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

1. **According to your Committee Questionnaire, you currently serve as the Deputy Chief of the Civil Division of the United States Attorney's Office for the Southern District of New York. According to the office's website: "Civil Division AUSAs are currently representing the United States Military Academy at West Point in a lawsuit seeking to enjoin the use of race as a factor in admissions, as a violation of Equal Protection."[1]**

   a. **When did you first learn of this lawsuit?**

      Response: September 2023.

   b. **Did you have any role in approving, reviewing, or assisting with any aspect of this litigation or related litigation?**

      Response: No.

      i. **If yes, please explain your role, including why you approved this lawsuit if you did.**

         Response: Not applicable.

   c. **Have you reviewed, approved, edited, or written any document related to this case? If yes, please identify which documents.**

      Response: No.

   d. **Have you offered any advice on this litigation?**

      Response: I was once consulted by the Deputy Chief responsible for supervising this matter regarding a procedural question. Our interaction was brief, lasting no more than a few minutes. Other than that interaction, I have not provided any advice regarding this litigation.

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[1] *Civil Division Priorities*, U.S. ATT'YS OFF. S.D.N.Y., https://www.justice.gov/usao-sdny/civil-division-priorities#.

e. **Have you sent, received, or been copied on any email, digital messages, or other communications involving this lawsuit? If yes, please explain the nature of these communications.**

Response: Other than as described in response in Question 1.d, I have had no substantive communications regarding this matter.

f. **Have you otherwise played any role in this case?**

Response: No.

g. **Have you ever expressed any reservations or opposition to this case?**

Response: This question calls for the disclosure of internal communications among counsel for the Government regarding the merits of a pending litigation. I am prohibited from doing so by the canons of professional responsibility.

h. **Have you had any involvement whatsoever in any other lawsuits related to the use of race, sex, transgender identification or similar characteristic in education admission or financial aid decisions?**

Response: Not to my recollection.

i. **If yes, please cite the case or matter, describe the issue, and explain your involvement.**

Response: Not applicable.

2. **According to your Committee questionnaire, you served a member of the New York City Bar Association's Committee on Lesbian, Gay, Bisexual, Transgender and Queer Rights. In 2011, the Committee issued a report entitled "Report on Repealing the Medicaid Exclusion of Medically Necessary Health Services for Transgender New Yorkers." The report argued for New York State Medicaid to cover gender reassignment treatments.**

a. **Did you have any involvement whatsoever with this report, including but not limited to drafting, reviewing, approving, or voting on it?**

Response: I had no involvement in drafting or editing this document. I do not recall whether I reviewed this report before it was issued or if I participated in any vote to approve the issuance of this report.

i. **If yes, please explain your role.**

Response: See above.

b. **Do you agree with the substance of this report?**

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the merits of any matter pending or impending in any court. The issues addressed in the referenced report, regarding the provision of "transition-related medical services" for those who identify as transgender, are implicated in a number of cases currently pending in both federal and state courts.

c. **Are "transition-related medical services" including "hormone therapy, and sex reassignment surgery" medically necessary?**

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the merits of any matter pending or impending in any court. The issues addressed in the referenced report, regarding the provision of "transition-related medical services" for those who identify as transgender, are implicated in a number of cases currently pending in both federal and state courts.

d. **By extension, should the state cover gender reassignment or affirming treatment for minors?**

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on matters of policy that are reserved for the legislative and executive branches. I am also precluded from commenting on the merits of any matter pending or impending in any court. The issues addressed in the referenced report, regarding the provision of "transition-related medical services" for those who identify as transgender, are implicated in a number of cases currently pending in both federal and state courts.

i. **At what age should this coverage begin?**

Response: Please see my response to Question 2(d).

ii. **Should this coverage extend to reversal care should a patient change his or her mind regarding his or her identified gender?**

Response: Please see my response to Question 2(d).

3. **The New York City Bar Association's Committee on Lesbian, Gay, Bisexual, Transgender and Queer Rights also drafted a report for then Governor Cuomo recommending that his office take "concrete actions. . . to ensure that the New York State LGBT population is appropriately represented on the bench," including appointing openly LGBT judges.**

    a. **Is a bench less diverse because it has LGBT judges that choose to not openly state their sexual orientation?**

    Response: No.

    b. **Would a clerkship candidate's sexual orientation or "gender identity" factor into your decision to offer a clerkship?**

    Response: No. While I believe that diversity across all metrics is an important goal, as it increases public confidence in the judicial system, this can best be achieved through an open and transparent hiring process.

4. **While you were a member of the New York City Bar Association's Federal Courts Committee, it released a statement stating that mandatory minimums "results in excessively severe penalties," and "have greatly exacerbated racial disparities" amongst federal offenders.**

    a. **Do you agree with this statement?**

    Response: I believe this question references the Committee's December 8, 2015 letter to Congress in support of the proposed bipartisan Sentencing Reform and Corrections Act of 2015. The excerpted language quoted above referred not to mandatory minimums generally, but to mandatory minimums for non-violent drug offenses. The sentence in question reads in full: "The problem created by mandatory minimum sentences is particularly acute with respect to the mandatory minimums currently imposed for non-violent drug offenses, which often result in excessively severe penalties relative to the gravity of the offense, are in large part responsible for the enormous growth of the federal prison population, and have greatly exacerbated racial disparities in the treatment of federal offenders."

I had no involvement in drafting or editing this letter. I do not recall whether I reviewed this letter before it was issued or if I participated in any vote to approve the issuance of this letter.

The appropriateness of mandatory minimums is a policy question reserved to the legislative and executive branches. Just as I have defended legislative enactments and executive branch policies as an Assistant United States Attorney for the past 21-years under four different Presidential administrations without regard for any personal policy preferences I might have, were I be to confirmed as a judge, I would faithfully and impartially apply the laws enacted by Congress.

b. **Are mandatory minimums racist?**

Response: No.

c. **Is it appropriate to consider a defendant's race in sentencing?**

Response: No, race should play no role in a judge's sentencing analysis. Indeed, the Sentencing Guidelines prohibit any consideration of race, sex, or national origin. U.S.S.G. 5H1.10. If I were so lucky as to be confirmed, I would not consider a defendant's race in determining an appropriate sentence.

5. **Are you a citizen of the United States?**

Response: Yes.

6. **Are you currently, or have you ever been, a citizen of another country?**

Response: No.

a. **If yes, list all countries of citizenship and dates of citizenship.**

Response: Not applicable.

b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**

Response: Not applicable.

i. **If not, please explain why.**

Response: Not applicable.

7. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant oral argument? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

8. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant additional oral argument time? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

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

   Response: I disagree with this statement. A district court judge is obligated to faithfully and impartially apply all binding precedents of the United States Supreme Court and the relevant United States Court of Appeals to the record before the court, regardless of the judge's personal views or preferences.

10. **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: No, it is not. A district court judge is obligated to faithfully and impartially apply all binding precedents of the United States Supreme Court and the relevant United States Court of Appeals to the record before the court, regardless of the judge's personal views or preferences.

11. **Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be disqualifying for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

    Response: Yes.

12. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full**

responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."

Response: Yes.

13. **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: A prisoner may file an appeal as of right from the final judgment of conviction to the Court of Appeals. A prisoner may also seek modification of a sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure. A prisoner may file a motion under 28 U.S.C. § 2255 to vacate, set aside, or modify the sentence upon the ground 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." A prisoner may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Prisoners may also file a motion for compassionate release, or seek a modification of a sentence where a "sentencing range . . . has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)." 28 U.S.C. § 3582(c).

14. **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: In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), the Supreme Court held that the University of North Carolina's use of race in its admissions policies violated the Equal Protection Clause of the Fourteenth Amendment, and that Harvard College's use of race in its admission program violated Title VI of the 1964 Civil Rights Act. Applying strict scrutiny, the Supreme Court determined that the programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points." *Id*. at 230.

15. **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?**

    Response: Yes.

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

Response: I have served on the Hiring Committee for the U.S. Attorney's Office for the Southern District of New York since 2010. Additionally, as Deputy Chief of the Civil Division, I participated in hiring decisions for certain positions within the Civil Division.

16. **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: No.

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

    Response: No.

18. **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: 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.

    Response: Not applicable.

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

    Response: Yes, race is a suspect class and government classifications made on the basis of race are subject to strict scrutiny under the Equal Protection Clause. *See, e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 206 (2023).

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

    Response: In *303 Creative*, the Supreme Court held that the Free Speech Clause of the First Amendment prohibited a website designer from being compelled by state anti-

discrimination laws to create websites celebrating same-sex marriages, and thereby be forced to convey a message contrary to her religious beliefs.

21. **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: Yes, this statement from *Barnette* remains good law. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 584-85 (2023).

22. **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: In conducting an analysis of whether a law is content-based or content-neutral, I would faithfully follow binding Supreme Court and Second Circuit precedent. In *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015), the Supreme Court explained that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." The Supreme Court has instructed that relevant considerations include whether the law at issue explicitly regulates particular subject matter, whether it regulates speech by its function or purpose, or whether, although facially neutral, the law "cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 163-64 (citations omitted).

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

    Response: "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes." *Counterman v. Colorado*, 600 U.S. 66, 69 (2023). "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Id.* at 74. Whether a particular statement constitutes a "true threat" is determined "solely on the objective content" of the statement at issue. *Id.* at 72. But in order for such speech to be unprotected by the First Amendment, the speaker must have acted recklessly in making the statements, such that the speaker is aware "'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 79 (citation omitted).

24. **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: The Supreme Court has observed that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). Moreover, the precise line-drawing between facts, mixed questions of law and fact, and questions of law can depend upon the context in which the issue arises. *See, e.g.*, *id.* (analyzing whether the voluntariness of a confession is a factual or legal issue under the habeas statute); *see also Wilkinson v. Garland*, 601 U.S. 209 (2023) (distinguishing between factual questions and mixed legal and factual questions under the Immigration and Naturalization Act). Generally speaking, however, factual questions encompass "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (citation omitted).

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

    Response: Judges are required by statute to consider each of the above-listed purposes of sentencing in fashioning an appropriate sentence. 18 U.S.C. § 3553(a)(2). Congress has not ranked or weighted these factors. If confirmed, I would faithfully and impartially consider and apply all the factors set forth in section 3553 when determining an appropriate sentence, as well as follow all binding precedent from the Second Circuit and the United States Supreme Court.

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

    Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided.

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

    Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Second Circuit's reasoning, or whether a case before that circuit was correctly decided.

28. **Please explain your understanding of 18 U.S.C § 1507 and what conduct it prohibits.**

Response: This section of the criminal code prohibits a person from picketing, parading, or using a sound-truck or similar device "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" "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."

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

    Response: I am not aware of any binding precedent addressing the constitutionality of section 1507, although the United States Supreme Court has upheld a state statute modeled on section 1507 that prohibited picketing or parading near a state courthouse. *Cox v. State of Louisiana*, 379 U.S. 559 (1965). In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the merits of any matter pending or impending in any court.

30. **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: In my current role as a nominee to the United States District Court for the Southern District of New York, I am ordinarily precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. However, there are certain Supreme Court decisions that are considered to be so foundational that their validity is highly unlikely to ever be challenged. Accordingly, following the precedent set by other nominees, I am able to respond that yes, *Brown v. Board of Education* was correctly decided.

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

       In my current role as a nominee to the United States District Court for the Southern District of New York, I am ordinarily precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. However, there are certain Supreme Court decisions that are considered to be so foundational that their validity is highly unlikely to ever be challenged. Accordingly, following the precedent set by other nominees, I am able to respond that yes, *Loving v. Virginia* was correctly decided.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. I note, however, that this case has been overturned by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), and is thus no longer good law.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. I note, however, that this case has been overturned by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), and is thus no longer good law.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent. I note, however, that much of the reasoning of this case has been rendered obsolete by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

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?**

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was

correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. If I were to be confirmed, I would faithfully apply this binding Supreme Court precedent.

31. **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 framework established by the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). First, a court must determine if the challenged regulation or statute infringes upon the right protected by the Second Amendment, which is the individual right to carry weapons for lawful purposes, such as self-defense. *Bruen*, 597 U.S. at 24; *Heller*, 554 U.S. at 595. If it does, "the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

32. **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, including Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond, requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Jen Dansereau, and/or Becky Bond? If so, who?**

Response: Not to my knowledge.

33. **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, including, but not limited to, Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris, requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

Response: No.

b. **Are you currently in contact with anyone associated with the Alliance for Justice including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Alliance for Justice, including, but not limited to: Rakim Brooks, Betsy Miller Kittredge, Nan Aron, Jake Faleschini, and/or Zachery Morris? If so, who?**

Response: Not to my knowledge.

34. **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.

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

b. **Are you currently in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**

Response: No.

i. **Please include in this answer anyone associated with Arabella's subsidiaries, including the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

c. **Have you ever been in contact with anyone associated with Arabella Advisors, including, but not limited to: Eric Kessler, Himesh Bhise, Joseph Brooks, Isaiah Castilla, and/or Saurabh Gupta?**

Response: Not to my knowledge.

i. **Please include in this answer anyone associated with Arabella's subsidiaries, such as the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, the North Fund, or any other such Arabella dark-money fund that is still shrouded.**

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

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

Response: No.

b. **Are you currently in contact with anyone associated with the Open Society Foundations, including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Open Society Foundations including but not limited to: George Soros, Alexander Soros, Mark Malloch-Brown, and/or Binaifer Nowrojee?**

Response: No.

d. **Have you ever received any funding, or participated in any fellowship or similar program affiliated with the Open Society network?**

Response: Not to my knowledge.

36. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**

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

Response: No.

b. **Are you currently in contact with anyone associated with Fix the Court, including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Fix the Court including, but not limited to: Gabe Roth, and/or Josh Cohen? If so, who?**

Response: Not to my knowledge.

37. **The Raben Group is a lobbying group that "champions diversity, equity, and justice as core values that ignite our mission for impactful change in corporate, nonprofit, government and foundation work." The group prioritizes judicial nominations and its list of clients have included the Open Society Foundations, the American Civil Liberties Union, the New Venture Fund, the Sixteen Thirty Fund, and the Hopewell Fund. It staffs the Committee for a Fair Judiciary.**

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

Response: No.

b. **Are you currently in contact with anyone associated with The Raben Group, including but not limited to: Robert Raben, Donald Walker, Patty First, Joe**

Onek, Gara LaMarche, Steve Sereno, Dylan Tureff and/or Katherine Huffman? If so, who?

Response: Although I am unfamiliar with the Raben Group, I have been in contact with Robert Raben in his prior role as Endorsement Chair for the Hispanic National Bar Association (the "HNBA"). The HNBA has a process by which members can seek the HNBA's endorsement for a judgeship. I submitted a request for such endorsement in June 2021. Shortly thereafter, I was copied on an email with various officers of the HNBA, including Robert Raben. I also spoke with him briefly at that time regarding the HNBA endorsement process. In July 2021 I interviewed via Zoom with members of the HNBA Judicial Endorsements Committee; Mr. Raben was one of the interviewers on that panel. I received the HNBA's endorsement in August 2021. In the following years, I had periodic contact with Mr. Raben, as it was my practice to send updates to HNBA officers, including Mr. Raben, whenever there were developments with respect to my application for a judgeship.

c. **Have you ever been in contact with anyone associated with The Raben Group including but not limited to: Robert Raben, Donald Walker, Patty First, Joe Onek, Gara LaMarche, Steve Sereno, Dylan Tureff, and/or Katherine Huffman? If so, who?**

   Response: Please see response to Question 37(b).

d. **Has anyone associated with the Raben Group offered to assist you with your nomination, including but not limited to organizing letters of support?**

   Response: Please see response above.

38. **The Committee for a Fair Judiciary "fights to confirm diverse and progressive federal judges to counter illegitimate right-wing dominated courts" and is staffed by founder Robert Raben.**

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

       Response: No.

    b. **Are you currently in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with the Committee for a Fair Judiciary, including, but not limited to: Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, and/or Joe Onek? If so, who?**

Response: I am unfamiliar with the Committee for a Fair Judiciary, but I have been in contact with Robert Raben in connection with his prior role as Endorsement Chair of the HNBA, as described in my response to Question 37(b) above.

39. **The American Constitution Society is "the nation's foremost progressive legal organization" that seeks to "support and advocate for laws and legal systems that redress the founding failures of our Constitution, strengthen our democratic legitimacy, uphold the role of law, and realize the promise of equality for all, including people of color, women, LGBTQ+ people, people with disabilities, and other historically excluded communities."**

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

Response: No.

b. **Are you currently in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

Response: I am a member of the American Constitution Society.

c. **Have you ever been in contact with anyone associated with the American Constitution Society including, but not limited to Russ Feingold? If so, who?**

Response: I had a brief phone conversation with Russ Feingold in or about May or June 2022. It was a solicitation call seeking a donation to the American Constitution Society. During this call, we did not discuss my application to be a district court judge. I am not aware of being in contact with any other members of the leadership of the American Constitution Society.

40. **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).**

On April 2, 2021, I submitted an application to Senator Kirsten Gillibrand's office. On April 13, 2021, I interviewed with a member of Senator Gillibrand's staff. On August

10, 2021, I submitted an application through Senator Charles Schumer's electronic portal. I interviewed with Senator Schumer's Screening Committee on November 19, 2021. In August 2022, I communicated with a member of Senator Schumer's screening committee about providing them with supplemental material. I interviewed with a member of Senator Schumer's staff on March 13, 2023. I spoke with members of Senator Schumer's staff in April, May, and June 2023, and January 2024, and was asked to provide additional supplemental material.

In January 2024, I was contacted by a member of Senator Gillibrand's staff, who requested an updated copy of my application. On January 31, 2024, I interviewed with Senator Gillibrand. I was informed that same day that the Senator was recommending my name to the White House for further consideration. On February 2, 2024, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On March 20, 2024, the President announced his intent to nominate me.

41. **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.

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

    Response: No.

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

    Response: No.

44. **During or leading up to 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.

45. **During or leading up to 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.

46. **During or leading up to your selection process, did you talk with any officials from or anyone directly associated with The Raben Group or the Committee for a Fair Judiciary, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

    Response: Please see my response to Question 37(c).

47. **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.

48. **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?**

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

    On February 2, 2024, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On March 20, 2024, the President announced his intent to nominate me.

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

    Response: I received these questions from the Office of Legal Policy on the evening of April 24, 2024. I completed a draft of answers on my own, conducting legal research and consulting my personal records as necessary. I provided the draft to an attorney from the

Office of Legal Policy and had one conversation about my responses. I submitted my final answers to the Office of Legal Policy for transmission to the Senate Judiciary Committee

Senator Mazie K. Hirono
Senate Judiciary Committee

Nominations Hearing | April 17, 2024
Questions for the Record for Jeannette A. Vargas

Sexual Harassment
As part of my responsibility as a member of this committee to ensure the fitness of nominees, I ask each nominee to answer two questions:

QUESTIONS:

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

   Response: No.

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

   Response: No.

Senator Mike Lee
Questions for the Record
Jeannette A. Vargas, Nominee for District Court Judge for the Southern District of New York

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

   Response: My approach to judging would be to be fair, to be impartial, to be respectful to those who appear before me, to move cases along expeditiously, to carefully develop the factual record, to faithfully follow the law and binding precedent, to diligently apply that law to the factual record, and to follow wherever the law and facts may lead me, with an open mind and without predetermining the result.

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

   Response: In deciding a case that turned upon the interpretation of a federal statute, I would first determine if there was any binding United States Supreme Court or Second Circuit precedent that had already construed the specific statutory provision at issue. If so, I would faithfully follow that precedent. If there was not, then I would analyze the text of the statute, including the statutory structure and context in which the provision appears. If I was able to determine the plain meaning of the statutory provision based upon that textual analysis, I would apply that plain meaning to the record in the case before me. If the text was ambiguous, I would employ relevant canons of statutory interpretation, as set forth in binding precedent, to assist in determining the meaning of the statute. I would also consult binding Supreme Court and Second Circuit precedent that looked at similar language in the statute at issue or analogous statutory contexts.

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

   Response: In deciding a case that turned upon the interpretation of a constitutional provision, I would first consult any United States Supreme Court or Second Circuit precedent that sets forth the framework to be applied with respect to the constitutional provision at issue, and faithfully apply that framework to the record before me. In the situation in which I was confronted with a constitutional question of first impression, I would start with the plain text of the provision in question. I would also consider any sources that the Supreme Court has directed are appropriate for interpreting the provision at issue, such as, e.g., historical texts and practices in analyzing cases that arise under the Second Amendment. Additionally, I would consult analogous Supreme Court and Second Circuit precedent, as well as any persuasive authority from other courts of appeals or district courts.

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

Response: The United States Supreme Court has instructed that text and original meaning play a significant role in the analysis of Constitutional provisions. For example, the Supreme Court has held that courts should look to the original meaning of both the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008), and the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004), in construing the scope of those provisions.

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.

6. **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 plain meaning of a statute refers to the public understanding of the relevant language at the time of enactment. *Bostock v. Clayton Cnty.*, *Georgia*, 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

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

Response: The constitutional requirements for standing under Article III of the Constitution are 1) the plaintiff must have suffered an injury in fact, defined as "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical'[;]" 2) there must be a causal connection between the injury and the conduct complained of that is fairly traceable to the challenged action; and 3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

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

Response: Congress has the powers enumerated in Article I of the Constitution. The Necessary and Proper Clause of the Constitution also expressly grants Congress the authority to enact all laws "necessary and proper for carrying into execution" those enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316, 353 (1819).

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

Response: The Supreme Court has made clear that the "'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

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

Response: The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Additionally, the Supreme Court has held that the Due Process Clause of the Constitution protects certain fundamental yet unenumerated rights that are "'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) (citations omitted). The Supreme Court has recognized as fundamental the right of married couples to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to marry someone of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to marry someone of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

11. What rights are protected under substantive due process?

Response: The Supreme Court has held that the Due Process Clause of the Constitution protects certain fundamental yet unenumerated rights that are "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' . . . ." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotations omitted). The Supreme Court has recognized as fundamental the right of married couples to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to marry someone of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to marry someone of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: The Supreme Court has determined that the Due Process Clause protects certain fundamental yet unenumerated rights that are "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' . . . ." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotations omitted). The Supreme Court has recognized as fundamental the right of married couples to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to marry someone of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to marry someone of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015). As the Supreme Court overruled *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*, 57 S. Ct. 578 (1937), and has referred to the *Lochner* line of cases as "discredited"

and "erroneous," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 292 (2022), *Lochner* is no longer good law.

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

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . ." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Accordingly, if Congress purports to legislate under the Commerce Clause, but such legislation does not fall within one of these three delineated categories, it has exceeded its authority under the Commerce Clause.

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

Response: The Supreme Court has held that a suspect class under the Equal Protection Clause is one that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Supreme Court has recognized race, *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967), ethnicity, *see, e.g.*, *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) religion, *see, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and national origin, *see, e.g.*, *Oyama v. California*, 332 U.S. 633 (1948), as suspect classes.

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

Response: Separation of powers and checks and balances are fundamental to our system of government. The Founders deliberately enacted this structure, including among other things bicameralism, separation of the legislative and executive power, the Presidential veto, and judicial review, in order to ensure that no branch of government could overreach its authority or encroach upon the rights of the people. *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

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

Response: The Constitution confers upon the judicial branch the ultimate authority in matters involving Constitutional interpretation. *See, e.g.*, *United States v. Nixon*, 418

U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* . . . that '(i)t is emphatically the province and duty of the judicial department to say what the law is.'").

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

Response: None.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: They are equally problematic. Invalidating a law that is constitutional results in the judiciary arrogating authority that properly belongs to the legislative branch, in violation of the separation of powers enshrined in the Constitution. Upholding a law that is unconstitutional also violates the Constitution, as it improperly subjects the people of the United States to legislation that Congress did not have authority to enact.

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

Response: I am not familiar with these statistics and have never undertaken to study what historical forces could have led to this change. With respect to whether the judiciary should be "aggressive" or "passive" in its exercise of judicial review, courts should be neither. "'Proper respect for a coordinate branch of the government' requires that [courts] strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)). Yet courts cannot abdicate their obligation to enforce the limitations imposed by the Constitution by refusing to strike down unconstitutional legislation. *Sebelius*, 567 U.S. at 538 ("Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.").

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

Response: Judicial review is the authority of federal courts to review the laws and policies enacted by the other branches of government to determine their

constitutionality, as established in the seminal case of *Marbury v. Madison*, 5 U.S. 137 (1803). Judicial supremacy refers to the related principle that the Constitution confers upon the judicial branch the ultimate authority in matters involving Constitutional interpretation. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* . . . that '(i)t is emphatically the province and duty of the judicial department to say what the law is.'").

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

Response: As a nominee to the United States District Court for the Southern District of New York, I cannot speak to how an elected official should weigh competing ethical obligations. Elected officials are required by Article VI to take an oath to support the United States Constitution, however. Moreover, elected officials have lawful avenues with which to address any disagreement with decisions of the judiciary, including through appeal to a higher court if available, or through the Article V amendment process. If I were so lucky as to be confirmed, and a case came before me that involved an elected official's refusal to comply with judicial decisions, I would follow binding Supreme Court and Second Circuit precedent. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958).

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

Response: Federalist 78 speaks to the limited nature of the authority conferred upon the judiciary under the separation of powers established by the Constitution. The judicial branch resolves cases and controversies, and in that context has supremacy to "to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). But the judicial branch cannot exercise the authority of the other branches of government; it cannot, for example, enact legislation, impose taxes, determine matters of foreign policy, or declare war. Those are powers conferred exclusively on other branches of government under our Constitutional system.

23. **As a federal judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a federal 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 federal judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: Under the vertical hierarchy of the federal courts, the duty of a district court judge is to apply the controlling precedent of the relevant Court of Appeals and the United States Supreme Court to the facts of a particular case, regardless of the judge's personal views regarding the soundness of the reasoning of such precedent. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Exp., Inc*., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has *direct* application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (emphasis added)). If a particular precedent does not, however, speak directly to the issue before the district court, then it is not controlling under the principles of vertical stare decisis. The proper course would be for such district court judge to explain why the prior precedent is distinguishable, determine whether there is binding precedent that more closely speaks directly to the issue before the court, and to follow such binding precedent if it does exist. Moreover, if a prior precedent of the Court of Appeals or the United States Supreme Court has been undermined by subsequent decisions of those courts, calling into question the continuing validity of such precedent, a lower court should hesitate to extend that prior precedent to new contexts.

24. **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 judge's sentencing analysis?**

Response: These characteristics should play no role in a judge's sentencing analysis. Indeed, the Sentencing Guidelines prohibit any consideration of race, sex, or national origin. U.S.S.G. 5H1.10. If I were so lucky as to be confirmed, I would not consider any of these factors in determining an appropriate sentence.

25. **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 this statement. The Oxford English Dictionary defines equity as, *inter alia*, "fairness, impartiality; even-handed dealing." I agree that judges should always strive to be fair, impartial and even-handed in their treatment of all individuals that come before them, regardless of their personal status or backgrounds.

26. Without citing a dictionary definition, do you believe there is a difference between "equity" and "equality?" If so, what is it?

Response: As stated above, equity refers to the concept of fairness, impartiality, and even-handedness. Equality refers to the state of being equal or the same. They are distinct concepts. They can overlap, however. For example, a judge must strive to treat all litigants that appear before the court equally, which is to say fairly and impartially.

27. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 25)?

Response: I am not familiar with the statement listed in question 25. And I am not aware of this definition, or any similar formulation, being used by either the Supreme Court or the Second Circuit in interpreting the scope of the Equal Protection Clause. If I were so lucky as to be confirmed, I would faithfully apply the body of Supreme Court and Second Circuit caselaw that sets forth the framework for analyzing issues arising under the Equal Protection Clause.

28. According to your current understanding, and without citing a dictionary definition, how do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism" but generally my understanding of the term is that it refers to institutionalized or structural systems that mark one race as inferior to another, such as the institutions of slavery, segregation, or Jim Crow laws.

29. According to your current understanding, and without citing a dictionary definition, how do you define "Critical Race Theory?"

Response: I do not have a personal definition of "Critical Race Theory" but generally my understanding of the term is that it refers to a multidisciplinary field of academic scholarship that examines the relationship between race and the law. Critical Race Theory posits that race is a social construct and that racism is embedded in certain laws, societal structures and institutions, thereby creating and perpetuating unequal outcomes for persons of color.

30. Do you distinguish "Critical Race Theory" from "systemic racism," and if so, how?

Response: My understanding is that Critical Race Theory is a field of academic scholarship. Systemic racism, in contrast, is a concept that is explored in this field of scholarship.

31. **You are a member of the American Constitution Society. In the last ten years, ACS has accepted nearly $5 million from George Soros' Open Societies Foundation. Do you belong to any other Soros-funded organizations?**

    Response: I have no knowledge of Open Societies Foundation, or any other entities affiliated with George Soros, and am unaware of what organizations they may or may not fund. A complete list of my memberships is set forth in my Senate Judiciary Questionnaire.

32. **While serving as a member of the New York City Bar Association's Committee on Lesbian, Gay, Bisexual, Transgender and Queer Rights, the Committee released several statements and briefs. You stated during previous questioning that you do not recall your votes to approve many of the statements made by the committee, but you remained an active member despite some of the more radical positions adopted by the committee. In one report, the committee recommended that New York's governor take "concrete actions . . . to ensure the New York State LGBT population is appropriately represented on the bench," including the "[a]ppointment of Openly LGBT Judges." Do you believe that a person should be chosen over another equally qualified candidate for lifetime appointment to the federal bench based off of their sexual orientation or gender identity?**

    Response: I do not believe that a person should be chosen for the federal bench based solely on their sexual orientation or gender identity.

33. **Similarly, you served as a member of the New York City Bar Association's Federal Courts Committee. As with the prior committee, you claim to not recall your role in the drafting of that committee's statements nor your votes on their adoption, but you maintained your membership despite these statements. This committee wrote negatively about mandatory minimum sentences, stating that mandatory minimums have "greatly exacerbated racial disparities." Do mandatory minimum sentencing requirements specify different minimum sentences according to a defendant's race? Are mandatory minimum sentences inherently racist?**

    Response: I am not aware of any statute setting forth a mandatory minimum sentence that specifies different minimum sentences according to a defendant's race. I do not subscribe to the view that mandatory minimum sentences are inherently racist. If I were so lucky as to be confirmed, I would faithfully adhere to all applicable laws, including those imposing mandatory minimum sentences, in imposing any sentences.

34. **While serving as Deputy Chief of the Civil Division, did you oversee the attorneys working on *Students for Fair Admissions v. United States Military***

***Academy at West Point*? If so, did you approve of the briefs filed by your office in that case?**

Response: I was not the supervisor assigned to *Students for Fair Admissions v. United States Military*, and am not familiar with the arguments made by the United States in that matter.

35. In *Students v. United States Military*, your office filed an argument stating that "[t]he Army has concluded that diversity in the officer corps is vital to national security because it [] fosters cohesion and lethality . . . ." How does racial diversity "foster . . . lethality"?

Response: I was not the supervisor assigned to *Students for Fair Admissions v. United States Military*, and am not familiar with the arguments made by the United States in that matter.

36. Is it appropriate for the federal government to suppress specific viewpoints unfavorable to the government? Is it proper for the federal government to exploit third parties to suppress those viewpoints? Is it true that the White House identified Alex Berenson as a party who should be removed from Twitter for his posts concerning COVID-19?

Response: With respect to the first question, government regulation of speech based on the viewpoint expressed is prohibited by the Free Speech Clause of the First Amendment unless such regulation is narrowly tailored to serve a compelling government interest. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

With respect to the second question, the Supreme Court has held that "the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019). Under the Supreme Court's state action doctrine, actions by private entities can qualify as actions of the state, and thereby implicate the First Amendment, only "in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function . . . ; (ii) when the government compels the private entity to take a particular action . . . ; or (iii) when the government acts jointly with the private entity . . . ." *Id.* at 809.

The final question appears to refer to my representation as an Assistant United States Attorney of various current and former government officials, sued in their official and individual capacities, in *Berenson v. Biden*, 23-cv-03048 (S.D.N.Y.), a case which is currently pending in the United States District Court for the Southern District of New York. The canons of professional responsibility prohibit me from disclosing confidential information received in the course of that representation or from discussing the merits of that pending matter beyond what is set forth in the Government's public filings. Moreover, in my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by

the Code of Conduct for United States Judges from commenting on the merits of any matter pending or impending in any court.

37. You appeared as counsel on behalf of President Biden and other executive officials in *Berenson v. Biden*. In a Motion to Dismiss, you argued that "there is no plausible, non-speculative allegations that Twitter is or was responding to President Biden's or [his agent]'s alleged actions rather than enforcing its own content-moderating policies," and that there is "no plausible allegation that federal officials coerced Twitter." However, in Berenson's Complaint, you were made aware of private communications between two Twitter employees which stated that the White House "had one really tough question about why Alex Berenson hadn't been kicked off the platform." Why did you decide that the Twitter employees' conversation did not constitute plausible evidence?

Response: As an Assistant United States Attorney, I represent various current and former government officials, sued in their official and individual capacities, in *Berenson v. Biden*, 23-cv-03048 (S.D.N.Y.), a case which is currently pending in the United States District Court for the Southern District of New York. This question calls for me to set forth my mental processes with respect to this representation, which I am prohibited from doing by the canons of professional responsibility. I note, however, that the arguments set forth in the Memorandum of Law in Support of the Federal Defendants' Motion to Dismiss the Complaint were made in my role as advocate, as with any arguments made in my capacity as an Assistant United States Attorney.

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

Questions for the Record for Jeanette Vargas, nominated to be United States District Judge for 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: Yes, invidious racial discrimination is wrong and illegal under a number of federal anti-discrimination statutes.

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

Response: The Supreme Court has held that the Due Process Clause of the Constitution protects certain fundamental yet unenumerated rights that are "'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) (citations omitted). The Supreme Court has recognized as fundamental the right of married couples to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right to marry someone of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to marry someone of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015). Were I to be confirmed and confronted with a case involving a claim of an additional unenumerated right, I would evaluate that claim in accordance with binding Supreme Court and Second Circuit caselaw. Any personal beliefs and policy preferences I might have would play no part in my analysis.

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: My approach to judging would be to be fair, to be impartial, to be respectful to those who appear before me, to move cases along expeditiously, to carefully develop the factual record, to faithfully follow the law and binding precedent, to diligently apply that law to the factual record, and to follow wherever the law and facts may lead me, with an open mind and without predetermining the result. The role of a Supreme Court Justice is so distinct from that of a federal district court judge that it is difficult for me to assess which Justices from the past 50 years would share this approach to judging.

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[ically], 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." An originalist interpretation can look to historical sources and practices to confirm proper understanding of a textual reading. Were I to be confirmed, my obligation would be to faithfully follow binding Supreme Court and Second Circuit

precedent. *See, e.g.*, *Bostock v. Clayton Cnty*., *Georgia*, 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

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." Were I to be confirmed, my obligation would be to faithfully follow binding Supreme Court and Second Circuit precedent. *See, e.g.*, *Bostock v. Clayton Cnty*., *Georgia*, 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

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 would be exceedingly unusual to encounter a provision of the Constitution which neither the Supreme Court nor the Second Circuit has ever had occasion to interpret. But in this hypothetical scenario, I would employ the interpretive methods and canons of construction that the Supreme Court and the Second Circuit have utilized in interpreting analogous language in the Constitution.

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 instructed that prevailing societal norms and practices will have some relevance in assessing the scope of certain Constitutional provisions. *See, e.g.*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (First Amendment challenges to obscenity regulations evaluated in accordance with "contemporary community standards"); *Moore v. Texas*, 581 U.S. 1, 12 (2017) (evaluating Eighth Amendment claims by reference to "evolving standards of decency"). Were I to be confirmed, I would faithfully apply this binding precedent of the Supreme Court to any such cases that come before me.

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

   Response: No.

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

   Response: As a decision of the United States Supreme Court, *Dobbs* is binding precedent.

If I were to be confirmed, I would faithfully follow and apply this precedent. 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: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided.

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

Response: As a decision of the United States Supreme Court, *Bruen* is binding precedent. If I were to be confirmed, I would faithfully follow and apply this precedent. 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: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided.

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

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am ordinarily precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. However, there are certain Supreme Court decisions that are considered to be so foundational that their validity is highly unlikely to ever be challenged. Accordingly, following the precedent set by other nominees, I am able to respond that yes, *Brown v. Board of Education* is settled law.

a. **Was it correctly decided?**

Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am ordinarily precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided. However, there are certain Supreme Court decisions that are considered to be so foundational that their validity is highly unlikely to ever be challenged. Accordingly, following the precedent set by other nominees, I am able to respond that yes, *Brown v. Board of Education* was correctly decided.

12. **Is the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* settled law?**

Response: As a decision of the United States Supreme Court, *Students for Fair Admissions* is binding precedent. If I were to be confirmed, I would faithfully follow and apply this precedent. The ruling in *Students for Fair Admissions* 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: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided.

13. **Is the Supreme Court's ruling in *Gibbons v. Ogden* settled law?**

Response: As a decision of the United States Supreme Court, *Gibbons* is binding precedent. If I were to be confirmed, I would faithfully follow and apply this precedent. The ruling in *Gibbons* 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: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the quality of the Supreme Court's reasoning, or whether a case before the United States Supreme Court was correctly decided.

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

Response: Under the Bail Reform Act, certain drug offenses, and certain enumerated firearm, terrorism, and human trafficking offenses, as well as certain crimes with minor victims, carry a rebuttable presumption that pretrial detention should be imposed. *See* 18 U.S.C. § 3142(e)(3).

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

Response: The purpose of these presumptions 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).

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

Response: The Free Exercise Clause subjects any law that is not neutral towards religion to strict scrutiny, such that it must be narrowly tailored to satisfy a compelling government interest to survive. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17-18 (2020). The Religious Freedom Restoration Act subjects federal laws that substantially burden religion to strict scrutiny. And the Religious Land Use and Institutionalized Persons Act similarly subjects local land use laws that substantially burden religion to strict scrutiny.

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

Response: Invidious discrimination on the basis of religion is impermissible. The Free Exercise Clause subjects any law that is not neutral towards religion to strict scrutiny, such that it must be narrowly tailored to satisfy a compelling government interest to survive. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17-18 (2020). Moreover, under the Religious Freedom and Restoration Act, a generally applicable federal law that substantially burdens religious exercise must also satisfy strict scrutiny. And the Religious Land Use and Institutionalized Persons Act similarly subjects local

land use laws that substantially burden religion to strict scrutiny.

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

    Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), the Supreme Court held that plaintiffs were likely to prevail on the merits, and thus were entitled to a preliminary injunction. While generally applicable laws that are neutral towards religion are generally not subject to challenge under the Free Exercise Clause, laws that discriminate against religious exercise are subject to strict scrutiny. *Id.* at 17-18. Because the challenged executive order treated secular activity in the same zones preferably to religious activity, the Supreme Court determined that the executive order was not neutral towards religion, thus triggering strict scrutiny. *Id*. Applying strict scrutiny, the Court held that, while New York had advanced a compelling government interest, it had not demonstrated that the law was narrowly tailored to achieve that interest. *Id.* at 18-19.

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

    Response: In *Tandon v. Newsom*, 593 U.S. 61 (2021), the Supreme Court applied strict scrutiny to a challenge under the Free Exercise Clause to California COVID restrictions that limited home religious gatherings to three households. In doing so, the Supreme Court first concluded that the law at issue was not a generally applicable law that was neutral as to religion. *Id.* at 62. It reasoned that where a law treats any comparable secular activity favorably to religious activities, the law discriminated on the basis of religion. *Id.* The Court next concluded that injunctive relief was appropriate because California had not met its burden of demonstrating that the law was narrowly tailored, in light of the other precautions that could be taken to address its concerns regarding the spread of COVID. *Id.* at 63.

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

    Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617 (2018), the Supreme Court held that the Colorado Civil Rights Commission had violated the Free Exercise Clause when it required a baker to sell wedding cakes to same-sex couples, because in rendering its order the Commission had exhibited hostility towards the baker's religious beliefs. *Id.* at 637-39.

21. **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. So long as those beliefs are "rooted in religion," *Thomas v. Review Board of Indiana Employment Security Div*., 450 U.S. 707, 713 (1981), and are "sincerely held" and not pretextual, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014), religious beliefs are protected. It is not the province of the courts to assess whether asserted religious beliefs are reasonable or in line with the doctrine of any particular 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: Yes. See response to Question 21 above.

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

Response: See response to Question 21 above.

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

Response: I am aware from my own religious education that the Catholic Church condemns abortion.

22. **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 Supreme Court previously held that the First Amendment's Free Exercise and Establishment Clauses protect the right of religious institutions to decide matters of "faith and doctrine." *Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020). As a component of this independence, the Supreme Court established the ministerial exception, which forecloses judicial involvement in employment disputes regarding ministers, church leaders, or others who serve an important role in teaching matters of faith. *Id.* at 2061. In *Our Lady of Guadalupe*, the

Supreme Court held that the ministerial exception precluded the plaintiffs, elementary school teachers at private religious schools, from bringing employment discrimination claims, as their duties included religious education. *Id.* at 2066.

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

    Response: In *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 524 (2021), the Supreme Court held that Philadelphia's decision to terminate its contract with a Catholic foster care agency that refused to certify same-sex or unmarried couples as foster parents on the basis of its religious beliefs violated the Free Exercise Clause. *Id.* at 535. The Supreme Court rejected the argument that the anti-discrimination provisions in the city's contract with foster care providers was a generally applicable policy because the contract permitted the city to make individual exceptions to the provision in its sole discretion. *Id.* Accordingly, the Court applied strict scrutiny to the city's decision and found that it was not narrowly tailored to satisfy a compelling government interest.

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

    Response: In *Carson v. Makin*, 596 U.S. 767 (2022), the Supreme Court held that a Maine law that provided tuition assistance to students that attended nonsectarian secondary schools yet denied assistance to parents who elected to send their children to religious schools violated the Free Exercise Clause. The Free Exercise Clause prohibits the indirect penalizing of religious practice, as well as outright prohibitions. *Id.* at 778. Strict scrutiny applied to the law because the state excluded plaintiffs from receiving public benefits because of their religion. *Id.* at 780. The Supreme Court held that a neutral benefit program did not pose issues under the Establishment Clause, and thus Maine's asserted rationale of avoiding violations of the Establishment Clause was not a compelling interest justifying the disparate treatment. *Id.* at 781.

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

    Response: In *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the Supreme Court determined that the termination of a football coach for briefly praying on the football field after each game violated the Free Exercise and Free Speech Clauses of the First Amendment. With respect to the Free Exercise claim, it was undisputed that the termination was not for a neutral purpose, but because of his religious exercise. *Id.* at 526. The Supreme Court also found that plaintiff's prayer was protected by the Free

Speech Clause because his prayers were offered in his capacity as a private citizen, and was not speech that could be attributed to the government. *Id.* at 528-29. Applying strict scrutiny, the Supreme Court rejected the argument that concerns about violations of the Establishment Clause justified the termination. *Id.* at 532.

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

    Response: Justice Gorsuch's concurrence in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), explained certain errors made by the state courts in adjudicating this case arising under the Religious Land Use and Institutionalized Persons Act. In particular, the lower courts allowed Fillmore County to assert a generalized compelling interest in the installation of septic systems. *Id.* at 2432. Yet the proper inquiry under the strict scrutiny test should have focused on whether Fillmore County had a compelling interest in refusing to grant the Amish plaintiffs an exception to this requirement. *Id.* This was particularly true where other secular groups had been granted such exceptions. *Id.*

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

    Response: In my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the merits of any matter pending or impending in any court. If I were so lucky to be confirmed, and a case came before me raising the constitutionality of section 1507, I would faithfully apply relevant Supreme Court and Second Circuit precedent, including as appropriate, the Supreme Court's decision in *Cox v. State of Louisiana*, 379 U.S. 559 (1965), which upheld a state statute modeled on section 1507 that prohibited picketing or parading near a state courthouse.

28. **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.

29. **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.

30. **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.

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

Response: I am unaware of any binding Supreme Court or Second Circuit caselaw addressing this question. Moreover, in my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from opining on questions that could be the subject of future litigation.

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

Response: Facially neutral programs or practices that have a racially disparate impact can violate federal anti-discrimination laws. The Supreme Court has held that in such cases, there need not be any evidence of intentional race discrimination; however, disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 521 (2015).

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

Response: These are policy questions reserved to the legislative and executive branches. I would faithfully apply Supreme Court precedent regardless of the number of justices on the Court.

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

illegitimate?

Response: No.

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

Response: Under the Second Amendment, regulations or statutes that infringe upon the individual right of a law-abiding citizen to keep and carry weapons "in common use" for lawful purposes, such as self-defense, are presumptively unconstitutional. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

36. **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: Under the Second Amendment, regulations or statutes that infringe upon the individual right of a law-abiding citizen to keep and carry weapons "in common use" for lawful purposes, such as self-defense, are presumptively unconstitutional. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). To justify such regulation, the government must demonstrate "that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). In *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court determined that bans on the possession of handguns in the home were unconstitutional; in *Heller*, the Supreme Court also struck down a requirement that any firearms in the home be rendered inoperable. 554 U.S. at 628-29. In *Bruen*, the Supreme Court struck down a New York law that required a showing of "proper cause" to be licensed to carry a concealed handgun. 597 U.S. at 70.

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: No.

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

Response: No.

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

Response: "Article II of the Constitution assigns the 'executive Power' to the President and provides that the President 'shall take Care that the Laws be faithfully executed.' U. S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *United States v. Texas*, 599 U.S. 670, 678 (2023) (citation omitted). The Supreme Court has further explained that the Executive Branch is permitted to prioritize its enforcement efforts because it "(i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people." *Id*. at 679-80.

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

Response: Prosecutorial discretion typically refers to a set of decisions by a prosecutor regarding whether to bring criminal charges, whom to charge with criminal offenses and what specific charges to bring. Although it is unclear what a "substantive administrative rule change" refers to in this context, the promulgation of agency regulations is governed by the Administrative Procedures Act.

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

Response: No.

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

Response: In *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 594 U.S. 758 (2021), the Supreme Court held that the Director of the Centers for Disease Control and Prevention did not have authority under the Public Health Service Act to impose a nationwide moratorium on evictions. The language of the statute, which delegated to the Surgeon General the authority to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases," could not be read to confer authority related to evictions. *Id.* at 763-64. Moreover, even if the text were ambiguous, the vast economic and political significance of the agency's claimed authority counseled against such a reading the statute. *Id.*

44. **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: Pursuant to the Justice Manual, the Department of Justice does not ordinarily disclose to the public the existence of a pending investigation. Justice Manual 1-7.410. The Justice Manual does permit disclosure of certain specified information once charges have been brought, including the name of the individual

charged and the substance of the charges. *Id.* 1-7.500.

45. **Your office is currently involved in two interesting cases. First, your office is defending the United States in *Students for Fair Admissions v. United States Military Academy at West Point*.**

   a. **Do you think the military academies admission policy should be different from every other university?**

   Response: Although I am not personally involved in the litigation of this matter, the United States Attorney's Office with which I am employed represents the Federal Defendants in this litigation. Accordingly, the canons of professional responsibility preclude me from opining on the merits of this pending litigation. Moreover, in my current role as a nominee to the United States District Court for the Southern District of New York, I am precluded by the Code of Conduct for United States Judges from commenting on the merits of any matter pending or impending in any court.

46. **Second, you are defending President Biden and other officials in a case alleging that the administration's attempts to combat the spread of false information regarding COVID-19 vaccines on social media constituted a violation of the First Amendment.**

   a. **In general, is social media censorship a danger to free speech?**

   Response: The Supreme Court has held that "the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019). Under the Supreme Court's state action doctrine, actions by private entities can qualify as actions of the state, and thereby implicate the First Amendment, only "in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function . . . ; (ii) when the government compels the private entity to take a particular action . . . ; or (iii) when the government acts jointly with the private entity . . . ." *Id.* at 809.

   b. **Is the concentration of corporate power that can, if desired, stifle public discussion of particular issues or viewpoints, a danger to democracy?**

   Response: I have not undertaken a study of this issue, and thus do not have an opinion. Moreover, this appears to be a policy issue that is reserved to the legislative and executive branches.

47. **Are you a member of the American Constitution Society?**

Response: Yes.

a. **Do you agree with ACS supporters that "racism is baked into our laws" and into "our institutions that interpret and apply those laws"?**

Response: I am unfamiliar with these statements, or which ACS supporters this question refers to. This statement does not represent my view of our laws, which I would faithfully uphold if I were so lucky as to be confirmed as a district court judge.

b. **Do you agree with ACS supporters who believe that "our country's founding document was encoded with white supremacy since its inception" and that it "continues to infect our economic, legal, educational, and health systems"?**

Response: I am unfamiliar with these statements, or which ACS supporters this question refers to. This statement does not represent my view of our laws, which I would faithfully uphold if I were so lucky as to be confirmed as a district court judge.

c. **Should judges use their "lived experiences" in judging or should judges just interpret the law without resorting to individual policy preferences?**

Response: Judges must apply the law faithfully and impartially, without reference to individual policy preferences. Were I to be so lucky as to be confirmed, I would faithfully and impartially follow the law and binding precedent, regardless of my own individual policy preferences.

d. **Does upholding the "rule of law" mean intimidating Supreme Court Justices' in front of their homes?**

Response: No.