Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Jessica Clarke
Nominee to be United States District Judge for the Southern District of New York

1. **In July 2020, while working at the office of the New York Attorney General, you contributed to an investigative report about the N.Y.P.D. The report states that "too many New Yorkers no longer trust the police to do their jobs effectively and fairly." The report also recommends a "redesign" of the police and says that "minor" crimes should be decriminalized or legalized. It also said that offenses like disorderly conduct and trespassing "should also be examined" to be decriminalized.**

    a. **Which crimes do you believe should be decriminalized or legalized?**
    b. **According to the N.Y.P.D., overcall crime in the city was 11.2% higher in October 2021 than it was in October 2020. Given such a steep increase in crime, do you still believe the police should be "redesigned" and that the policing of "minor" crimes should be abandoned?**

    Response to all subparts: The report represents the policy position of the New York Attorney General. Because of my duties as a lawyer with the Office of the Attorney General, it would be inappropriate for me to give my personal opinions on the positions of my client. *See*, *e.g.*, New York Rule of Professional Conduct 1.1. If confirmed as a district court judge, I would set aside any prior policy work that I have done on behalf of clients and neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, to the facts of the case before me.

2. **In 2016, you signed a letter urging Northwestern University to "refuse to comply with federal authorities regarding deportations or immigration raids." The letter asked the university to declare Northwestern a "sanctuary" for illegal immigrants.**

    a. **Please describe your understanding of Supreme Court and Second Circuit precedent concerning the plenary power of the federal government to enforce the nation's immigration laws.**
    b. **In your view, is it lawful for universities and colleges to impede federal enforcement of immigration laws?**

    Response to all subparts: I signed this letter as an alumna of Northwestern University to show my support for students in the wake of hate crimes that happened on campus. I was in private practice at the time.

    As the Supreme Court stated in *Arizona v. United States*, 567 U.S. 387 (2012), "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *See also Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United

States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."); *City of New York v. United States*, 179 F.3d 29, 34 (2d Cir. 1999). The Supreme Court has further explained that immigration policy is "so exclusively entrusted to the political branches" of the federal government as "to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1962).

No individual or entity, including a college or university, is permitted to obstruct a federal investigation. Individuals and entities must comply with any lawful immigration order, warrant, subpoena, summons, or other process issued pursuant to 8 U.S.C. § 1101 *et seq*. *See also* 8 U.S.C. § 1373 ("[N]o person or agency may prohibit, or in any way restrict, a federal . . . government entity from" sending or requesting information regarding immigration status, maintaining such information, or exchanging such information with any other governmental entity.). If confirmed as a district court judge, I would neutrally and impartially apply all relevant law, including Supreme Court and Second Circuit precedent, regarding the federal government's enforcement of immigration laws.

3. **In 2020, you moderated a conversation on race and social justice. During the talk, you said that "[s]tructural racism and enduring racial disparities continue to exist in our country."**

   a. **Please define the term "structural racism."**

   Response: I referred to "structural racism" in introductory remarks that I gave during an event organized by the New York Attorney General's Office about the history of redlining in this country. The event included panelists from academia and non-profit organizations, who discussed the history of institutions, beginning in the 1930s, refusing to lend or insure mortgages in minority neighborhoods. The term "structural racism" was a reference to these historical, discriminatory policies and practices. The panelists also presented maps and other data purporting to show that communities that were historically redlined in several cities in New York remain predominantly minority neighborhoods today and that people in those communities are more likely to have negative health outcomes, have less accumulated wealth, and are more likely to have contact with the criminal justice system than those who live in communities that were not historically redlined in New York. The use of "enduring racial disparities" was a reference to these studies and maps that I knew the panelists were going to present.

   b. **In your view, is America a structurally racist country?**

   Response: As I testified at the Senate Judiciary Committee hearing, I am proud to have started my post-clerkship legal career with the Department of Justice, representing the United States in court. Questions about the extent to which

unfairness exists in American institutions are important ones for policymakers to consider. If confirmed as a district court judge, my role would not be to make policy, but to decide the individual case or controversy before me by neutrally and impartially applying the law, including Supreme Court and Second Circuit precedent, to the facts of the case.

4. **In a 2008 article, you recommended that the National Basketball Association use "restorative justice" rather than suspensions for NBA players who commit violent fouls. You suggested that "[r]estorative justice, in the form of victim-offender mediations and community impact panels" could "give offenders a better idea of what they did wrong and what effect their actions had on others."**

    a. **Please provide your understanding of "restorative justice" in the context of punishments for criminal acts.**
    b. **In your view, to what extent are federal judges empowered to use "restorative justice" to achieve the goals of criminal sentencing?**

    Response to all subparts: Thank you for the opportunity to clarify this article. At the outset, I want to make clear that the article I wrote was not advocating for the use of restorative justice in the criminal justice system. I wrote this article while in law school as part of a mediation seminar. If confirmed as a district court judge, I would follow all laws around sentencing, including the factors set forth in 18 USC § 3553(a), which do not include restorative justice.

5. **Please describe your understanding of Supreme Court and Second Circuit precedents concerning the permissibility of requiring prospective voters to show identification in order to vote.**

    Response: The Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) held that Indiana's law requiring voters to show identification in order to vote was not facially unconstitutional.

6. **Please list and explain your understanding of the Second Circuit cases you would rely on in evaluating claims regarding the use of excessive force by a police officer against an arrestee.**

    Response: When evaluating an excessive force claim, I would first look to Supreme Court precedent, including *Graham v. Conor*, 490 U.S. 386 (1989). There, the Court stated when confronting an excessive force claim against an officer by an arrestee: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. The Second Circuit has directed that determining reasonableness "requires careful attention to the facts and circumstances of each particular case including the following three factors: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight."

Brown v. City of New York, 798 F.3d 94 (2d Cir. 2015) (quoting *Graham*, 490 U.S. at 396) (internal quotations omitted).

7. **Under Second Circuit precedent, when, if ever, are federal courts required to apply a heightened rational basis review?**

   Response: The Second Circuit has followed Supreme Court precedent from *Plyler v. Doe*, 457 U.S. 202 (1982) and recognized that heightened rational basis review applies in circumstances involving "people who reside in the United States without authorization." *Dandamudi v. Tisch*, 686 F.3d 66, 74 (2d Cir. 2012).

8. **Please list and explain your understanding of the Supreme Court and Second Circuit cases you would rely on in evaluating claims regarding violations of the Free Exercise Clause.**

   Response: The Supreme Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877 (citing *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)). *See also*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "A law is not generally applicable if it invites the government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (internal quotations omitted). *See also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

   The Free Exercise Clause also creates a "ministerial exception" to employment discrimination laws, prohibiting courts from adjudicating "employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

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

   Response: In *Washington v. Glucksberg*, the Supreme Court recognized that one of the rights protected under substantive due process is the right to "direct the education and upbringing of one's children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. **When you are considering a case, do you have a process for ensuring that you correctly understand how the law should apply, without letting personal preferences shape your view? If so, what is your process or approach?**

    Response: When considering a case as an attorney, I set aside any personal preferences that I have, carefully research the law and consult with other attorneys who have worked on similar cases.

11. **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?**
    b. **Was *Loving v. Virginia* correctly decided?**
    c. **Was *Griswold v. Connecticut* correctly decided?**
    d. **Was *Roe v. Wade* correctly decided?**
    e. **Was *Planned Parenthood v. Casey* correctly decided?**
    f. **Was *Gonzales v. Carhart* correctly decided?**
    g. **Was *District of Columbia v. Heller* correctly decided?**
    h. **Was *McDonald v. City of Chicago* correctly decided?**
    i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

    Response to all subparts: As a judicial nominee, it would be inappropriate for me to comment on the legitimacy of any Supreme Court decision. If confirmed as a district court judge, I would be bound by, and would faithfully follow, Supreme Court precedent regardless of any personal views I hold. I will, however, join prior judicial nominees in making an exception with respect to *Brown v. Board of Education* and *Loving v. Virginia* because the legal precedents they establish—for example, the precedent that *de jure* segregation in public schools is unconstitutional—are unlikely to ever come before me as a judge if confirmed. I agree that those decisions were correctly decided.

12. **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 approximately February 7, 2021, I submitted a judicial questionnaire to Senator Schumer's Judicial Screening Committee. On March 24, 2021, I interviewed with the Committee. On May 30, 2021, I interviewed with Senator Schumer. On September 2, 2021, 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 United States Department of Justice. On December 15, 2021, my nomination was submitted to the Senate.

13. **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: I spoke to Chris Kang, who I understand previously worked on judicial nominations for the White House. We discussed generally how the nominations process works.

14. **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: An employee with the American Constitution Society congratulated me after Senator Schumer announced his recommendation of me to the White House.

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

    Response: No.

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

    Response: No.

17. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**

    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, and/or Jen Dansereau?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, and/or Jen Dansereau?**

Response: As stated in response to Question 13, I have spoken to Chris Kang with Demand Justice. I have not spoken to Brian Fallon, Tamara Brummer, Katie O'Connor or Jen Dansereau.

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

    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

    Response to all subparts: No.

19. **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? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.**
    b. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward 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? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.**

    Response to all subparts: No.

20. **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?**
    b. **Are you currently in contact with anyone associated with the Open Society Foundations?**
    c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

    Response to all subparts: No.

21. **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?**
    b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**
    c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

    Response to all subparts: No.

22. **Do the answers you have provided to these questions reflect your true and personal views?**

    Response: Yes.

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

    Response: On January 19, 2022, I received the Committee's questions from the Department of Justice's Office of Legal Policy (OLP). I reviewed each question, conducted research, reviewed my records and drafted answers. I provided my draft responses to OLP, and after receiving feedback, I revised my responses for submission.

Senator Marsha Blackburn
Questions for the Record to Jessica Clarke
Nominee for the Southern District of New York

1. **Do you believe in defunding the police?**

   Response: I have never advocated for defunding the police. As a government attorney and as an attorney who previously represented police officers and a police union while in private practice, I have great respect for law enforcement. I believe that police play an important role in protecting public safety. The amount of funding a particular department should receive is an important question for local policymakers and their constituents to decide.

2. **While working in the New York Attorney General's office in July 2020, you contributed to a report about the NYPD which recommended decriminalizing various crimes and removing several policing functions from the jurisdiction of law enforcement. The report recommended that "New York City should decriminalize or legalize" several offenses, including "marijuana possession, disorderly conduct, alcohol consumption, and trespassing." Do you stand by the recommendations and policing philosophy of this report?**

   Response: The report represents the policy position of the New York Attorney General. Because of my duties as a lawyer with the Office of the Attorney General, it would be inappropriate for me to give my personal opinions on the positions of my client. *See*, *e.g.*, New York Rule of Professional Conduct 1.1. If confirmed as district court judge, I would set aside any prior policy work that I have done on behalf of clients and neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, to the facts of the case before me.

3. **This report did not examine the effects that decriminalizing offenses and removing the police would have on safety and crime rates in New York. How do you think decriminalizing offenses and defunding and removing the police will affect public safety?**

   Response: The report did not advocate for removing funding from the NYPD or any other police department. The report set forth the Attorney General's position on increasing public confidence in police, while promoting public safety. Because of my duties as a lawyer with the Office of the Attorney General, it would be inappropriate for me to give my personal opinions on the positions of my client. *See*, *e.g.*, New York Rule of Professional Conduct 1.1. If confirmed as a district court judge, I would set aside any prior policy work that I have done on behalf of clients and neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, to the facts of the case before me.

4. **Do you acknowledge that unauthorized entry and reentry into the United States are federal crimes?**

Response: Yes. *See* 8 U.S.C. §§ 1325 & 1326.

5. **In April 2020, you authored a letter on behalf of Attorney General Letitia James that advised local authorities not to cooperate with federal immigration officials enforcing immigration law. This was a letter providing guidance for a New York law that prohibited State and local law-enforcement officers from arresting individuals for civil immigration violations. Do you believe police departments should not cooperate with federal immigration enforcement and protect violent criminals who are present in the United States unlawfully?**

   Response: State and local law enforcement are permitted under federal law to cooperate with federal immigration officials. 8 U.S.C. § 1357(g)(10). This includes permitting state and local law enforcement to enter into cooperation agreements "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). State and local law enforcement are also authorized, "to the extent permitted by relevant State and local law" to "arrest and detain an individual who (1) is an alien illegally present in the United States and (2) has previously been convicted of a felony." 8 U.S.C. § 1252c. The letter you asked about was written after a state appellate court in New York determined that New York state law does not permit state or local law enforcement to arrest or hold a person based on a civil law immigration violation or a civil immigration detainer. *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518 (2d Dep't 2018). The guidance issued notified New York law enforcement agencies of that decision, which every agency in the state is required by law to follow.

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

Questions for the Record for Jessica Clarke, Nominee for the Southern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. **A report that you helped author concluded that New York City should "decriminalize or legalize" several offenses, including "marijuana possession, disorderly conduct, alcohol consumption, and trespassing." The report recommended that "[m]inor offenses should be decriminalized with the goal of reducing negative contact with the police, particularly in communities of color." Did**

this report's conclusions and recommendations reflect your contributions and opinions?

Response: The report represents the policy position of the New York Attorney General. Because of my duties as a lawyer with the Office of the Attorney General, it would be inappropriate for me to give my personal opinions on the positions of my client. *See*, *e.g.*, New York Rule of Professional Conduct 1.1. I am also duty bound to maintain client confidences, including internal discussions about policy positions of the New York Attorney General. New York Rule of Professional Conduct 1.6. If confirmed, I would set aside any prior policy work that I have done on behalf of clients and neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, to the facts of the case before me.

2. **Do you believe that judges should play a role in addressing policy concerns about purported over-incarceration by reducing sentencing for crimes without reference to the facts of the underlying case?**

Response: No.

3. **Does a state have legal authority under our country's system of federalism to prevent the federal government from enforcing federal immigration laws?**

Response: No.

4. **Do you believe that, as a matter of law, federal law enforcement agencies or officers lack authority to arrest illegal aliens on American soil for civil immigration violations?**

Response: No.

5. **If confirmed, would you rule against the federal government's authority to enforce federal immigration laws, including authority to take legal action against illegal aliens, including arrests or deportations?**

Response: If confirmed as a district court judge, I would not rule against the federal government's authority to enforce federal immigration laws unless a federal statute or binding Supreme Court or Second Circuit precedent compel me to do so.

6. **As you may know, in 2012, the Supreme Court issued a decision in *Arizona v. United States* that made it substantially more difficult for states to enforce federal immigration law. Basically, the decision said, the federal government has control and the states don't have room to act—their efforts to enact policy in this area is preempted. At the same time as states are handicapped in actually enforcing this country's immigration laws, you authored a letter to local New York authorities on**

behalf of Attorney General Letitia James in April 2020 to provide guidance on cooperation with federal immigration enforcement. You advised local authorities not to cooperate with federal immigration officials that seek to apprehend or deport illegal aliens. You wrote that "New York law bars State and local law-enforcement officers from arresting individuals for civil immigration violations." You additionally explained that the "delayed release of an incarcerated individual who has completed his or her criminal sentence or who has posted bail" could violate state law against cooperating with federal immigration authorities. What role does state law have to play in limiting or supplementing federal immigration enforcement?

Response: State and local law enforcement are permitted under federal law to cooperate with federal immigration officials. 8 U.S.C. § 1357(g)(10). This includes permitting state and local law enforcement to enter into cooperation agreements "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). State and local law enforcement are also authorized, "to the extent permitted by relevant State and local law" to "arrest and detain an individual who (1) is an alien illegally present in the United States and (2) has previously been convicted of a felony." 8 U.S.C. § 1252c. The letter you asked about was written after a state appellate court in New York determined that New York state law does not permit state or local law enforcement to arrest or hold a person based on a civil law immigration violation or a civil immigration detainer. *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518 (2d Dep't 2018). The guidance issued notified New York law enforcement agencies of that decision, which every agency in the state is required by law to follow.

7. **Under the United States Constitution, are noncitizens permitted to vote in federal elections?**

Response: No, noncitizens are not permitted to vote in federal elections.

8. **Supporters of New York City's recent measure to allow noncitizen legal residents to vote in local elections pointed to the fact that these aliens live in the city, pay taxes, send their children to public schools, and rely on city services. And as we've seen, Democrats have increasingly moved to increasing federal services provided to illegal aliens. If New York City is allowing noncitizens to vote under this reasoning, what legal provisions prevent these illegal aliens or noncitizens from voting in federal elections?**

Response: Because this is an issue that is now being litigated in state court in New York, it would be inappropriate for me to comment on a pending legal action.

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

Response: I have never served as a judge, and therefore have not had the opportunity to develop a judicial philosophy. If confirmed, I would treat all parties with fairness and respect, thoroughly research binding Supreme Court and Second Circuit precedent, and neutrally and impartially apply the law to the facts before me.

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

Response: I understand "originalism" to mean interpreting the Constitution based on its original public meaning. If confirmed as a district court judge, I would follow Supreme Court and Second Circuit precedent on the role of the original public meaning when interpreting the Constitution.

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

Response: I understand "living constitutionalist" to mean that the Constitution's meaning changes and evolves through time. I would not characterize myself as a "living constitutionalist." If confirmed as a district court judge, I would follow Supreme Court and Second Circuit precedent when interpreting the Constitution.

12. **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 confirmed as a district court judge, I would be bound by, and follow, Supreme Court and Second Circuit precedent on the methods these courts have used to interpret the specific constitutional provision at issue. If the Supreme Court or Second Circuit interpreted the provision based on the original public meaning (*see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008)), I would follow that method of interpretation.

13. **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: If confirmed as a district court judge, I would interpret a statute or the Constitution consistent with Supreme Court and Second Circuit precedent. As the Supreme Court stated in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) a court should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738.

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

Response: No. The Constitution requires amendments as described in Article V.

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: There are limits to what the government may impose—or may require—of private institutions with respect to religion. For example, under Religious Freedom Restoration Act ("RFRA"), the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The only exception recognized under RFRA is if the government demonstrates that the burden "is in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b). The Supreme Court has applied RFRA both to religious organizations (*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020)) and closely held for-profit corporations with sincerely held religious beliefs (*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014)).

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

Response: I cannot think of a situation where it would be permissible for the government to discriminate against an individual or an organization based on religion.

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 in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) concluded that the applicants were entitled to a preliminary injunction. The Court found that the applicants met all criteria for a preliminary injunction: likelihood of success on the merits, irreparable harm, and public interest. *Id.* First, with respect to likelihood of success on the merits, the Court found "[t]he applicants have made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Id.* at 66 (internal quotations omitted). This conclusion was based not only on statements "viewed as targeting" religion, but also because the regulations "single out houses of worship for especially harsh treatment." *Id.* Second, the Court found irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (internal quotations omitted). Finally,

the Court concluded that "it has not been shown that granting the applications will harm the public." *Id.*

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted emergency injunctive relief, enjoining California's restrictions on religious gatherings during the pandemic. The Court concluded that: (1) plaintiffs were likely to succeed on the merits of their claim under the Free Exercise Clause; (2) plaintiffs were irreparably harmed; and (3) the state had not shown that the public interest would be harmed by an injunction. *Tandon*, 141 S. Ct. 1249, 1297. In reaching this conclusion, the Supreme Court found that the state treated "comparable secular activity more favorably than religious exercise" and as such was not neutral and generally applicable, triggering strict scrutiny. *Id.* at 1296.

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 v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018), the Supreme Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause when it initiated an enforcement action against a cakeshop and after it engaged in "clear and impermissible hostility toward the sincere religious beliefs" of the cakeshop.

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: The Supreme Court has held that an individual's sincerely held religious beliefs are protected even if there is "disagreement among sect members" about the belief. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833. (1989). The Court also stated: "we reject the notion that, to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. *See also Welsh v. United States*, 398 U.S. 333, 339 (1970) ("[S]incere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion.")

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

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

Response to Question 21(a) and (b): The Supreme Court in *Frazee*, 489 U.S. at 833, stated that "only beliefs rooted in religion" as opposed to "[p]urely secular views" are protected by the Free Exercise Clause. It is not, however, the role of the court to determine whether a particular religious belief is "acceptable, logical, consistent or comprehensible" to be protected. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on what is considered the official position any religion.

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*, 140 S. Ct. 2049, 2060 (2020), the Supreme Court held that the "ministerial exception" which derives from the First Amendment, prevents courts from adjudicating plaintiffs' employment discrimination claims. The Court concluded that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Morrissey-Berru*, 140 S. Ct. at 2060.

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*, 141 S. Ct. 1868 (2021), the Supreme Court held that the city's refusal to contract with Catholic Social Services for foster care services unless the agency agrees to certify same-sex couples as foster parents violated the Free Exercise Clause. In reaching this conclusion, the Court found that the city's action was not neutral and generally applicable because it allowed for exceptions for this certification requirement at the Commissioner's sole discretion. *Id.* at 1878-79.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated a state court judgment in case in which county officials "insisted that the Amish must adopt certain modern technologies or risk jail, fines, and even losing their farms." The Court concluded that "[t]he lower court plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act." *Id.*

Justice Gorsuch, in concurring in the decision to grant certiorari and vacate the lower court's decision, identified four errors committed by the lower courts in applying RLUIPA. First, the courts erred by treating the county's interest as compelling "without reference to the *specific* application of those rules to *this* community." *Mast*, 141 S. Ct. at 2432 (emphasis in original). Second, the courts "erred by failing to give due weight to exemptions other groups enjoy." *Id.* Third, the courts "failed to give sufficient weight to rules in other jurisdictions." *Id.* at 2433. Fourth, the courts improperly rejected an alternative proposed by the Amish based on inappropriate assumptions. *Id.*

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

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

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

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

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

Response to all subparts: No, a training of that nature would not be appropriate.

26. **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.

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

Response: I am aware of studies regarding disparities in the criminal justice system. If confirmed as a district court judge, my role would be to treat all parties fairly and to

decide the individual case or controversy before me by neutrally and impartially applying the law, including Supreme Court and Second Circuit precedent, to the facts of the case.

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

Response: Under Article II, Section 2 of the Constitution, the Executive Branch is responsible for making political appointments. If confirmed as a district court judge and an issue about the constitutionality of political appointments came before me, I would neutrally and impartially apply Supreme Court and Second Circuit precedent to the facts of the case.

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

Response: If confirmed as a district judge, I would be bound to follow all Supreme Court precedent regardless of the size or composition of the Court. It would therefore be inappropriate for me to comment on the size or composition of the Court.

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

Response: Yes.

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

Response: I am not aware of any Supreme Court or Second Circuit precedent that has concluded that the Second Amendment receives less protection than any other enumerated right in the Constitution. If confirmed, I would follow on Supreme Court and Second Circuit precedent regarding the Second Amendment.

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

Response. Please see my response to Question 31.

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

Response: The Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. If confirmed as a district court judge and confronted with an issue about executive power and discretion, I would review and neutrally apply all relevant Supreme Court and Second Circuit precedent. This could

include *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which discusses the scope of executive power.

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

Response: The Supreme Court has found that a substantive administrative rule is one that "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979). Because issues concerning what distinguishes an act of prosecutorial discretion from a substantive administrative rule change are currently pending before courts, it would be inappropriate for me to comment.

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

Response: Under 18 U.S.C. § 3591, a defendant found guilty of an offense eligible for the death penalty "shall be sentenced to death if, after consideration of the factors set forth in [the Act] in the course of a hearing held pursuant to [the Act], it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense." The President does not have the authority to unilaterally abolish this (or any) statute.

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

Response: The Supreme Court vacated a stay of a district court's judgment, which vacated a nationwide eviction moratorium that the Center for Disease Control and Prevention (CDC) issued during the COVID-19 pandemic. *Alabama Ass'n of Realtors v. Dep't of Health & Human Svcs*, 141 S. Ct. 2485 (2021). The Court found that the CDC had exceeded its authority in issuing that moratorium. *Id.*

Senator Josh Hawley
Questions for the Record

Jessica Clarke
Nominee, U.S. District Court for the Southern District of New York

1. **In 2020, you said that "structural racism" exists "in our criminal justice system." Federal courts are a critical part of our criminal justice system. Why do you want to be part of an institution that you think is structurally racist?**

   Response: I referred to "structural racism" in introductory remarks that I gave during an event organized by the New York Attorney General's Office about the history of redlining in this country. The event included panelists from academia and non-profit organizations, who discussed the history of institutions, beginning in the 1930s, refusing to lend or insure mortgages in minority neighborhoods. The term "structural racism" was a reference to these historical, discriminatory policies and practices. The panelists also presented maps and other data purporting to show that communities that were historically redlined in several cities in New York remain predominantly minority neighborhoods today and that people in those communities are more likely to have negative health outcomes, have less accumulated wealth, and are more likely to have contact with the criminal justice system than those who live in communities that were not historically redlined in New York. In my statement, I referred to "enduring racial disparities . . . in our criminal justice system." That statement was meant to refer to these studies and maps that I knew the panelists were going to present.

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

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

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

   Response to all subparts: Justice Thurgood Marshall is an important figure in American history. He successfully argued important cases, including *Brown v. Board of Education* and *Shelley v. Kraemer*. I am not familiar with the full context of the quote; however, if confirmed as a district judge, I would neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent. I would not impose my personal views in any case.

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

Response: There are several potentially applicable abstention doctrines, including *Rooker-Feldman*, *Younger*, *Colorado River*, *Pullman*, *Burford*, *Thibodaux* and *Brillhart/Wilton*.

Rooker-Feldman "bars federal district courts from hearing cases that in effect are appeals from state court judgments, because the Supreme Court is the only federal court with jurisdiction over such cases." *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021). *See also Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman,* 460 U.S. 462 (1983). The Second Circuit has established a four-part test for *Rooker-Feldman* abstention: "(1) the federal-court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by a state-court judgment; (3) the plaintiff must invite district court review and rejection of that judgment; and (4) the state-court judgment must have been rendered before the district court proceedings commenced." *Dorce*, 2 F.4th at 101 (cleaned up).

Younger abstention "forbid[s] federal courts [from] stay[ing] or enjoin[ing] pending state court" criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 41 (1971). Based on *Younger* and its progeny, the Second Circuit has articulated the following three-factor test for determining when a federal court should abstain from exercising jurisdiction: "(1) there is an ongoing state criminal proceeding; (2) the claim raises important state interests; and (3) the state proceedings provide an adequate opportunity to raise the constitutional claims." *Schlagler v. Phillips*, 166 F.3d 439, 442 (2d Cir. 1999).

Colorado River abstention applies when a parallel action is filed in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). In deciding whether to abstain, the Second Circuit has directed courts to consider whether: (1) "the controversy involves a res over which one of the courts has assumed jurisdiction"; (2) "the federal forum is less inconvenient than the other for the parties"; (3) "staying or dismissing the federal action will avoid piecemeal litigation"; (4) "proceedings have advanced more in one forum than in the other"; (5) "federal law provides the rule of decision"; and (6) "the state procedures are adequate to protect the plaintiff's federal rights." *Woodford v. Cmty. Action Agency of Greene Cty., Inc.*, 239 F.3d 517, 522 (2d Cir. 2001).

Pullman abstention directs federal courts "not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). *See also R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 498-501 (1941). The Second Circuit has

established a three-part test for *Pullman* abstention to apply: "(1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)).

Burford abstention applies when "a federal court sitting in equity" is asked to "interfere with the proceedings or orders of state administrative agencies" and where "timely and adequate state-court review is available." *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (construing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). The Second Circuit has identified three factors to consider when determining whether to abstain under *Burford*. Those factors are: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 650 (2d Cir. 2009).

Under *Thibodaux* abstention, a district court may abstain from "deciding questions of state law otherwise within [its] jurisdiction" "where a difficult question of state law of substantial import is present." *Smith v. Metro. Prop. & Liab. Ins. Co.*, 629 F.2d 757, 759 (2d Cir. 1980) (citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-29 (1959)).

Lastly, under *Brillhart/Wilton* abstention, a district court may "dismiss declaratory judgment actions where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 104 (2d Cir. 2012) (internal quotations omitted). There are five factors that a court must consider: (1) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (2) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (3) "whether the proposed remedy is being used merely for procedural fencing or a race to res judicata"; (4) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (5) "whether there is a better or more effective remedy." *Id.*

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

Response: Yes.

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

Response: A wedding photographer sued the New York Attorney General and other state officials, alleging that any enforcement action against her for violating state public accommodation laws violated her free exercise and free speech rights. *Carpenter v. James*, Civ. No. 21-6303 (W.D.N.Y. Dec. 13, 2021). The court dismissed the case. I supervise several of the attorneys who worked on the case, and I provided feedback on one of the briefs, as mentioned below in Question 40.

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

Response: When interpreting the Constitution, I would follow Supreme Court and Second Circuit precedent on the role of original public meaning of a constitutional provision. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court applied the original public meaning of the Second Amendment in interpreting that provision. I would follow Supreme Court and Second Circuit precedent in making this determination.

6. Do you consider legislative history when interpreting legal texts?

Response: Consistent with Supreme Court and Second Circuit precedent, I would only consider legislative history when there is no applicable, binding precedent and when the text of the statute at issue is ambiguous. *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language.") (quotation marks and citations omitted); *Lee v. Bankers Tr. Co.*, 166 F.2d 540, 544 (2d Cir. 1999) ("Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.").

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

Response: The Supreme Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Supreme Court has found that other forms of legislative history are less persuasive. *See, e.g., id.* ("We have eschewed reliance on the passing comments of one Member, . . . and casual statements from the floor debates.") (internal citations omitted); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating

forms of legislative history."); *United States v. Craft*, 535 U.S. 274, 285 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (internal quotation marks and citation omitted).

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

Response: It is generally inappropriate to consult the laws of foreign nations when interpreting the Constitution. If confirmed as a district court judge, I would only do so when directed by the Supreme Court or Second Circuit.

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

Response: The Supreme Court has articulated the following standard for evaluating whether an execution protocol violates the Eighth Amendment: (1) there must be a "substantial risk of serious harm" or "an objectively intolerable risk of harm"; (2) the prisoner must identify an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain"; and (3) the state refuses to adopt that alternative without a "legitimate penological justification." *Baze v. Rees*, 553 U.S. 35, 50-52 (2008).

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

Response: Yes. The Supreme Court reaffirmed in *Glossip*, 135 S. Ct. at 867, that a prisoner must identify "a known and available alternative method of execution that entails a lesser risk of pain," which the Court identified as "a requirement in Eighth Amendment method-of-execution claims.

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

Response: The Supreme Court in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), held that the respondent had no right post-conviction to access DNA evidence the prosecution had. The Second Circuit has

likewise held that there is "no freestanding substantive due process right to DNA evidence." *Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015).

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

Response: No.

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

Response: The Supreme Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877 (citing *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)). *See also*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "A law is not generally applicable if it invites the government to consider particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (internal quotations omitted). *See also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

The Free Exercise Clause also creates a "ministerial exception" to employment discrimination laws, prohibiting courts from adjudicating "employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

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

Response: Please see my response to Question 11.

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

Response to Question 13: The Supreme Court has held that an individual's sincerely held religious beliefs are protected even if there is "disagreement among sect members" about the belief. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833. (1989). The Court also stated: "we reject the notion that, to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Id.* at 834. *See also Welsh v. United States*, 398 U.S. 333, 339 (1970) ("[S]incere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion.").

The Supreme Court in *Frazee*, 489 U.S. at 833, further stated that "only beliefs rooted in religion" as opposed to "[p]urely secular views" are protected by the Free Exercise Clause. It is not, however, the role of the court to determine whether a particular religious belief is "acceptable, logical, consistent or comprehensible" to be protected. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, the Supreme Court and Second Circuit employ a subjective test to determine whether a religious belief is sincerely held. *Ford v. McGinnis*, 352 F.2d 582, 589 (2d Cir. 2003) (citing *Frazee*, 489 U.S. at 834).

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

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

Response: The Supreme Court's holding in *Heller*, 554 U.S. at 622 is that the Second Amendment confers "an individual right to keep and bear arms."

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

Response: No.

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

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

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

Response to all subparts: I understand Justice Holmes' statement to support his argument that "a constitution is not intended to embody a particular economic theory, whether of paternalism . . or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (1905). The Supreme Court later abrogated much of *Lochner*, stating that "[t]he doctrine that prevailed in Lochner . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature acted unwisely—has long since been discarded." *Ferguson v. Skrup*, 372 U.S. 726, 730 (1963). If confirmed as a district court judge, I will follow all Supreme Court and Second Circuit precedent regarding the 14th Amendment.

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

a. **If so, what are they?**

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

Response to all subparts: I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court that are no longer good law. If confirmed as a district court judge, I commit to faithfully applying all Supreme Court and Second Circuit precedent as decided.

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

a. **Do you agree with Judge Learned Hand?**

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

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

Response to all subparts: The Second Circuit in *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc.*, 651 F.2d 122, 129 (2d Cir. 1983) stated "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." The Second Circuit, relying on Supreme Court precedent, has cautioned, however, that market share percentages alone are not conclusive of determining monopoly power. *Id.* (citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). Instead, market share must be considered along with "additional market characteristics, among them, the strength of the competition, the probable development of the industry, and consumer demand." *Id.*

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

Response: Federal common law refers to law derived from courts in decisions as opposed to by statute. In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court stated there is "no federal general common law."

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

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

Response to 19 and 19(a): If confirmed as a district court judge, I would interpret federal law consistent with Supreme Court and Second Circuit precedent. When interpreting state law, I would defer to the "views of the state's highest court with respect to state law" as directed by the Supreme Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: The Constitution is the "Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI cl. 2. States may provide greater protections than the Constitution, but the protections in the Constitution are, at a minimum, binding on the states.

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

Response: As a judicial nominee, it generally would be inappropriate for me to comment on the legitimacy of any Supreme Court decision. If confirmed as a district court judge, I would be bound by, and would faithfully follow, Supreme Court precedent regardless of any personal views I hold. I will, however, join prior judicial nominees in making an exception with respect to *Brown v. Board of Education*, because the legal precedent it establishes—that *de jure* segregation in public schools is unconstitutional—is unlikely to ever come before me as a judge if confirmed. I agree that *Brown v. Board of Education* was correctly decided.

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

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

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

Response to all subparts: The Second Circuit in *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 87 (2d Cir. 2020) concluded that there is "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions" and "that such injunctions may be an appropriate remedy in certain circumstances." The Court further instructed district courts not to issue a nationwide injunction when the same issue is being litigated in multiple courts across the country. *Id.* If confirmed as a district court judge, I would follow Federal Rule of Civil Procedure 65, along with all Supreme Court and Second Circuit precedent, with respect to issuing an injunction.

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

Response: Please see my response to Question 21.

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

Response: Federalism, which is the relationship between the federal government and the states, is a central feature of the Constitution. As the Supreme Court stated in *Bond v. United States*, 564 U.S. 211, 222 (2011), "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."

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

Response: Please see my response to Question 3.

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

Response: The availability of damages and injunctive relief depends on the facts and legal claims in a particular case. Generally, damages are awarded to compensate for past illegal conduct, and injunctive relief restrains a party's future conduct.

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

Response: The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution protect "those fundamental rights and liberties, which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court in *Glucksberg* recognized that these rights include rights enumerated in the Constitution, along with others, including the right to marry, marital privacy, have children, and direct the education and upbringing of one's children. *Id.* at 720.

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

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

Response: Please see my response to Question 11.

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

Response: The Supreme Court has stated that free exercise "embraces" both a "freedom of conscience and worship." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: As the Second Circuit stated in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007), "Supreme Court precedents

teach that a substantial burden on religious exercise exists when an individual is required to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'"

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

Response: Please see my response to Question 13.

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

Response: Religious Freedom Restoration Act (RFRA) "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb(a)(1).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that judges should set aside personal opinions and neutrally and impartially apply the law regardless of whether the judge likes the result reached. If confirmed as a district court judge, I would neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, and set aside all personal views.

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

a. If yes, please provide appropriate citations.

Response: In *Stein v. Thomas*, I represented Dr. Stein in recount litigation in Michigan. In that case, we argued that the application of a two-day waiting period to start the recount under state law violated the Constitution. *See Stein v. Thomas*, 222 F. Supp. 3d 539 (E.D. Mich. 2016), *aff'd*, 672 F. App'x 656 (6th Cir. 2016).

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

Response: I do not recall deleting or attempting to delete any content from my social media since I was under consideration by the White House for this nomination.

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

Response: As I testified at the Senate Judiciary Committee hearing, I am proud to have started my post-clerkship legal career with the Department of Justice, representing the United States in court. Questions about the extent to which unfairness exists in American institutions are important ones for policymakers to consider. If confirmed as a district court judge, my role would not be to make policy, but to decide the individual case or controversy before me by neutrally and impartially applying the law, including Supreme Court and Second Circuit precedent, to the facts of the case.

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

Response: Yes.

33. How did you handle the situation?

Response: As with any case, I upheld my duty to zealously advocate the position of my client within the confines of the law.

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: As a judicial nominee, it would be inappropriate for me to provide my personal view on this question. If confirmed as a district court judge and a case came before me that raised this question, I would neutrally and impartially apply Supreme Court and Second Circuit precedent to the facts of the case.

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

Response: Other than testimony I gave on behalf of the New York State Office the Attorney General before the New York City Police Department, as set forth in my Senate Judiciary Questionnaire, I have not testified under oath.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: I do not own any individual shares in any of these companies. My assets are set forth in my Financial Disclosure Statement submitted to this Committee.

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

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

Response: There are two briefs I recall editing in cases in which I was not one of the counsel of record: (1) the memorandum of law in support of the motion to dismiss in *Carpenter v. James*, 21 Civ. 6303 (W.D.N.Y.); and (2) the New York Attorney General's amicus brief in *Francis v. Kings Park Manor*, 15-1823 (2d Cir.).

41. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I do not recall having ever confessed error to a court.

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

Response: A nominee should be truthful in stating their views on their judicial philosophy and forthcoming when testifying before the Senate Judiciary Committee.

Questions for the Record for Jessica Clarke
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Jessica Clarke, Nominee to the District Court for the Southern District of New York

1. How would you describe your judicial philosophy?

Response: I have never served as a judge and therefore have not had the opportunity to develop a judicial philosophy. If confirmed as a district court judge, I would treat all parties with fairness and respect, thoroughly research binding Supreme Court and Second Circuit precedent, and neutrally and impartially apply the law to the facts before me.

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

Response: I would first determine whether the Supreme Court or the Second Circuit has interpreted the particular provision at issue. If so, those precedents would be binding. If not, I would look at the text of the statute and if "the words of [the] statute are unambiguous, then . . . judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (internal quotations omitted). If the meaning of the statute is ambiguous, I would then employ "interpretive tools, including canons, statutory structure and legislative history." *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014). I would also consider persuasive authority from other courts if no binding precedent exists and the text of the statute is ambiguous.

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

Response: I would first determine whether there is binding Supreme Court or Second Circuit precedent interpreting the constitutional provision. If so, I would apply that binding precedent. In the rare instance that I was confronting a case of first impression involving an issue of constitutional interpretation, I would consider the text of the provision and the meaning of its terms, using methods of interpretation that the Supreme Court or Second Circuit has used in the most analogous case. I would also consider persuasive authority from other courts.

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

Response: When interpreting the Constitution, I would follow Supreme Court and Second Circuit precedent on the role of the text and original meaning of a constitutional provision.

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 "plain meaning" refers to the meaning at the time of enactment.

6. What are the constitutional requirements for standing?

Response: The Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) articulated a three-part test for the "constitutional minimum" requirements for standing. A plaintiff must prove: (1) injury in fact; (2) causation; and (3) a likelihood of redress. *Id.*

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

Response: The Supreme Court in *McCullough v. Maryland*, 17 U.S. 316, 400 (1819) held that Congress has powers under the Necessary and Proper Clause beyond those enumerated in the Constitution. In that case, the Supreme Court held that Congress had the power to establish a national bank. *Id.*

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

Response: If confirmed as a district court judge, I would follow all Supreme Court and Second Circuit precedent about Congress's powers, including *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) and *United States v. Comstock*, 560 U.S. 126 (2010).

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

Response: The Supreme Court has held that the Constitution protects certain substantive rights and liberties not expressly enumerated in the Constitution that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). The Supreme Court in *Glucksberg* recognized that these rights include the right to marry, marital privacy, have children, and direct the education and upbringing of one's children, among others. *Id.* at 720.

10. What rights are protected under substantive due process?

Response: The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution protect "those fundamental rights and liberties, which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997).

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: If confirmed as a district court judge, I would be guided by, and bound to follow, all precedent from the Supreme Court and Second Circuit with respect to substantive due process and would not apply my personal view on which rights are protected.

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

Response: In *United States v. Morrison*, 529 U.S. 598, 618-19 (2000), the Supreme Court held that Congress, under the Commerce Clause, may regulate the channels of interstate commerce, persons or things in interstate commerce, and those activities that substantially affect interstate commerce.

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 identified race, religion, national origin and alienage as suspect classes requiring strict scrutiny. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.4 (1976); *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: Checks and balances and separation of powers are foundational to the structure of the Constitution. The Constitution sets forth the three branches of government: legislative (Article I), executive (Article II) and judicial (Article III). Each branch has different powers and authority. The Framers developed this structure so each branch checks and limits the power of the others to ensure no single branch of government is all powerful.

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

Response: If confirmed as a district court judge, I would look to the applicable provision of the Constitution at issue and any Supreme Court and Second Circuit precedent. Depending on the circumstance, this precedent could include *United States v. Morrison*, 529 U.S. 598 (2000) or *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: A district judge should set aside all personal views and feelings and faithfully and impartially discharge all duties. If confirmed as a district court judge, I would uphold this duty.

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

Response: Both scenarios are undesirable, and if confirmed, I would endeavor to avoid both.

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 this issue. If confirmed as a district court judge, I would follow all precedent from the Supreme Court and the Second Circuit and discharge my duties neutrally and impartially.

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

Response: I understand judicial review to mean the power of the judiciary to review the legality of actions taken by the legislative and executive branches. I understand judicial supremacy to refer to the idea that Supreme Court is the final interpreter of the meaning of the constitutional provisions.

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: Elected officials must follow the law and the Constitution and must adhere to applicable judicial decisions.

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

Response: The role of a judge is limited. Federal judges are not elected officials, and they do not make the law as is the legislature's authority or enforce the law as is the executive branch's authority. A judge's role is limited to interpreting the law and applying it neutrally and impartially to the facts of any case properly before the court.

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

Response: If confirmed as a district court judge, I would be bound by all precedent from the Supreme Court and the Second Circuit. It would not be my role to question precedent or apply my personal views.

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: Under 18 U.S.C. § 1335(a), a judge must consider certain factors when imposing a sentence. A judge should not discriminate against a criminal defendant in sentencing based on the defendant's group identit(ies). Instead, the statute requires judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

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

Response: I am not familiar with this statement or its context. I understand equity to mean "fairness or justice in the way people are treated" as it is defined in Merriam-Webster's dictionary.

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

Response: "Equity" is defined as "fairness or justice in the way people are treated" in Merriam-Webster's dictionary. Merriam-Webster's dictionary defines "equality" as "the quality or state of being equal."

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

Response: If confirmed as a district court judge, I would follow Supreme Court and Second Circuit precedent regarding the scope of the 14th Amendment's Equal Protection Clause.

27. How do you define "systemic racism?"

Response: I understand "systemic racism" to mean patterns or practices that disproportionately impact people based on race, as opposed to individual instances of discrimination.

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

Response: I do not have a personal definition of critical race theory, but I understand it to refer to academic writings and scholarship about the intersection between race and law.

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

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

Questions from Senator Thom Tillis for Jessica Clarke
Nominee to be United States District Judge for the Southern District of New York

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

   Response: Yes. If confirmed as a district court judge, I would neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, without following any personal views.

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

   Response: I understand "judicial activism" to occur if a judge allows personal views to guide her decision-making instead of the law and binding precedent. If confirmed as a district court judge, I would neutrally and impartially apply the law, including Supreme Court and Second Circuit precedent, without regard to any personal views I had.

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

   Response: I believe impartiality is an expectation, and if confirmed as a district court judge, I would be impartial.

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

   Response: No. The role of a judge is to apply the laws enacted by Congress.

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

   Response: Yes. The role of a judge is to apply the law regardless of the outcome.

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

   Response: No. Judges should set aside politics and policy preferences when interpreting and applying the law.

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

   Response: If confirmed as a district court judge, I will follow all Supreme Court precedent on the Second Amendment without reservation, including *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment creates "an individual right

to keep and bear arms") and *McDonald v. City of Chicago,* 561 U.S. 742 (2010) (holding that this right is enforceable against the states).

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

Response: If confirmed as a district court judge, I would follow and apply Supreme Court and Second Circuit precedent on the Second Amendment and any applicable decisions evaluating constitutional rights during the pandemic. This includes Second Amendment decisions like *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago,* 561 U.S. 742 (2010). I would also follow any decision the Supreme Court issues in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843, regarding New York's concealed-carry law and whether it violates the Second Amendment. I would also consider the Supreme Court's pandemic-related decisions, including *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: If confirmed as a district court judge, I would follow and apply Supreme Court and Second Circuit precedent on qualified immunity. In *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018), the Supreme Court held that officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time."

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split second decisions when protecting public safety?

Response: If confirmed as a district court judge, I would follow and apply Supreme Court and Second Circuit precedent on qualified immunity. Questions about whether that precedent provides sufficient protection for law enforcement officers present important questions for policymakers to consider. The role of a judge, however, is to neutrally and impartially apply that precedent.

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

Response: Please see my response to Question 10.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: In my legal career, I have had experience with other types of law besides intellectual property law. I recognize that if a case were to come before me involving issues of patent eligibility, I would need to quickly get up to speed in order to give the parties a fair day in court. While it would be inappropriate for me as a district court nominee to criticize any Supreme Court jurisprudence that I would be required to apply, I do commit to you that I will faithfully follow all Supreme Court precedent and will provide the parties in any such case as much clarity as possible on the basis for my decision.

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

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

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

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

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

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

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

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

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

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

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

Response to all subparts: I join other judicial nominees before me who have declined to analyze factual hypotheticals because doing so may run afoul of canons of judicial ethics. If confirmed as a district court judge, I would look to all applicable precedent, including, but not limited to, *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Bilski v. Kappos*, 561 U.S. 593 (2010).

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

Response: Please see my response to Question 13.

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

a. What experience do you have with copyright?

Response: I may have worked on a copyright case as a judicial law clerk.

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

Response: I do not recall having any particular experiences involving the Digital Millennium Copyright Act.

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

Response: During my time with the New York Attorney General's Office, I have worked on investigations against online services providers involving allegations of discriminatory and unlawful advertisements posted on their sites.

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

Response: I have litigated cases involving claims under the First Amendment, including free speech issues. I do not recall having any experience addressing these issues in an intellectual property or copyright case.

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

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

Response: When interpreting a federal statute, I would first determine whether the Supreme Court or the Second Circuit has interpreted the particular provision at issue. If so, those precedents would be binding. If not, I would look at the text of the statute and if "the words of [the] statute are unambiguous, then . . . judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (internal quotations omitted). As directed by the Supreme Court and Second Circuit, I would only consider legislative history, among other interpretive tools, if the meaning of the statute is ambiguous. *See, e.g.*, *Bostock v. Clayton County,* 140 S. Ct. 1731, 1749 (2020); *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014).

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

Response: The Supreme Court has held that advice in the form of opinion letters, policy statements, agency manuals, or enforcement guidelines from a federal agency with jurisdiction over an issue is "entitled to respect." *Christensen v. Harris Cnty.,* 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift*, 323 U.S. 134 (1944)). This is a less deferential standard than *Chevron* deference.

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

Response: If confirmed as a district court judge, I would apply binding Supreme Court and Second Circuit precedent regarding the Digital Millennium Copyright Act, including *Viacom Int'l, Inc. v. YouTube, Inc.,* 676 F.3d 19 (2d Cir. 2012).

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

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

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

Response to all subparts: Whether the DMCA sufficiently addresses current digital advances is an important question for policymakers to address. If confirmed as a district court judge, I would neutrally and impartially apply the statute as written and interpreted by the Supreme Court and Second Circuit.

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

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

Response: The Second Circuit has stated that if "it appears that the plaintiff's choice of a U.S. forum was motivated by forum shopping reasons . . . the less deference the plaintiff's choice [of venue] commands." *Iragorri v. United Techs. Corp.,* 274 F.3d 65, 72 (2d Cir. 2001).

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

Response: If confirmed as a district court judge, I would not encourage any party to engage in forum shopping, and I would follow all Supreme Court and Second Circuit precedent regarding venue.

c. **Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?**

Response: I cannot think of an instance where it would be appropriate for a judge to engage in "forum selling."

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

Response: Yes, I will not engage in "forum selling."

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

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

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

Response to all subparts: Federal judges are subject to the Code of Conduct for United States Judges. Whether this effectively addresses the concerns raised by these questions is an important issue for policymakers. If confirmed as a district court judge, I would neutrally and impartially apply binding precedent and adhere to the Code of Conduct for United States Judges.

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

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

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

Response to all subparts: If confirmed as a district court judge, I would neutrally and impartially follow and apply Federal Rules of Civil Procedure, the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, and Supreme Court and Second Circuit precedent regarding venue.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of

mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

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

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

Response to all subparts: Please see my response to Question 19.