of conduct for New York barred lawyers practicing as prosecutors or government lawyers).

43. **On June 20, 2020, you signed a letter signed a letter criticizing the actions of President Trump and Attorney General Barr in summarily firing U.S. Attorney Geoffrey Berman without cause.**

a. **Does the President need cause to remove a U.S. Attorney? If yes, please cite authority.**

Response: No, cause is not legally required. Under the Appointments Clause of the Constitution, most presidential appointees are at-will employees who serve at the pleasure of the President. *See Seila Law v. Consumer Fin'l Protection Bur.*, 140 S. Ct. 2183, 2191-92 (2020).

44. **Your report on the New York Police Department during the 2020 riots set forth twenty recommendations to improve NYPD's policies and practices relating to policing protests. One recommendation noted "to the extent NYPD deems the assignment of specialized units or officers in 'riot gear' or 'hard uniforms' potentially necessary to a protest response, it should stage those officers in nearby areas not visible to protestors for deployment only if necessary."**

a. **When rioters cause tens of millions of dollars in property damage and firebomb an NYPD vehicle would that be appropriate for riot officers to be visible?**

Response: For context, the DOI report referenced in the question was praised by both advocates for police reform and the NYPD's largest police officer union, an unprecedented endorsement for an act of police oversight. *See, e.g.*, Ali Watkins, "An Unprepared N.Y.P.D. Badly Mishandled Floyd Protests, Watchdog Says," N.Y. Times, Dec. 18, 2020; Michael R. Sisak, "Watchdog: Floyd Protests Overwhelmed

NYPD, Sparking Conflict," Associated Press, Dec. 18, 2020. In addition, although DOI's recommendations are not binding on any New York City agency, all of the recommendations in the report regarding protest policing have been voluntarily accepted and implemented by the NYPD. In over 100 pages of careful factual investigation and analysis, the report found, among other things, that the NYPD both over-policed peaceful protestors lawfully exercising their First Amendment rights and was at the same time poorly positioned to respond to serious criminal acts such as property damage and assault (which acts the report clearly and explicitly condemns). The specific recommendation identified in this subpart is directed to contingency planning for peaceful protests, not "rioters."

b. **Is firebombing a NYPD police car to make a political statement an act of terrorism?**

Response: I know from my nearly twenty years of experience as a federal and state prosecutor that using an incendiary device on a police vehicle would be subject to prosecution under a number of provisions of federal criminal law and New York state penal law, depending on the facts and circumstances.

45. **You are a Founder and Steering Committee Member of the "When There Are Nine Scholarship Project," correct?**

Response: In late 2020, I was one of the founders of the When There Are Nine Scholarship Project, and then served as a member of the Project's Steering Committee until I became the Deputy United States Attorney in November 2021. I have had no involvement with the Project since November 2021.

a. **Does the project's scholarship criteria note "individuals who consistently live and self-identify as women regardless of their gender assignment at birth, and meet the following criteria are eligible to apply for a scholarship"?**

Response: Yes, that is an accurate quote from the Project's current criteria for applicants.

b. **Does your committee's policy allow biological men to win scholarships intended for women?**

Response: As noted above, I have had no association with the Project since November 2021. Based on my prior involvement, the selection criteria for the Project's Scholars was initially developed by the Selection Committee, which consisted of 5 to 10 former Assistant United States Attorneys from the Southern District of New York, following consultation with a range of admissions and financial aid professionals from a number of law schools and colleges. The Selection Committee's recommendations on applicant criteria were adopted by the Steering Committee, which at the time of my service on the Committee consisted of 10 former Assistant United States Attorneys from the Southern District of New York, as well as

the Executive Director of the Federal Bar Council, which is a sponsor of the Project.

c. **How would your Steering Committee define a woman? How would you?**

Response: As noted in my response to the prior subparts to this Question, I have not been involved with the Project since November 2021, and would not presume to speak for the Steering Committee or the Project. Merriam-Webster Dictionary defines a woman as "an adult female person."

d. **When biological men (who identify as women) compete against biological women in women's sports, is that a good thing or a bad thing?**

Response: Whether the involvement of transgender athletes in competitive sports is "good" or "bad" is a policy judgment, on which my opinion, if any, as a judicial nominee is irrelevant. In addition, this issue is currently being litigated in courts around the country, and accordingly it would not be appropriate for me, as a judicial nominee, to opine, lest future litigants think that I had prejudged their case in any way. If I were presented with a case in the future that required consideration of this issue, I would faithfully apply the relevant and binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

46. **On February 2, 2023, you spoke on a panel of the Women's White Collar Defense Association's 'Women in Leadership" presentation. During the talk, you highlighted the alleged importance of "implicit bias training for all Assistant United States Attorneys."**

a. **Do you believe all individual people have implicit bias?**

Response: As part of the preparation for this panel (which I spoke on in my capacity as Deputy United States Attorney), I, the moderator, and the other panelist (the First Assistant United States Attorney for the EDNY) collaboratively prepared a draft outline of potential questions and answers that might be addressed during the panel event. I provided a copy of this draft outline as an attachment to my Senate Judiciary Questionnaire. One of the potential questions for which I and the other panelist prepared answers was "How are you [the two Offices] thinking about/approaching training for less experienced prosecutors generally?" My bulleted list for SDNY included, among numerous other things, a reference to implicit bias training for all AUSAs. The list was a factual recitation of training that either had been offered or was on the calendar to be offered in the future; it was not an advocacy statement. The draft outline covered significantly more material than the panel itself; I do not recall whether the question about training was actually asked by the moderator at the panel or, if so, whether my answer to it included any reference to the planned implicit bias training for SDNY AUSAs.

The limited set research on bias that I am familiar with, as a layperson, suggests that all human beings may have biases of various kinds, positive and negative, of which

they may or may not be consciously aware.

b. **Would you require law clerks to take implicit bias training?**

Response: If I am confirmed, I do not plan to require that my law clerks take implicit bias training.

47. **You and your husband posted the following to your online blog:**

We were greeted in Hondo by a sign reading: 'Welcome to Hondo, Texas This is God's Country -- please don't drive like hell through it.' While we appreciated the safe driving reminder, we find all this 'God's Country' business in Texas to be a little self-satisfied. Isn't everywhere God's country? Texans are clearly very proud – the state outline and lone star are imprinted or stamped on anything that will hold still long enough, and millions of dollars have been invested in the many informative historical markers that line even the back roads. We like this pride of place (and certainly appreciate the markers), but only to a point. After a while it is a bit much, and we pretty much draw the line at claiming God for your own."

a. **What did you mean by this?**

Response: In 2005, my husband and I rode our bicycles for 10 weeks to cross the United States, from Jacksonville, Florida, to Huntington Beach, California. Given the geography of the route we chose, approximately one-third of the trip was in Texas. To chronicle our trip, we kept a daily journal online for our family and friends, and for other long-distance bicycle travelers. We generally took turns drafting the day's entries and shared in the final editing. I do not recall the specifics of who drafted the entry partially quoted above, over 18 years ago. However, reading it over now and recalling some of our discussion at the time, I believe we were highlighting the inherent tension between believing in a God-created universe (as presumably the author or sponsor of the quoted sign did) and claiming a special divine dispensation or particular divine favor for the one place in that universe where <u>you</u> happen to live (as implied by the phrase "This is God's Country," which suggests, as noted in the quoted portion above, that other places, including the place where your visitors might live, are <u>not</u> "God's Country").

Senator John Kennedy
Questions for the Record

Margaret Garnett

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

   Response: I do not consider myself an adherent of, or committed to advancing, any broader ideological project in the law. Having said that, I would describe my judicial philosophy as follows: to treat every person and party with dignity and with equality before the law, and to approach each case with an open mind, thorough preparation, careful consideration of each parties' arguments, and total fidelity to the law. In civil cases that also means resolving the dispute that is presented to you, as efficiently and expeditiously as possible, consistent with appropriate thoughtfulness and due process. In criminal cases that also means carefully balancing the interests of public safety and the rule of law with protecting and enforcing every defendant's constitutional rights.

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

   Response: The meaning of the Constitution is fixed, although judges are at times confronted with applying the Constitution to factual situations that could not have been anticipated by the Framers or the American public at the time of ratification. *See, e.g., New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("the Founders created a Constitution . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." (internal quotations and citations omitted)).

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

   Response: No, where the text is clear that ends the inquiry.

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

   Response: In any case involving statutory interpretation, the Supreme Court has held that a judge must begin with the text and, where it is clear, end its inquiry. If I were presented with a case involving statutory interpretation where the textual meaning was not clear, I would next look to Supreme Court and Second Circuit precedent for guidance on the types of other sources authorized, which can include recognized canons of statutory construction and other interpretive principles, as well as interpretations by regulatory

agencies under certain circumstances, s*ee, e.g., WPIX v. ivi*, 691 F.3d 275, 279-80 (2d Cir. 2012) (deferring to interpretation of U.S. Copyright Office). If these methods and sources still did not resolve the ambiguity in the text, only then would I consult the categories of legislative history that have been identified by the Supreme Court and Second Circuit as most reliable. *See, e.g., United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) (identifying committee reports as "among the most authoritative and reliable materials of legislative history"); *but see Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005). Generally speaking, presidential signing statements are disfavored even where a judge must consider legislative history, *see, e.g.*, *Struniak v. Lynch,* 159 F. Supp. 3d 643, 658 (E.D. Va. 2016) ("Presidential signing statements are rarely of use in statutory interpretation given that the president's role in the legislative process amounts to nothing more than approving or disapproving—not modifying—the bills that Congress passes."), but there are rare circumstances where they may be relevant, *see, e.g.*, *United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989) (considering signing statement where text was unclear and materials from House and Senate conflicted, and where presidential staff participated in the negotiation of the compromise between House and Senate versions of the bill).

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

Response: The Supreme Court has held that the "Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Courts distinguish between government action and private action using the "state-action doctrine," under which the constraints that would apply to a government actor can be applied to a private party when it "exercises a function traditionally exclusively reserved to the State." *Id*. (holding that public access cable channels are not subject to First Amendment limits on their discretionary editorial judgments about who can use their platform). *See also Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding that a shopping center with a strict "no handbills" policy could prohibit specific handbill distribution, and that the accessibility of private property to the public for the purpose of doing business therein did not convert private property to public property for First Amendment purposes). If a case involving restrictions placed by a shopping center owner on its private property were presented to me, I would faithfully apply binding Supreme Court and Second Circuit precedent, including precedent on the state-action doctrine, to the particular facts of the case before me.

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

Response: The Supreme Court has held that determination of whether a non-citizen is included within the "people" protected by various constitutional rights depends on the nature of the right asserted and a fact-intensive analysis, including of the individual's connection to this country. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-66 (1990); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *cf. Zadvydas v. Davis*, 533 U.S.

678, 693 (2001). If I were presented with a case raising this issue, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

   Response: The Supreme Court has long recognized a "border exception" to the Fourth Amendment, in which "routine" searches and seizures at the border may be conducted without probable cause or a warrant. *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004). As to law enforcement encounters generally, please see my response to Question 6, above. If I were presented with a case involving a Fourth Amendment claim by a non-citizen unlawfully present in the United States, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

   Response: The Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), held that questions around abortion and any permissible restrictions on abortion were being returned "to the people and their elected representatives," *id*. at 2244, and that its decision was not "based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth," *id*. at 2261. Accordingly, this is a policy question for legislators and the voting public. If I were presented with an equal protection question in a case assigned to me, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of that case.

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

   a. **Do you agree?**

      Response: I am not familiar with this case. Questions around permissible restrictions on abortion are presently being litigated in courts around the country, and under the canon of judicial ethics it would be inappropriate for me to opine on the views of another judge that is not binding on me, nor on the issue generally lest future litigants think that I had pre-judged the issues in their case.

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

Response: Lower court judges are duty-bound to apply binding precedent of the Supreme Court and the relevant Circuit.

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

Response: No.

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

Response: The Supreme Court held that Indiana's law requiring the presentation of identification in order to vote did not violated the Fourteenth Amendment. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). If I were presented with a case involving a voter identification requirement, the only question before me would be whether such a requirement comported with the Constitution and with applicable law. In answering that question, I would faithfully apply binding precedent from the Supreme Court and Second Circuit to the particular facts of the case before me.

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

Response: I would apply the standard prescribed by binding Second Circuit and Supreme Court precedent. If such an issue were to come before me today, I would begin with the standard set forth in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), which 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.'" *Id*. at 2126.

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

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

Response: The factors the Supreme Court has identified that can justify overturning its prior precedents are: (i) the nature of the prior error; (ii) the quality of the reasoning in the prior decision; (iii) the workability of the rule imposed by the prior decision; (iv) the effect on other areas of the law; and (v) reliance

interests. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022); *Janus v. AFSCME*, 138 S. Ct. 2448, 2478-79 (2018). I am not aware of any Supreme Court decision addressing how many of these factors would be sufficient to justify overturning a prior precedent.

b. Is one factor alone ever sufficient?

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

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

Response: Judicial review is the duty of the judicial branch to review actions of the legislative or executive branch to determine whether they comport with the Constitution. *See Marbury v. Madison*, 5 U.S. 137 (1803). Judicial supremacy generally refers to the notion that the Supreme Court is the authoritative interpreter of the Constitution and that its judgments bind other branches and levels of government unless and until overruled by subsequent Supreme Court decisions or amendment as set forth in Article V of the Constitution. Judicial supremacy is not unlimited, however, and is constrained by, for example, the requirements of Article III standing and judicial doctrines like the political question doctrine.

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

Response: The Constitution's meaning is fixed, although judges are at times confronted with applying the Constitution to factual situations that could not have been anticipated by the Framers or the American public at the time of ratification. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("the Founders created a Constitution . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." (internal quotations and citations omitted)). I am not aware of any Supreme Court precedent that singles out the Ninth Amendment for different treatment.

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

Response: Precedential caselaw on the Ninth Amendment is limited. In *dicta* in his concurring opinion in *McDonald v. Chicago*, 561 U.S. 742, 851 n. 20 (2010), Justice Thomas included the Ninth Amendment in a list of provisions of the Bill of Rights that are structural protections in the federal-state relationship and do not protect individual rights. Other Supreme Court cases have referenced the Ninth Amendment as potential sources for the protection of unenumerated individual rights related to the family. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972). If I were confronted with a Ninth Amendment claim in a case before me, I would faithfully apply binding precedent from the Supreme Court and Second Circuit to the particular facts of the case.

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

Response: Yes. The Ninth Amendment specifically references rights listed elsewhere in the Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

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

Response: I am not aware of any case in which the Supreme Court or Second Circuit has looked to Founding-era history to understand the Ninth Amendment. However, the Supreme Court has emphasized the importance of the text and the original public meaning of constitutional provisions in numerous contexts, including the Free Exercise Clause of the First Amendment and the Second Amendment. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2411 (2022); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136-37 (2022).

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

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

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), the Supreme Court extensively analyzed the use of the term "the people" in various parts of the Constitution (as compared to the use of "person" or "persons" in other parts), including the First, Second, Fourth, Ninth, and Tenth Amendments. This analysis "suggests" that "the people" as used in these amendments "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of the community." *Id.* Regarding the Second Amendment specifically, the Court in *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), held that "the people" referred to "all members of the political community."

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

Response: Please see my response to Question 19(a), above.

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

Response: Please see my response to Questions 6 and 19(a), above.

21. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions

and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: The Supreme Court has articulated a test to determine whether unenumerated rights are nonetheless protected by the Constitution's Due Process clauses: the asserted right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Because unenumerated rights are, by definition, not described in the text of the Due Process Clause, this test for identifying unenumerated rights does not depend on changing meaning of the text itself. The Court has held in other contexts that the Constitution's meaning is fixed, although judges are at times confronted with applying the Constitution to factual situations that could not have been anticipated by the Framers or the American public at the time of ratification. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("the Founders created a Constitution . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." (internal quotations and citations omitted)). If I were presented with a case involving an assertion of unenumerated rights under the Due Process Clause, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

Response: In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Supreme Court conducted a lengthy analysis of the narrow limitations imposed on the scope of the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. 36 (1872), including the extensive scholarly and judicial criticism of that limited scope in the intervening years. *McDonald*, 561 U.S. at 754-58. Nonetheless, relying on the expansiveness of the application of the Due Process Clause as a vehicle for applying Bill of Rights protections to the states, the Court "decline[d] to disturb the *Slaughter-House* holding." *Id*. at 758. If I were presented with a case that involved a claim of unenumerated rights under the Privileges or Immunities Clause, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

Response: Please see my response to Question 22, above.

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

Response: In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court laid out a two-step test for reviewing a regulatory agency's construction of a statute that it administers: first, courts must ask "whether Congress has directly spoken to the precise question at issue [and if] the intent of Congress is clear, that is the end of the matter," *id*. at 842; second, if there is ambiguity in the statute, courts will defer to the administrative agency's interpretation so long as it is reasonable and "based on a permissible construction of the statute," *id*. at 843. The scope of the deference to be afforded to administrative agency interpretations has been narrowed by the Supreme Court in recent years, including through the adoption of the "major questions" doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

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

Response: Courts first, and always, must look to the text of the statute providing the claimed authority. If the statute itself does not answer the question of whether the agency acted within its delegated authority, then courts can in some circumstances defer to the agency's interpretation of the statute under which it exercised the challenged authority. However, where the interpretation of the statutory provision, or the challenged agency action, deals with "a question of deep economic and political significance that is central to the statutory scheme," agencies must "point to clear Congressional authorization to justify the challenged program." *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (internal quotations and alterations omitted). In addition to the guidance of the caselaw, courts must also assess whether agency rulemaking is consistent with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

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

Response: Congress' powers are limited to those enumerated in the Constitution; Article 1, Section 9 also lists specific things that are forbidden to Congress, including not suspending habeas corpus except in response to rebellion or invasion, not passing bills of attainder or *ex post facto* laws, not imposing taxes or duties on the movement of goods interstate, and not granting any titles of nobility. In addition to the specific powers enumerated elsewhere in Article I, Section 8 grants to Congress the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing power, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Since the earliest days of the Republic, the Supreme Court has held that this clause empowers Congress to legislate on matters "by all means which are appropriate, which are plainly adapted to [an end that is 'within the scope of the Constitution'], which are not prohibited, but consistent with the letter and spirit of the Constitution." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see also, e.g., Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1779 (2022) (the Necessary and Proper Clause cannot override the terms of the Constitution's specific grants of power (here, the power to create uniform bankruptcy laws)); *United States v. Kebodeaux*, 570 U.S. 387, 400-03 (2013) (Roberts, C.J., concurring in the judgment) (discussing scope, and limitations, of

the Necessary and Proper Clause). The design and text of the Constitution also implicitly limits the authority of Congress by expressly delegating certain powers to the executive branch in Article II and to the judicial branch in Article III. Finally, the Bill of Rights also limits the power of Congress by prohibiting certain actions, such as the First Amendment's provision that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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

Response: The power of Congress under the Commerce Clause includes regulating "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce [including] persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This power is not limitless even within these categories. For example, the Supreme Court has held that Congress cannot shape an interstate market by requiring individuals "to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 522 (2012). Similarly, the Court has limited Congress' ability to use its Commerce Clause authority to compel state governments to take enforcement or regulatory actions. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

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

Response: Please see my answer to Question 27, above.

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

Response: The Supreme Court has held that due process rights under the Fifth and Fourteenth Amendments are to be analyzed under the same standard. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018).

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

Response: The "non-delegation doctrine" bars Congress from transferring its legislative authority to another branch of government, drawing on the text of Article I of the Constitution, which provides that "all legislative powers . . . shall be vested in [] Congress." In *Gundy*, the Supreme Court held that the relevant constitutional question when conducting a non-delegation inquiry is "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion," including "what task [the statute] delegates and what instructions it provides." 139 S. Ct. 2116, 2123 (2019). Statements contained in dissenting opinions are not binding precedent for lower courts,

unless or until adopted by a subsequent majority opinion of the higher court. If I were presented with a case involving the non-delegation doctrine, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

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

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

Response: Under the anti-commandeering doctrine, the Supreme Court has limited Congress' ability to use its Commerce Clause authority to compel state governments to take enforcement or regulatory actions, or to conscript state officers directly to carry out federal programs. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

33. Does the meaning of the Eighth Amendment change over time? Why or why not?

Response: The Supreme Court has held that the Constitution's meaning is fixed but that its terms must sometimes be applied to new circumstances. In the context of the Eighth Amendment's ban on "cruel and unusual punishment," the Court has held that in determining whether specific challenged punishments are cruel or unusual, the touchstone is "the evolving standards of decency that mark the progress of a maturing society." *Moore v. Texas*, 581 U.S. 1 (2017); *see also Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (the Eighth Amendment "standard itself remains the same, but its applicability must change as the basic mores of society change").

34. Is the death penalty constitutional?

Response: The Supreme Court has repeatedly held that the death penalty is not *per se* unconstitutional, so long as its imposition and its implementation otherwise comports with the Constitution, including the Fifth, Eighth, and Fourteenth Amendments. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008).

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

Response: The Supreme Court has described the prosecutorial function (determining who to arrest, who to prosecute, and with what charges) as the quintessential executive branch function, with which courts should be loath to interfere. *See United States v. Texas*, 143 S. Ct. 1964, 1971-72 (2023). I am aware of no other Supreme Court or Second Circuit precedent directly addressing the question posed, and as a judicial nominee it would not be appropriate for me to speculate or hypothesize about these circumstances.

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

Response: I am aware of no court granting a claim of "absolute immunity" from congressional subpoenas for any presidential aide. To the contrary, the district courts in the District of Columbia have denied such claims on multiple occasions. *See, e.g.*, *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008). If I were presented with a case raising this issue, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

Response: Please see my response to Question 5, above.

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

Response: This issue is presently being litigated in courts around the country, challenging various state laws and addressing the scope of Section 230 of the Communications Decency Act. Accordingly, under the canons of judicial ethics it would be improper for me, a judicial nominee, to opine on this issue, lest future litigants think that I had prejudged the issues in their case. If I were presented with a case raising this question, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

Response: The Supremacy Clause is contained in Article VI of the Constitution and provides that the Constitution and federal laws take precedence over state constitutions and state laws. Under the Supremacy Clause, federal courts are empowered, in certain circumstances, to strike down or invalidate state laws and the actions of state officials that contravene federal law or the Constitution. The Adequate and Independent State Ground doctrine is a limitation on this federal judicial review authority, and holds that where a state court judgment rests on two grounds, one federal and one based in state law or the state constitution, a federal court will lack jurisdiction to review the case so long as the non-federal ground is independent of the federal ground and is adequate under state law to support the judgment (so long as the state-law ground is not counter to federal law or the Constitution). *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

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

Response: I am not aware of any decision from the Supreme Court or Second Circuit that addresses this question, although I would note that a number of other Circuits have concluded that the procedures employed by the government with respect to the no-fly list do not violate Due Process. *See, e.g.*, *Busic v. Transp. Sec. Admin.*, 62 F.4th 547, 549-50 (D.C. Cir. 2023); *Kashem v. Barr*, 941 F.3d 358, 361 (9th Cir. 2019). If I were presented with a case raising this issue, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

Response: The standards of review (rational basis, intermediate/heightened scrutiny, and strict scrutiny) are judicially-created doctrines established by the Supreme Court to guide federal courts in protecting constitutional rights. *See, e.g.*, *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 203-04 (1934) (rational basis test for regulatory laws alleged to infringe constitutional rights); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (intermediate scrutiny for gender classifications); *Grayned v. Rockford*, 408 U.S. 104, 119-20 (1972) (strict scrutiny in the context of First Amendment restrictions on protests on or near school grounds).

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

Response: A district court's authority to issue injunctions is governed by Rule 65 of the Federal Rules of Civil Procedure; the court's injunctive authority generally may derive from statute or from the courts' inherent authority under the All Writs Act. The Supreme Court has held that the issuance of preliminary injunctions is a matter of equitable discretion, but that it is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Four factors govern the granting of a preliminary injunction: (i) whether the seeking party is likely to succeed on the merits; (ii) whether the seeking party is likely to suffer irreparable harm in the absence of preliminary relief; (iii) whether the balance of equities tips in the favor of the seeking party; and (iv) whether an injunction is in the public interest. *See id*. at 20. The scope of a preliminary injunction, including its nationwide effect, is subject to review for abuse of discretion. The Supreme Court and numerous legal commentators have criticized the practice of issuing nationwide injunctions, on a variety of grounds, emphasizing that, while there is no general bar against nationwide relief in district or circuit courts, such a broad grant of relief is extraordinary and should only be undertaken when strictly necessary to give the prevailing party the relief they are entitled to under law. *See, e.g., Dep't of Homeland Security v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch and Thomas, JJ., concurring in the grant of stay and discussing problems created by the proliferation of nationwide injunctions). If I were presented with a request to enter a nationwide injunction, I would evaluate that request for relief by faithfully applying binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

43. Please identify one federal judge or justice, current or former, whose service on the bench most inspires you and explain why you will seek to emulate it if confirmed.

Response: During my nearly twenty years as a regular courtroom litigator in the Southern District of New York and the Second Circuit, I have observed many outstanding judges who are role models for the kind of judge I would hope to become if I am confirmed. Like many former law clerks, however, I reserve my greatest admiration for the judge that I clerked for, the Honorable Gerard E. Lynch. If I am lucky enough to be confirmed, I could only dream of inspiring the same fierce devotion in my future clerks that Judge Lynch has created among his community of law clerks in his over two decades of service on first the Southern District of New York and now the Second Circuit Court of Appeals. I clerked for Judge Lynch when he was serving as a district court judge, and he had also been my first-year Criminal Law professor when I was a student at Columbia Law School before he became a judge. After that first course, I sought out every opportunity I could to take additional classes with him, and eventually had him as a professor for three additional courses. I credit him in large part with inspiring my love of criminal law. I came to clerk for him after having practiced law as an associate in a law firm for several years. During my clerkship year, Judge Lynch not only dramatically improved my skills and judgment as a legal thinker and writer, but played a key role in setting me on the career path in public service that I have followed since my clerkship.

I could generate a long list of Judge Lynch's qualities that I would strive to emulate if confirmed, but the most important that I observed during my clerkship year and during our friendship over the last twenty years are these: he is brilliant; he has an infectious and joyful curiosity about the law; he is a clear writer, able to explain complex matters in a way that not only provides guidance to the bar but is understandable to the general public; he is deeply kind; he unfailingly treats everyone with dignity and respect, and makes them feel valued and heard; despite the deference with which judges are treated regardless of their behavior, he maintained his professionalism in ways large and small by, as one small example, endeavoring to always be on time and to respect the time of attorneys and litigants; he emphasized to his clerks that we were all engaged together in the provision of a public service, which was the fair and efficient resolution of disputes, and that accordingly we owed the public our hard work and our best efforts; and he has a deep respect for the American legal system and for the proper restraint that judges should bring to their role in it. If I could be even half the lawyer and judge that he has been and has modeled for his clerks over the years, I would be very proud.

Questions from Senator Thom Tillis
for Margaret Merrell Miller Garnett Nominee to be United States District Court for the Southern 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.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines "judicial activism" as "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." I do not think this approach is appropriate.

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

   Response: Impartiality is an expectation and a duty for a judge. The judicial oath requires it, *see* 28 U.S.C. § 453 ("administer justice without respect to persons . . . and faithfully and impartially discharge and perform all the duties"), as does the Code of Conduct for federal judges, *see Canon 3* ("A Judge Should Perform the Duties of the Office Fairly, Impartially, and Diligently"), and all litigants have the right to have their case heard by an impartial judge, *see, e.g., Chevron v. Donziger*, 833 F.3d 74, 124 (2d Cir. 2016) (collecting cases).

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

   Response: No.

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

   Response: Faithfully interpreting the law may sometimes produce an outcome that is contrary to a judge's personal views or contrary to the weight of public opinion on an issue. But neither of these concerns should play any part in a judge's decisions. Those decisions must be based on faithful application of the law, including binding precedent from the Supreme Court and the Second Circuit, to the particular facts of the case presented. It is for elected officials and policymakers (and, in appropriate circumstances, the voting public) to consider whether laws that produce "undesirable" outcomes in particular cases should be altered or amended.

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

   Response: No.

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

Response: If I am confirmed, I will faithfully apply binding Supreme Court and Second Circuit precedent to any case involving a Second Amendment challenge. The Supreme Court held in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), "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.'" *Id*. at 2126. *See also District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010).

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

Response: I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me. I would note that in *Bruen*, the Supreme Court expressly held that the right to carry a firearm for self-defense cannot be subject to the discretionary decisions of government officers based on the showing of a special need. *Bruen*, 142 S. Ct. at 2123-24, 2156.

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: In any case presenting a defense of qualified immunity, I would faithfully apply binding Supreme Court and Second Circuit precedent to the facts of the case before me. In *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), the Supreme Court stated that "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. at 7-8 (internal citations and quotation marks omitted).

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: I know from my experience supervising the Civil Division of the U.S. Attorney's Office as Deputy U.S. Attorney that issues of qualified immunity for law enforcement

officers are frequently litigated in the Southern District of New York. If such a case were to be assigned to me, I would faithfully apply binding precedent from the Supreme Court and Second Circuit to the facts of the case before me. It would not be appropriate for me as a judicial nominee to offer my opinion about this matter, both because it would be unfair to future litigants to give the appearance of having prejudged their case, and also because whether current law provides sufficient protection for law enforcement officers in the discharge of their duties is a question for policymakers and legislators, not for judges who are duty-bound to apply existing law to the cases that come before them.

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

Response: Please see my response to Question 10, above.

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: Claims of patent infringement and patent eligibility are frequently litigated in the Southern District of New York. If such a case were to be assigned to me, I would faithfully apply binding precedent from the Supreme Court and Federal Circuit to the facts of the case before me, including the Supreme Court's guidance on patent eligibility in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014). It would not be appropriate for me as a judicial nominee to offer my opinion about the quality of the Supreme Court's jurisprudence in this area, both because it would be unfair to future litigants to give the appearance of having prejudged their case, and also because whether the Court's current approach with respect to eligibility under 35 U.S.C. § 101 is a good one is a question for policymakers and Congress, or for the Supreme Court itself, not for lower court judges who are duty-bound to apply existing precedent to the cases that come before them.

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

Response: Please see my response to Question 12, above.

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

a. What experience do you have with copyright law?

Response: In my nearly two decades as a prosecutor and investigator, and my four years of complex bankruptcy litigation practice prior to that, I have not dealt with copyright or patent matters. When I was a law clerk for the Honorable Gerard E. Lynch in the Southern District of New York, I was the assigned clerk and assisted the judge with a patent infringement case that went to trial before a jury; the matter involved a *Markman* hearing, extensive pre-trial briefing, and crafting the specialized jury instructions for this type of trial.

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

Response: Please see my response to Question 14(a), above.

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

Response: In my experience as a prosecutor and as head of an investigative agency, I have extensive experience with search warrants and other forms of criminal process used to gather evidence of unlawful content hosted by internet service providers. I have also participated in discussions between law enforcement officials and representatives of those internet service providers regarding their own efforts to prevent their platforms from being used for criminal activity such as child exploitation, human trafficking, money laundering, terrorism, or criminal threats.

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: My primary experience with First Amendment issues has been in the areas of press access to court proceedings and court documents, the proper scope of protective orders that govern the handling and disclosure of material produced in criminal discovery, and Freedom of Information Act/Freedom of Information Law issues (including policies, disputes, and determinations). As Commissioner of DOI and as Deputy U.S. Attorney, I have also had to consider First Amendment issues in the context of policies around permissible speech restrictions for government employees. In my nearly two decades as a prosecutor, including as Chief of Appeals for the Criminal Division of the U.S. Attorney's Office in SDNY, I may have addressed other First Amendment issues involving challenges to various criminal statutes, but I cannot specifically recall a particular issue of that type.

15. The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address

infringement even when they do not receive a takedown notice. However, the Copyright Office reported that courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute…" It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

Response: In any case involving statutory interpretation, I would begin by assessing whether there is any binding or relevant Supreme Court, Second Circuit, or (where applicable) Federal Circuit precedent that resolves the issue. If there is no such precedent, I would consider the plain meaning of the text of the statute. *See Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005). If the meaning of the text was not clear on its face, I would then look to Supreme Court and Circuit precedent for guidance on the types of other sources authorized, which can include recognized canons of statutory construction and other interpretive principles. If these methods and sources still did not resolve the ambiguity in the text, I would consult the categories of legislative history that have been identified by the Supreme Court and Second Circuit as most reliable. *See, e.g., United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) (identifying committee reports as "among the most authoritative and reliable materials of legislative history").

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

Response: In any case involving the potential relevance of agency advice or analysis, I would faithfully follow binding Supreme Court and Second Circuit (or Federal Circuit, where appropriate) regarding when agency advice or analysis should be consulted and what weight, if any, it should be given. For example, under current Second Circuit precedent, there are circumstances where the Copyright Office's interpretation should be given deference. *See WPIX v. ivi*, 691 F.3d 275, 279-80 (2d Cir. 2012).

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: Under canons of judicial ethics, it would not be appropriate for me as a judicial nominee to opine as to my beliefs about a matter that could come before me as a judge, lest future litigants think that I had pre-judged the issues in their case. If I

were presented with a case involving the issue of the obligation of online service providers to take remedial action regarding copyrighted material, I would faithfully apply binding Supreme Court and Second Circuit precedent, including precedent interpreting the Digital Millennium Copyright Act and its "safe harbor" provisions, to the facts of the case before me.

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

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

Response: As to statutory construction generally, please see my response to Question 15(a), above. I have experience as a litigator with applying older statutes to rapidly changing technology, given my role in the appeals in *In re A Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation, Microsoft Corporation v. United States*, 855 F.3d 53 (2d Cir. 2017), so I have some familiarity with how judges can use precedent, including as to sources and interpretive methods, in this sort of situation. I would note, however, that although the Supreme Court granted certiorari in this case, the matter was ultimately resolved by Congress amending the Stored Communications Act to address the issue in dispute. Because matters involving the application of statutes in an environment of rapid technological change are quite likely to come before me if I am confirmed as a judge, it would not be appropriate for me to opine further. If I were presented with such a case as a judge, I would faithfully apply binding Supreme Court and Second Circuit precedent to the particular facts of the case before me.

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

Response: Please see my response to Question 16(a), above.

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

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

Response: "Judge shopping" and "forum shopping" can potentially undermine public confidence in the fair administration of justice. The issues described in the question are unlikely to arise in the Southern District of New York, however, because there are no divisions staffed by only one judge, and assignment of cases as between Manhattan and the White Plains division is governed by the Rules for the Division of Business Among District Judges, rather than by the choices or preferences of litigants. Within each of the two divisions, matters are assigned randomly.

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

Response: Please see my response to Question 17(a), above. If I were confirmed, I would expect matters to be filed and assigned according to the Rules for the Division of Business and would ensure proper action was taken to correct any known divergence from those Rules. The only other role for a district judge on this issue in the Southern District of New York arises when parties identify matters as "related" to already pending matters. In such circumstances, I would follow all applicable rules and consult with my colleagues as necessary to ensure that my handling of such requests comported with the rules and promoted confidence in the fair administration of justice.

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: Federal judges have an obligation to follow all applicable rules and laws, and to comport themselves in a manner that "promotes public confidence in the integrity and impartiality of the judiciary," *see Code of Judicial Conduct, Canon 3A(3), commentary.* It is difficult to imagine a circumstance where "forum selling" as described in this question would be consistent with this principle.

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

Response: Please see my response to Question 17(c), above.

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

Response: Please see my response to Question 17(a), above.

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

Response: Please see my response to Question 17(a), above.