Senator Lindsey Graham, Ranking Member
Questions for the Record
Mary Kay Lanthier
Nominee to be United States District Judge for the District of Vermont

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

   Response: Yes.

2. **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.**
   b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**
      i. **If not, please explain why.**

3. **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.

4. **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.

5. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: Generally speaking, no. The laws of other countries are not binding precedent in questions involving the interpretation of the United States Constitution. The United States Supreme Court, however, has referred to foreign law to provide historical background of several constitutional provisions. *See, e.g., New York State Rifle and Pistol Association v. Bruen*, 597 U.S. 1, 39-45 (2022); *Crawford v. Washington* 541 U.S. 36, 42-47 (2004). If the United States Supreme Court or the Second Circuit instructs courts to consider foreign law in a particular area of constitutional interpretation, then it would be appropriate to do so.

6. **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.

7. **In a concurrence in the denial of rehearing en banc in *Al–Bihani v. Obama* then-Judge Kavanaugh wrote: "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms." Is this a correct statement of law?**

   Response: Yes. In *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008), the United States Supreme Court stated that "while treaties 'may comprise international commitments. . .they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'" [citation omitted].

8. **Please define the term "prosecutorial discretion."**

   Response: Black's Law Dictionary (11th ed. 2019) defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court."

9. **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. The role of a federal district judge is to faithfully and impartially apply the law to the facts of a case.

10. **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.

11. 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.

12. 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 in custody under sentence of a federal court may seek relief from the sentence imposed in the following ways: (1) the prisoner may file a direct appeal of the district court's judgment under 28 U.S.C. § 1291; (2) the prisoner may move to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255; (3) the prisoner may file a petition for a writ of habeas corpus under 28 U.S.C. § 2241; or (4) the prisoner may file a motion to modify a term of imprisonment under 28 U.S.C. § 3582(c).

13. 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. University of North Carolina* and *Students for Fair Admissions v. President and Fellows of Harvard College*, petitioners argued that the admissions process used at both the University of North Carolina and Harvard violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Both institutions considered the race of applicants as one of many factors in its admission process. The Supreme Court held that the policies discriminated based on race and therefore were subject to review under the strict scrutiny standard. Applying this standard, the Court held that the policies violated both Title VI and the Equal Protection Clause.

14. 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: As the supervising attorney in a staff public defender office, I have participated in the hiring process, although I have not been responsible for final hiring decisions.

15. 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, sex, sexuality, or gender identity?

Response: No.

16. Have you ever solicited applications for employment on the basis of race, ethnicity, religion, sex, sexuality, or gender identity?

Response: No.

17. 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, sex, sexuality, or gender identity?

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.

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

Response: Yes.

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

Response: In *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), the Supreme Court held that Colorado's Anti-Discrimination Act could not be used to compel a website designer to create a website that promoted same-sex marriage where same-sex marriage was contrary to the website designer's strongly held religious beliefs. The Court concluded that requiring the website designer to make such statements violated the website designer's First Amendment free speech rights.

20. 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. The holding in *West Virginia State Board of Education v. Barnette* remains precedent.

21. 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 determining whether a law that regulates speech is "content-based" or "content-neutral," I would follow all Supreme Court and Second Circuit precedent. "A content-based regulation 'target[s] speech based on its communicative content,' restricting discussion of a subject matter or topic." *Vidal v. Elster*, 602 U.S. ___ (2024) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). I would first look to the face of the regulation to determine if it is content-neutral. Even if the regulation is facially content-neutral, however, the Supreme Court has held that "[i]f there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction. . .that restriction may be content based." *City of Austin v. Reagan*, 596 U.S. 61, 76 (2022).

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

Response: "'True threats' of violence is [an] historically unprotected category of communications." *Counterman v. Colorado*, 600 U.S. 66, 74 (2023). "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Id*. (quoting *Virgina v. Black*, 538 U.S. 343, 359 (2003)). The existence of a true threat does not depend on the subject intent of the speaker, but instead focuses on "what the statement conveys" to the recipient. *Id*.

23. 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 recognized that the "proper characterization of a question as one of fact or law is sometimes slippery." *Thompson v. Keohane*, 516 U.S. 99, 110-11 (1995). Questions of fact are often described as the basic, primary, or historical facts, including the "who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge*, 583 U.S. 387, 394 (2018). It may also involve questions

whose "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor." *Thompson v. Keohane*, 516 U.S. 99, 111 (1995). Application of the law to established and undisputed facts is a question of law. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020).

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

Response: Congress has identified the factors a federal judge must consider when imposing a sentence in 18 U.S.C. § 3553. The factors include the four referenced in this question as well as others. The statute does not identify one factor to be more or less important than the others. If I am confirmed, I will consider all of the factors outlined in 18 U.S.C. § 3553 in making each sentencing determination.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the quality of the reasoning in Supreme Court decisions. If confirmed, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the quality of the reasoning of the decision of the Second Circuit. If confirmed, I would follow all Supreme Court and Second Circuit precedent.

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

Response: Section 1507 of Title 18 of the United States Code provides:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise of any court of the United States of its power to punish for contempt."

28. Is 18 U.S.C. § 1507 constitutional?

Response: I am not aware of any authority declaring 18 U.S.C. § 1507 unconstitutional. The Second Circuit addressed the constitutionality of a comparable, although not identical, statute. *See Picard v. Magliano*, 42 F.4th 89 (2d Cir. 2022). In *Magliano*, the Second Circuit cited the Supreme Court's decision in *Cox v. Louisiana*, 379 U.S. 559 (1965) which upheld the constitutionality of a similar state statute.

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

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

Response: Yes. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. Consistent with the practice of prior judicial nominees, however, *Brown v. Board of Education* falls within a small number of cases that is so unlikely to ever be relitigated that I can say it was correctly decided.

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

Response: Yes. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. Consistent with the practice of prior judicial nominees, however, *Loving v. Virginia* falls within a small number of cases that is so unlikely to ever be relitigated that I can say it was correctly decided.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned *Roe v. Wade*. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned *Planned Parenthood v. Casey*. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit 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: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: When evaluating whether a regulation or statutory provision infringes on Second Amendment rights, I would apply all Supreme Court and Second Circuit precedent. The Supreme Court has held that the right to keep and bear arms is a fundamental right. *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). The right, however, is not unlimited. *District of Columbia v. Heller*, 554, U.S. 570, 626 (2008). "[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. [citation omitted.] A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *United States v. Rahimi*, 602 U.S. ___ (2024); slip op. at 7.

31. 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: No.

32. **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: No.

33. **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?**
        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.**

    Response: No.

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?**
    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.**

    Response: No.

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?**
    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.**

    Response: No.

34. **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: No.

35. 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: No.

36. 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: No.

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: No.

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: No.

37. 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.

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: No.

38. 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: No.

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: No.

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

Response: On December 1, 2023, I submitted an application to the judicial screening committee established by Senator Sanders and Senator Welch. I interviewed with the committee on January 26, 2024. On March 25, 2024, I met with Senator Sanders' chief of staff and learned my name had been forwarded from the committee. I met with Senator Welch on April 5, 2024. I interviewed with Senator Sanders on April 9, 2024. On April 10, 2024, staff from Senator Welch and Senator Sanders' offices advised that my name was being recommended as a potential candidate. I met with attorneys from the White House Counsel's Office on April 10, 2024. Since April 10, 2024, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 23, 2024, the President announced his intent to nominate me.

40. 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: Not to my knowledge.

41. 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: Not to my knowledge.

42. 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: Not to my knowledge.

43. 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: Not to my knowledge.

44. 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: Not to my knowledge.

45. 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: Not to my knowledge.

46. 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: Not to my knowledge.

47. 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: The selection of which cases to include on my committee questionnaire was my decision. I spoke with a number of people, including individuals from the Office of Legal Policy, about which cases to include to best reflect the entirety of my legal career.

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?**

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

Response: I met with attorneys from the White House Counsel's Office on April 10, 2024. Since April 10, 2024, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 23, 2024, the President announced his intent to nominate me.

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

Response: On June 27, 2024, I received the Questions for the Record from the Office of Legal Policy at the Department of Justice. I reviewed the questions and prepared my responses. I submitted my draft answers to the Office of Legal Policy. I received and considered limited feedback from the Office of Legal Policy. I finalized my answers and submitted them to the Office of Legal Policy.

Senator Hirono Questions for the Record for the June 20, 2024, Hearing in the Senate Judiciary Committee entitled "Nominations."

QUESTIONS FOR MARY KAY LANTHIER

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.

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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
Mary Kay Lanthier, Nominee to the U.S. District Judge for the District of Vermont

1. How would you describe your judicial philosophy?

Response: If I am confirmed as a district court judge, my judicial philosophy will consist of considering each case presented to me with an open-mind, carefully listening to the evidence presented to me, considering the arguments of the parties, conducting my own research of the issues, and issuing a decision that explains my reasoning in clear language that allows the parties to understand what is being decided and why the decision is being reached.

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

Response: If I am confirmed as a district court judge, I would first look to see if the Supreme Court or Second Circuit had interpreted the statutory provision at issue. If there was no such precedent, I would start with the text of the statute and determine if there were any relevant statutory definitions. If the plain meaning of the statute is unambiguous, the analysis would end there. If the language was ambiguous, I would apply the various principles of statutory construction, as authorized by Supreme Court and Second Circuit precedent. I would also look to see if other circuits or district courts had interpreted the statute and consider their analysis as well as legislative history.

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

Response: If I am confirmed as a district court judge, I would start with Supreme Court and Second Circuit precedent interpreting the constitutional provision. I would follow that precedent. I believe it would be rare to address a question involving the interpretation of a constitutional provision that had not been interpreted by the Supreme Court or Second Circuit. If I was presented with such a question, I would look to the text of the provision and the meaning of the word or words at issue. I would also look to the method of interpretation that the Supreme Court or Second Circuit has used in similar circumstances. I would also consider the analysis used by other circuits or district courts if they had interpreted the same provision.

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

Response: The Supreme Court has held that the text and original meaning of a constitutional provision play an important role in interpreting the Constitution. *See, e.g., United States v. Rahimi*, 602 U.S. ___ (2024), slip op. at 6 (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment).

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

Response: Please see my response to Question 2.

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

Response: The Supreme Court has commented it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 590 U.S. 644, 654 (2020).

6. What are the constitutional requirements for standing?

Response: To establish standing, a plaintiff must demonstrate that (i) they have suffered or likely will suffer an injury in fact; (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief. *Lujan v. Defenders of* Wildlife, 504 U.S. 555, 560-561 (1992). These three requirements are essential parts of the Article III case or controversy requirement. *Id*. at 560.

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

Response: Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. *See McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: I would look to Supreme Court and Second Circuit precedent to decide whether Congress had the constitutional authority to enact a law. *E.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 568-70 (2012) ("constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise").

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

Response: The Supreme Court has held that the "Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of

physical restraint. [citations omitted]. The Clause also provides heightened protection against government interference with certain fundamental and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The unenumerated rights recognized by the Supreme Court include the right to marry a person of a different race, to marry a person of the same gender, to have children, to direct the education and upbringing of one's children, to engage in private, consensual sexual acts, to use contraception, and, in certain circumstances, not to undergo involuntary surgery, forced administration of drugs, or substantially similar procedures. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 256-57 (2022).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The Supreme Court has decided that the right to abortion is not a protected substantive due process right. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231 (2022). The Supreme Court overturned *Lochner v. New York*, 198 U.S. 45 (1905) in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If I am confirmed, I will apply Supreme Court and Second Circuit precedent to any case that comes before me.

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

Response: The Supreme Court has recognized three categories of activity that Congress may regulate under the Commerce Clause. Congress "may regulate the use of the channels of interstate commerce," "may 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," and "regulate those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

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

Response: The Supreme Court has held that statutes that classify by race, religion, alienage, or national origin are subject to strict scrutiny. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The role of checks and balances and separation of powers in the Constitution's structure is to protect against abuse of power and to protect individual liberties. The Supreme Court has stated that "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

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

Response: If I am confirmed, I will consider Supreme Court and Second Circuit precedent, and the text of the Constitution to determine if one branch assumed an authority not granted to it by the text of the Constitution. There are a number of ways in which this issue could be raised and I would look to the relevant Supreme Court and Second Circuit precedent relating to the particular issue. I would also look to the text of the Constitution. *See*, *e.g., Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (executive branch assumed power belonging to legislative branch in eliminating federal student loan debt); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 568-70 (2012) ("constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise").

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

Response: Judges must decide cases by impartially applying the law to the facts of a case. Personal feelings should play no role in the decision.

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

Response: Both are to be avoided.

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

Response: I have not studied the history and frequency of the Supreme Court's use of judicial review to strike down federal statutes during these two historical periods. If I am confirmed as a district court judge, I will apply Supreme Court and Second Circuit precedent to any case that comes before me.

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

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

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

Response: Article VI of the Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . .shall be the Supreme Law of the Land." Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The Supreme Court stated that the decision in *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional government." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As a district court nominee, it would be inappropriate of me to comment on how an elected official should balance his or her obligations.

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

Response: Judges have a limited role. They do not exercise the authority given to the Executive branch. They do not exercise the authority given to the Legislative branch. Judges are tasked with applying the law as enacted to the facts presented to them.

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

Response: A district court judge must follow precedent of the Supreme Court and the relevant circuit court. A district court judge "should follow the case which directly controls, leaving to the [Supreme Court] the prerogative of overruling its own decisions. [citation omitted]. This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" *Mallory v. Norfolk Southern Railway, Co.*, 600 U.S. 122, 136 (2023) (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 474 (1989)). If I am confirmed as a district court judge, I will apply Supreme Court and Second Circuit precedent to any case that comes before me.

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

Response: None. A judge must consider the factors set forth in 18 U.S.C. § 3553 when sentencing an individual. The United States Sentencing Guidelines include a policy statement that a defendant's "race, sex, national origin, creed, religion, and socio-economic status" are not relevant in the determination of a sentence. U.S.S.G. § 5H1.10.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "equity" as "[f]airness; impartiality; evenhanded dealing." If I am confirmed as a district court judge, and the definition of "equity" were to be an issue in a case before me, I would apply Supreme Court and Second Circuit precedent.

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

Response: If I am confirmed, and the definition of "equity" and "equality" were to be an issue in a case before me, I would research the use of those words, following all Supreme Court and Second Circuit precedent.

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

Response: The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. I am not aware of Supreme Court or Second Circuit precedent that has applied the definition of "equity" articulated in question 24 to this constitutional provision.

27. How do you define "systemic racism?"

Response: I am not aware of a universally agreed upon definition for systemic racism. The Merriam-Webster Dictionary defines "systemic racism" as "the oppression of a racial group to the advantage of another as perpetuated by inequity within interconnected systems (such as political, economic, and social systems)."

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

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

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

Response: I have not studied or substantively considered the meaning of these two phrases sufficiently so as to be able to distinguish them. Please see my responses to Questions 27 and 28.

30. You have been a member of the National Association of Criminal Defense Lawyers since 2010. NACDL has a number of extreme views on sentencing sex offenders. For example, NACDL opposes sex offender registration and community notification laws. Do you agree with this position?

Response: I have not been involved in the development of the policy statements and priorities of the National Association of Criminal Defense Lawyers. The appropriateness of sex offender registration and community notification laws is a policy determination that should properly be made by legislatures. If I am confirmed as a district court judge, I would apply the law, including laws enacted by Congress relating to sex offender registration and community notification, and Supreme Court and Second Circuit precedent to any case that should come before me.

31. NACDL also opposes residence restriction laws for sex offenders. Do you share this view?

Response: I have not been involved in the development of the policy statements and priorities of the National Association of Criminal Defense Lawyers. The appropriateness of residence restrictions for sex offenders is a policy determination that should properly be made by legislatures. If I am confirmed as a district court judge, I would apply the law, including laws enacted by Congress regarding residence restrictions, and Supreme Court and Second Circuit precedent to any case that should come before me.

32. NACDL has put out strong statements on matters of race in the justice system as well. NACDL has published its views as follows:

"the same criminal legal system that was developed after the Civil War to reimpose control over African Americans exists today. Imprisonment has been and continues to be used as a weapon to control communities of color in ways that aren't used in other communities. We see this in the crack-cocaine sentencing disparity, the over policing of black communities, the excessive criminal fines and fees imposed on defendants, and a bail system that relies on payment to secure one's freedom."

Do you agree with this statement?

Response: I have not been involved in the development of the policy statements and priorities of the National Association of Criminal Defense Lawyers. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on issues that might come before me.

33. Given these strong statements by a group of which you have been a member for fourteen years, will you tend towards not requiring sex offender registration or community notification of sex offenders? Will you refrain from placing residence restrictions on sex offenders? Will you consider the color of a person's skin when sentencing them?

Response: If I am confirmed to be a district court judge, I will follow and apply the law to any case that should come before me as it relates to sex offender registration, community notification of and residence restrictions on sex offenders. In terms of my considerations in sentencing, please see my answer to Question 23.

34. You wrote an article, *Children's Right to be Heard*. You wrote: "parents who fear that they are losing control over a daughter's sexuality may report her to juvenile court as a runaway."

What are the limits on parents' rights to direct the upbringing of their children?

Response: The Supreme Court has recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). "[S]o long as a parent adequately cares for his or her children. . .there will normally be no reason for the State to inject itself into the private realm of the family. . . ." *Id*. at 68.

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

Questions for the Record for Mary Kay Lanthier, nominated to serve as United States District Judge for the District of Vermont

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.

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: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the issues that may come before me. If I am confirmed as a district court judge, I would apply all Supreme Court and Second Circuit precedent for identifying rights not enumerated in the Constitution, including the test set forth by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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: If I am confirmed as a district court judge, my judicial philosophy will consist of considering each case presented to me with an open-mind, carefully listening to the evidence presented to me, considering the arguments of the parties, conducting my own research of the issues, and issuing a decision that explains my reasoning in clear language that allows the parties to understand what is being decided and why the decision is being reached. My nomination as a district court judge is to a role that is different than that of a Supreme Court justice and I am not familiar with each of the justices' philosophies to identify one as being most analogous to mine.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings that they had when they were adopted; specif.,the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." If confirmed as a district court judge, I would apply interpretative methods as directed by all precedent from the Supreme Court and Second Circuit.

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 "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." If

confirmed as a district court judge, I would apply interpretative methods as directed by all precedent from the Supreme Court and Second Circuit.

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

Response: If faced with a constitutional issue of first impression, I would look to the precedent from the Supreme Court and Second Circuit. In general, the Supreme Court and Second Circuit have articulated the test that should be applied when considering the application of a constitutional provision to a new factual situation or question. I would look to the tests and standards articulated by the Supreme Court and the Second Circuit and apply that test to the new factual question. If there was truly no test provided by the Supreme Court or Second Circuit, I would look to how the Supreme Court and Second Circuit evaluated analogous constitutional provisions to obtain a framework for interpreting the constitutional issue.

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: When determining the meaning of the Constitution or a statute, I would apply binding Supreme Court and Second Circuit precedent. The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment should be determined by current social norms. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

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

Response: No. Changes to the Constitution may only be accomplished through the amendment process set forth in Article V.

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

Response: Yes.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

settled law?

Response: Yes.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: Yes.

a. Was it correctly decided?

Response: Yes. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. Consistent with the practice of prior judicial nominees, however, *Brown v. Board of Education* falls within a small number of cases that is so unlikely to ever be relitigated that I can say it was correctly decided.

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

Response: Yes.

a. Was it correctly decided?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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

Response: Yes.

a. Was it correctly decided?

Response: Yes. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the correctness of Supreme Court precedent. Consistent with the practice of prior judicial nominees, however, *Gibbons v. Ogden* falls within a small number of cases that is so unlikely to ever be relitigated that I can say it is correctly decided.

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

Response: Offenses which trigger a presumption in favor of pretrial detention in the federal criminal system are outlined in 18 U.S.C. § 3142(e)(3). They include certain drug offenses for which there is a maximum penalty of ten years or more, certain firearms offenses, conspiracy to commit several crimes, including murder and kidnapping, acts of terrorism, human trafficking, and certain offenses involving minor victims. There is also a rebuttable presumption of pretrial detention in cases where the defendant is alleged to have committed certain offenses while on pretrial release or has specified prior convictions. 18 U.S.C. § 3142(e)(2).

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

Response: Under the Bail Reform Act in 18 U.S.C. § 3142, pretrial detention is appropriate where a judicial officer determines that release will not reasonably assure the appearance of the individual charged or will endanger public safety. Statutes providing for presumptions of pretrial detention are policy decisions that are properly left to the legislative branch. If I am confirmed as a district court judge, I would follow the law as enacted by the legislature.

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: Yes. In the context of religious freedom, there are a number of limits on the government's ability to impose restrictions on organizations. For example, anti-discrimination laws cannot compel a business to express a message with which it disagrees. *See 303 Creative v. Elenis*, 600 U.S. 570 (2023). State governments may not make decisions based on animus toward religion. *See Masterpiece Cake Shop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018). Laws that treat religious organizations differently will not be permitted unless the law survives review under strict scrutiny. *Tandon v. Newsom*, 593 U.S. 61 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). Additionally, the Religious Freedom Restoration Act precludes the federal government from substantially interfering with the religious freedom of businesses unless justified by strict scrutiny. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The Supreme Court has held that laws which discriminate against religious organizations or religious people must survive strict scrutiny review. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).

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: The Supreme Court found that petitioners were entitled to a preliminary injunction having satisfied the criteria for one. First, the Supreme Court found there was a likelihood of success on the merits, because the regulations were not neutral toward religion in that they "single[d] out houses of worship for especially harsh treatment." *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 17 (2020). As a result, the restriction needed to be "narrowly tailored" to serve a compelling state interest, which the Court concluded it was not. Second, the Court found that petitioners would suffer irreparable harm if the injunction was not granted. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. at 19. Finally, the Supreme Court found that the State failed to show that public health would be harmed if less restrictions were imposed. *Id*.

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

Response: Petitioners sought an injunction barring the State of California from enforcing a restriction adopted during the COVID-19 pandemic which placed restrictions on at-home religious gatherings to three households, while permitting comparable secular activities, such as the operation of hair salons, retail stores, and restaurants. The Supreme Court determined the Ninth Circuit erred in refusing to grant the preliminary injunction, finding that petitioners met the criteria needed for such an injunction. The Supreme Court found that this restriction was not neutral and would not survive strict scrutiny, that there was a danger of irreparable harm, and that the State failed to establish the public would be harmed by less restrictive measures.

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

Response: Yes. *See, e.g., Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), the Colorado Commission Against Discrimination was tasked with evaluating the reasons why a cake shop owner declined to bake a wedding cake for a same-sex couple. The Supreme Court held that the Commission's treatment of the cake

shop owner and consideration of the owner's religious reasons for refusal to make the cake were hostile and the cake shop owner was not afforded neutral consideration as required by the First Amendment.

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. One is entitled to protection under the Free Exercise Clause of the First Amendment if based on sincerely held religious belief. *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). It is not for courts to decide if the distinction made by an individual is an unreasonable one, so long as it is a sincerely held religious belief. *Burwell v. Hobby Lobby*, 573 U.S. 682, 725 (2014).

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

Response: I am not aware of any limitations, so long as the religious belief is sincerely held. *Frazee v. Illinois Dep't of Emp. Sec.,* 489 U.S. 829, 834 (1989).

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

Response: I am not aware of any limitations, so long as the religious belief is sincerely held. *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989).

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

Response: I do not understand that to be the official position of the Catholic Church.

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: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), the question presented was whether teachers at two Catholic elementary schools were barred from pursuing employment discrimination claims against the schools. The question involved the breadth of the ministerial exception to laws governing the employment relationship between religious institution and certain employees. Under this exception, courts are required to stay out of employment disputes involving certain employees within churches and other religious schools. The Supreme Court reiterated that the First Amendment grants a religious school the right to decide for itself "matters of church government as well as those of faith and doctrine" without state interference.

The Court determined that the ministerial exception was not limited to those who enjoyed the title of minister, but should instead focus on the responsibilities of the employee. In this case, the Court held that the teachers were barred from pursuing employment discrimination claims because the specifics of their employment, educating and guiding students in the religion, constituted the performance of vital religious duties.

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*, 593 U.S. 522 (2021), the Supreme Court held that the City of Philadelphia's refusal to contract with Catholic Social Services to provide foster care unless the organization agreed to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. The Supreme Court held that the City of Philadelphia's policies both burdened the religious exercise of Catholic Social Services and were neither neutral nor generally applicable. Laws impacting the free exercise of religion that are neither neutral nor generally applicable are subject to strict scrutiny. The Supreme Court held that the City's three stated interests in refusing to grant Catholic Social Services an exemption, including maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and children were insufficient to justify the refusal to contract with organization under strict scrutiny.

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 was asked to decide whether Maine's system of paying for high school tuition violated the Free Exercise Clause of the First Amendment. The tuition program provided funds for communities without a public high school to pay tuition to an approved secondary school at which the student was accepted. In order to be approved, the school must be nonsectarian. The Supreme Court held this requirement did not survive review under strict scrutiny and violated the Free Exercise Clause, because the law excludes religious observers from otherwise public benefits solely because of their religious observance.

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 held that a high school's decision to take disciplinary action against a football coach who prayed by himself on the field after a game, at a time when coaches and

students had free time to answer phone calls, talk with family, or engage in other personal matters, violated the Free Speech and Free Exercise Clause. The Court held that the coach's activities and speech were singularly prohibited because of their religious nature. The Court rejected the school district's argued justification that it barred the conduct to avoid a violation of the Establishment Clause, finding that allowing the coach to pray in the manner in which he did would not be a violation of the Establishment Clause when viewed in reference to historical practices and understanding of the Clause.

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) highlights that the Religious Land Use and Institutionalized Persons Act (RLUIPA) required the lower courts to review the application of the ordinance to these homeowners using strict scrutiny. He emphasized that the lower courts "erred by treating the County's *general* interest in sanitation regulation as 'compelling' without reference to the *specific* application of those rules to *this community*. . .strict scrutiny demands 'a more precise analysis.'" *Id*. at 2432 (emphasis in original).

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: Section 1507 of Title 18 of the United States Code provides:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise of any court of the United States of its power to punish for contempt."

As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the application of this statute to factual situations that may come before me. If I am confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent.

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.

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: The power to make political appointments is a political decision vested with the appointing authority. As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the appropriateness of a political determination.

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

Response: The Supreme Court has "not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an

invidious racial discrimination forbidden by the Constitution." *Washington v. Davis*, 426 U.S. 229, 242 (1976). There are federal anti-discrimination claims which may be based on disparate impact. *E.g., Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519, 545 (2015) (disparate impact claims cognizable under Fair Housing Act); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971) (disparate impact claims cognizable under Title VII of the Civil Rights Act of 1964).

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

Response: I do not have an opinion as to this issue. This is an issue that is decided by Congress. *See* U.S. Const. art. III, sec. 1.

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: The Supreme Court has held that the Second Amendment protects the right of ordinary, law-abiding citizens to possess a gun for self-defense both inside and outside the home. *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 1, 10 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (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: The Supreme Court has held that to justify the regulation of the right to possess firearms, "the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. " *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 1, 17 (2022). Recently, the Court further explained that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *United States v. Rahimi,* 602 U.S. ___ (2024), slip op. at 6. In *Rahimi*, the Court held that individuals who pose a clear threat of physical violence to another and are subject to a domestic violence restraining order may be prohibited from possessing firearms.

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); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Association v.*

Bruen, 597 U.S. 1 (2022).

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

Response: No. "The constitutional right to bear arms in public for self-defense is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 70 (2022) [citation omitted].

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

Response: No. "The constitutional right to bear arms in public for self-defense is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022) [citation omitted].

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

Response: The Constitution vests the executive power in the President. U.S. Const. art. II, § 1. The President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has stated that "[u]nder 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) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021)). "[T]he Executive's enforcement discretion implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives.'" *Id*. at 679. Prosecutorial discretion, however, is not without all limits. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979) (selectivity in enforcement of criminal laws is subject to constitutional constraints). If I am confirmed as a district court judge, and this issue is presented in a case that should come before me, I would follow Supreme Court and Second Circuit precedent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." A change to a legislative administrative rule, which has the force and effect of law, requires compliance with the Administrative Procedure Act's notice and comment rulemaking process. *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 95-96 (2015).

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 Association of Realtors v. HHS*, 594 U.S. 758 (2021), the Supreme Court vacated a nationwide moratorium imposed by the Centers for Disease Control on evictions for tenants living in an area experiencing high levels of COVID-19 transmission, finding that petitioners met the criteria for an injunction, including likelihood of success on the merits, irreparable harm, equities were in favor of the petitioners, and the public interest did not compel the moratorium absent congressional action.

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: As a judicial nominee, it would be inappropriate for me to comment on the decisions of prosecutors. If I am confirmed, I would follow Supreme Court and Second Circuit precedent to any case that comes before me.

45. Are you a member of the National Association of Criminal Defense Lawyers?

Response: Yes.

a. When did you become a member?

Response: 2010.

46. Listed as one of its priorities, NACDL claims that it "opposes sex offender registration and community notification laws." Do you share those views?

Response: I have not been involved in the development of the policy statements and priorities of the National Association of Criminal Defense Lawyers. The appropriateness of sex offender registration and community notification laws is a policy determination that should properly be made by legislatures. If I am confirmed, I would apply the law, including laws enacted by Congress regarding sex offender registration and community notification, and Supreme Court and Second Circuit precedent to any case that should come before me.

47. NACDL also claims that it is opposed to residence restrictions for sex offenders. Do you share the views of the NACDL regarding residence restrictions?

Response: I have not been involved in the development of the policy statements and

priorities of the National Association of Criminal Defense Lawyers. The appropriateness of residence restrictions for sex offenders is a policy determination that should properly be made by legislatures. If I am confirmed, I would apply the law, including the laws enacted by Congress regarding residence restrictions for sex offenders, and Supreme Court and Second Circuit precedent to any case that should come before me.

48. NACDL claims that "the same criminal legal system that was developed after the Civil War to reimpose control over African Americans exists today" in the form of "over-policing in black communities."

a. Do you think we are "over-policing black communities?"

Response: I have not been involved in the development of policy statements or priorities of the National Association of Criminal Defense Lawyers. The question of whether we are "over-policing black communities" is a policy determination that should properly be considered by legislatures. If I am confirmed, I would apply the law, and Supreme Court and Second Circuit precedent to any case that should come before me.

b. NACDL also opposes mandatory minimum sentencing. Do you share the view that mandatory minimums should be eliminated?

Response: I have not been involved in the development of policy statements or priorities of the National Association of Criminal Defense Lawyers. I have neither written about nor advocated for the elimination of mandatory minimum sentences. Whether mandatory minimums should be eliminated is a policy determination that should properly be considered by legislatures. If I am confirmed, I would apply the law, including mandatory minimum sentences as required by Congress, and Supreme Court and Second Circuit precedent to any case that should come before me.

c. Do you believe it would be a civil rights violation to under-police blank communities?

Response: As a judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on issues that may come before me. If I am confirmed as a district court judge and this issue were presented to me, I would follow Supreme Court and Second Circuit precedent.