Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Eunice Lee
Nominee to be United States Circuit Judge for the Second Circuit
June 16, 2021

1. **Over the course of your legal career, you have worked on a number of matters that presented challenging questions of law, often with little or no relevant state or federal precedent. Among other difficult legal issues, you have addressed vagueness arguments around the Armed Career Criminal Act's residual clause and the definition of a "dwelling" for purposes of a New York burglary statute.**

   a. **How do you approach challenging or novel questions of law that arise in the course of a criminal representation?**

   Response: When I am confronted with a novel question of law in the context of my role as an advocate, I begin by familiarizing myself with the general background on the legal topic through my review of the most relevant case law and the underlying statute or other legal provision at issue, as well as treatises and other academic sources. In the context of an appeal, because there is a discrete legal claim that was raised below and that is at issue on appeal, I review the specific arguments raised and the case law cited by the parties and relied upon by the judge in the lower court. After this refining of what the issue is for the appeal, I research the relevant case law and binding precedent, and to the extent that precedent is limited, I consider the case law relating to analogous issues. Through this process, I have effectively briefed issues with which I initially had little familiarity.

   b. **As a judge, what approach will you take to addressing challenging or novel questions of law?**

   Response: As a Circuit Judge, should I be confirmed, I will take a similar approach to gaining mastery over novel issues on appeal that I employ as an advocate. Appellate judges are presented with a limited factual record and a discrete legal claim to determine on appeal. I would approach a case by first carefully reviewing the facts in the record and the arguments presented by the parties, as well as the underlying statute or other legal provision at issue. I would review the case law cited by the parties, in addition to any other relevant Supreme Court and Second Circuit precedent. To the extent that I needed additional general background on the specific legal topic, I would review treatises and other academic sources, and perhaps consider case law in an analogous context. Following careful and open-minded consideration of all this information, I would apply the law to the specific facts of the case.

2. **Virtually all judicial nominees bring with them to the bench expertise in certain areas of the law. And all of these nominees, once confirmed, must consider and rule on a host of legal issues they have not personally confronted beforehand.**

   What steps would you take to familiarize yourself with legal issues that you have not previously encountered in your legal career?

   Response: Should I be confirmed as a Circuit Judge, I will endeavor to immerse myself in those areas of the law with which I am less familiar, and I also would look forward to discussing with my Second Circuit colleagues what they found to be most helpful in getting up to speed on areas of the law with which they may have been less familiar when they first joined the bench. More importantly, when I am presented with a specific legal issue on appeal, I will employ the approach outlined above to ensure that I am fully knowledgeable about the applicable law. As an advocate with over two decades of experience working on criminal appeals, I have frequently had to learn novel areas of law and generally have followed the process I outline in my answer to Question 1.a.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Eunice Lee
Nominee to be United States Circuit Judge for the Second Circuit Court of Appeals

1. **You spoke with a number of my colleagues about a CLE presentation you gave about "cop talk." I understand the answer you gave about crafting the most persuasive argument for your client. I hope you have reviewed your notes since the hearing because I do have one more question I hope you could clarify for me. In your notes, under the heading of avoiding cop talk, you gave this as one of the reasons to do so: "Using institutional police language legitimizes the behavior of the police."**

    a. **Did you mean that it legitimizes the particular behavior of the police in a given case, or the behavior of the police generally?**

    Response: The CLE presentation was on drafting a persuasive statement of facts and arguments as an appellate criminal defense practitioner. The idea that "using institutional police language legitimizes" police behavior referred to the particular behavior of the police in a given case. As an appellate advocate, because it may be necessary in the course of effectively representing one's client to challenge the behavior of the police in a particular case, it is less effective to use language that may bolster the prosecution's theory of the case.

    b. **What is "institutional police language?"**

    Response: "Institutional police language" refers to the type of language often used by police officers when testifying at trial. The CLE materials give the following example of such language: "They apprehended an alleged perpetrator." Instead of using institutional police language, the materials recommend that defense advocates state: "They arrested someone."

    c. **As a judge, would you avoid using "institutional police language" in your opinions? Would you sign on to an opinion by a colleague that uses it?**

    Response: Avoidance of using "institutional police language" is a practice tip for effective representation by criminal defense advocates. As an appellate judge, should I be confirmed, my role would not be to advocate for a position, but rather to rule impartially on the issue before me. Thus, I would not draft my opinions as an advocate or try to avoid, or discouraging others from using, any particular type of language.

2. **Do you believe property damage caused during rioting should be prosecuted to the fullest extent of the law?**

Response: Policy decisions about the appropriate manner in which to charge and prosecute offenses, as well as appropriate criminal penalties for such offenses, are for the legislative

and executive branches, as well as other policy makers. As a judge, should I be confirmed, any personal views that I might have on a question of public policy will have no bearing on my decision-making.

3. **How many appeals have you argued?**

   Response: As either lead counsel, co-counsel, or supervisor, I have represented approximately 390 clients in state and federal court on appeal or in post-conviction proceedings. Of those cases, I personally argued approximately 80 of those cases in court.

4. **Of the appeals you have argued, how many have you won?**

   Response: Of the 80 cases that I have personally argued, I achieved relief of some kind on appeal, including reversal, conviction modification, or sentence reduction, in approximately 18 of them.

5. **Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?**

   Response: The Supreme Court has not explicitly ruled on this issue, but it noted in dicta in *Schenck v. United States*, 249 U.S. 47, 52 (1919), that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

6. **Do you agree with Judge Ketanji Brown Jackson's 2013 remarks when she said she did not believe in a "living constitution"?**

   Response: Because I am not familiar with these remarks or the context in which they were given, I am unable to give an opinion on these comments.

7. **During your hearing you wouldn't explain your approach to constitutional interpretation beyond whatever is commanded by precedent. How would you interpret a constitutional issue in a case of first impression?**

   Response: In the overwhelming majority of cases that would come before me in the role of a Circuit Judge, should I be confirmed, there would be relevant Supreme Court or Second Circuit precedent as to the appropriate method of constitutional interpretation. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning of the Second Amendment. While the Supreme Court has frequently interpreted the Constitution by examining original public meaning, it also has applied other methods, such as considering the original intent of the Framers. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53–57 (2004) (interpreting the Confrontation Clause). If there were a matter before me that presented a constitutional issue of first impression, I would begin my analysis with an examination of the constitutional text at

issue. To the extent that there was ambiguity as to the text's meaning, I would look for guidance to Supreme Court and Second Circuit precedent interpreting analogous provisions, as well as any instructive but non-binding precedent from other Circuits.

8. In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?

Response: See answer to Question 7.

9. What role should empathy play in interpreting the law?

Empathy has no role in interpreting the law.

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

Response: No.

11. Are legal doctrine and practice best understood as an objective and defensible scheme of human association? Or are they better understood as of instrumental use for political ends?

Response: The question of the role of legal doctrine and practice in society is a complex one that is not subject to easy categorization. My personal views, if any, as to the role of legal doctrine in society would have no bearing on my judicial decision-making, should I be confirmed.

12. How do you define formalism?

Response: I understand formalism to be "[a]n approach to law, and esp. to constitutional and statutory interpretation, holding that (1) where an authoritative text governs, meaning is to be derived from its words, (2) the meaning so derived can be applied to particular facts, (3) some situations are governed by that meaning, and some are not, and (4) the standards for deciding what constitutes following the rules is objectively ascertainable." "Formalism" Definition, Black's Law Dictionary (11th ed. 2019), available at Westlaw.

13. Do you consider yourself a formalist?

Response: I do not have any overarching theory of interpretation, and thus I would not label myself a formalist. If confirmed, I would apply the law in accordance with Supreme Court and Second Circuit precedent, regardless of the label that might be applied to describe those precedents.

14. Can the Supreme Court mandate formalism on lower courts?

Response: Lower courts are required to apply the precedent of the Supreme Court, including the interpretative method applied by the Supreme Court to a particular issue.

15. Can an appeals court mandate formalism on trial courts?

Response: Trial courts are required to apply the precedent of the Supreme Court, including the interpretative method applied by the Supreme Court to a particular issue. In the absence of Supreme Court precedent, trial courts are required to apply the precedent of the Circuit.

16. Is the complexity of precedent and its multiplicity a feature or a bug of the law?

Response: I believe that the complexity of precedent is both a feature and a bug of the law.

17. How do you define legal realism?

Response: I understand legal realism to be the "theory that law is based not on formal rules or principles but instead on judicial decisions deriving from social interests and public policy as conceived by individual judges." "Legal Realism" Definition, Black's Law Dictionary (11th ed. 2019), available at Westlaw.

18. Do you consider yourself a legal realist?

Response: I do not have any overarching theory of interpretation, and thus I would not label myself a legal realist. If confirmed, I would apply the law in accordance with Supreme Court and Second Circuit precedent, regardless of the label that might be applied to describe those precedents.

19. Do you agree that all lawyers are, at some level, legal realists?

Response: If confirmed, my personal views, if any, about the prevalence of legal realisms would have no bearing on my decision-making.

20. As I mentioned at your hearing, the Second Circuit is in many ways a commercial court. Are you familiar with the Law and Economics movement?

Response: As a lawyer who has been practicing in the area of criminal law, and especially criminal appellate law, representing nearly 400 clients and arguing 80 appeals over the last 23 years, I have limited familiarity with the Law and Economics movement, beyond a general awareness that it involves the application of economic theory to analysis of the law.

21. What value, if any, do you see in Law and Economics?

Response: I have no opinion as to this. See answer to Question 20.

22. Is the practice of judicial review defensible absent the existence of neutral legal principles?

Response: As the Supreme Court recognized in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the courts possess the power of judicial review, or the right "to say what the law is." This holding is a seminal and binding precedent of the Supreme Court.

23. In *People v. Roche*, you represented a man charged with murdering his common-law wife by stabbing her 12 to 14 times in the face, back, and chest. You argued that "the brutal nature of the stabbing constituted evidence that [the defendant] acted under the influence of a mental infirmity."

a. Why did you make that argument?

Response: As an advocate assigned to provide my client the zealous representation guaranteed to him by the Sixth Amendment, I pursued the strongest argument on his behalf that I could within the bounds of the law. The argument raised on appeal was that, under New York law pertaining to the defense of extremely emotional disturbance, all of the facts in the case, including the excessive number of wounds inflicted, supported instructing the jury as to this defense, which would reduce the offense from second-degree murder to first-degree manslaughter.

b. Had the court you were arguing before ever held that a jury may infer the presence of an extreme emotional disturbance based solely on proof that the crime was especially violent or brutal?

Response: Under New York law, for the jury to be instructed on the defense of extreme emotional disturbance, there must be proof of more than just an offense that is particularly violent or brutal. The defense requires proof of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance. *See People v. Smith*, 1 N.Y.3d 610, 612 (2004). The argument that I made was based on both components. When I argued the case before the intermediate New York appellate court, the court agreed with me that the jury should have been given the instruction, and the court reversed the conviction and granted my client a new trial. *See People v. Roche*, 286 A.D.2d 290 (2001), *rev'd*, 98 N.Y.2d 70 (2002). On subsequent appeal by the prosecution, the New York Court of Appeals reversed the intermediate court and reinstated the conviction.

24. What is the purpose of criminal sentencing under the law?

Response: There are several purposes of sentencing that have been generally recognized, including deterrence, incapacitation, rehabilitation, retribution, and restitution. As a Circuit Judge, should I be confirmed, my assessment of any issues relating to sentencing will based on the relevant statute and the Sentencing Guidelines, as well as binding Supreme Court and Second Circuit precedent. Any personal views that I may have about the purpose of sentencing will have no bearing on my decision-making.

25. What is the purpose of criminal sentencing from a moral perspective?

Response: See answer to Question 24.

26. What, if anything, do you think is the relationship between morality and the law when it comes to punishing criminals?

Response: See answer to Question 24.

27. What is the relationship between morality and the law generally?

Response: See answer to Question 24.

28. What is your understanding of the original meaning of the Cruel and Unusual Punishment Clause?

The Supreme Court has held that "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Fla.*, 560 U.S. 48, 58 (2010), *as modified* (July 6, 2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)) (internal quotations omitted). More recently, in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Supreme Court discussed the meaning of the phrase "cruel and unusual" at the time of the Eighth Amendment's adoption. If confirmed as a Circuit Judge, I would faithfully follow binding Supreme Court and Second Circuit precedent interpreting the Eighth Amendment.

29. Much of your career has been in state court. How would you describe the differences between the New York State Court of Appeals and the U.S. Court of Appeals for the Second Circuit in terms of the limits of their respective authority?

Response: The New York State Court of Appeals is the court of the highest authority in the State of New York, and it largely has discretion to determine which cases it will hear. As New York's highest court, it has the authority to make the final determination as to the

meaning of any state law or constitutional provision. The U.S. Court of Appeals for the Second Circuit is an intermediate federal appellate court with a primarily mandatory docket. The Second Circuit is bound by all rulings of the U.S. Supreme Court.

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

Response: This is a decision to be made by the individual law firm.

31. Do you think law-firm clients should use their financial position to influence which pro bono clients their attorneys take?

Response: This is a decision to be made by the individual clients.

32. Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?

Response: This is a decision to be made by the individual law firm.

33. As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?

Response: I am not aware of any ethical standard pertaining to this.

34. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? Please describe your view on whether and/or how the Supreme Court has placed limits on church autonomy.

Response: The Supreme Court has recognized the fundamental First Amendment right of religious liberty in many contexts. In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that under the "ministerial exception" to laws pertaining to employment discrimination, religious institutions have the right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 2055 (citation omitted). Thus, the Supreme Court held that the First Amendment barred two teachers' employment discrimination claims against the religious schools by whom they were employed. If I am confirmed, I will follow all Supreme Court and Second Circuit precedent.

35. What level of scrutiny applies to a Second Amendment challenge in the Second Circuit?

Response: The level of scrutiny applicable to a challenge under the Second Amendment depends upon the facts and circumstances of each case. In *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), the Second Circuit held that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." The Second Circuit further concluded that "[we] do not believe . . . that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment. *Heller* explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.' *Heller,* 554 U.S. at 634–35, 128 S.Ct. 2783. Although we have no occasion to decide what level of scrutiny should apply to laws that burden the 'core' Second Amendment protection identified in *Heller,* we believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits." *Kachalsky*, 701 F.3d at 93.

36. Have you ever brought a Second Amendment defense on behalf of a client charged with a gun crime?

Response: I have never raised a defense to a criminal charge based on the Second Amendment.

37. One of the federal courts' important functions is reading statutes and regulations, determining what they mean, and determining how they apply to the facts at hand.

a. How would you determine whether statutory or regulatory text was ambiguous?

Response: The interpretation of a statute or a regulation "begin[s] with the text." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). "If the plain meaning of a statute is susceptible to two or more reasonable meanings, i.e., if it is ambiguous, then a court may resort to the canons of statutory construction." *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

b. Would you apply different standards to determining whether statutory text and regulatory text were ambiguous? If so, how would the ambiguity standards differ?

Response: The standard for determining ambiguity is similar in both contexts. A statute is ambiguous when it is "susceptible to two or more reasonable meanings." *Nat. Res. Def. Council, Inc.*, 268 F.3d at 98. Similarly, the Supreme Court has recognized that interpreting ambiguous regulations "involves a choice between (or among) more than one reasonable reading." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411

(2019). I will follow Supreme Court and Second Circuit precedent in determining if text is ambiguous.

c. When interpreting ambiguous text, what tools would you use to resolve the ambiguity?

Response: If confronted with ambiguous text, I would look to controlling precedent from the Supreme Court and the Second Circuit for guidance on the appropriate tools of interpretation that should apply to the statute or regulation at issue. If there is no controlling precedent, I would consider the plain meaning of the text in its structural context, as well as any appropriate canons of construction. If necessary, I would consider persuasive, but not binding, authority from other Circuits. If appropriate under Supreme Court and Second Circuit precedent, I would consider legislative history.

d. When interpreting ambiguous text, how would you handle two competing and contradictory canons of statutory interpretation?

Response: To resolve any potential conflict between different canons of interpretation, I would consult any relevant Supreme Court and Second Circuit precedent. Absent guidance from such precedent, I would closely examine the plain language of the provision at issue and the language and structure of the statute as a whole. If permitted by controlling precedent, I might consult the legislative history to determine legislative intent, which is the focus of the canons of interpretation.

38. Is climate change real?

Response: I am generally aware that a substantial majority of scientific studies indicate that climate change exists. If confirmed as a Circuit Judge, should an issue relating to this come before me, I would decide the matter based solely on a careful review of the specific record in the case and the applicable law of the Supreme Court and the Second Circuit.

39. Do people have implicit racial bias?

Response: I understand the term "implicit bias" to describe the universal phenomenon of when we have attitudes towards people or associate stereotypes with them without our conscious awareness. If confirmed as a Circuit Judge, I will strive to make decisions based solely on the applicable law and the specific facts of the case before me.

40. Does human life begin at conception?

Response: The question of whether life begins at conception is a complicated one that is frequently debated and litigated. In *Roe v. Wade*, 410 U.S. 113, 159 (1973), the Supreme Court concluded that it "need not resolve the difficult question of when life begins." To the extent that this question asks for my personal views, under Canon 3 of the Code of Conduct, it would be inappropriate for me, as a pending judicial nominee, to offer them.

41. In your hearing you told Sen. Lee that your views on Clarence Thomas when you were 20 years old did not reflect your current views. What are your current views on Clarence Thomas?

Response: I respect the United States Supreme Court and all the Justices who serve on it. As a pending judicial nominee to a court that is under the authority of the Supreme Court, it would be inappropriate under Canon 3 of the Code of Conduct for me to provide personal views regarding a sitting Supreme Court Justice.

42. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?

Response: In making hiring decisions, I will seek to hire law clerks from a diverse array of backgrounds, and I will evaluate candidates based on the totality of their applications. Membership in any particular organization is neither disqualifying nor required.

43. The Blackstone Legal Fellowship "prepares Christian law students for careers marked by integrity, excellence, and leadership." Blackstone "is a program of Alliance Defending Freedom. ADF is the world's largest legal organization committed to protecting religious freedom, free speech, and the sanctity of life." Would you hire a Blackstone Fellow to serve in your chambers as a law clerk?

Response: See answer to Question 42.

44. Please explain, with detail, the process by which you became a circuit-court nominee.

Response: In late January 2021, I became aware of a judgeship opening on the Second Circuit. I spoke with a member of Senator Charles E. Schumer's Judicial Screening Committee about the application process, and then submitted a written application to the committee on February 10, 2021. I spoke by telephone with a member of Senator Schumer's staff on March 1, 2021. On March 3, 2021, I submitted a Judicial Position Interest Questionnaire to Senator Kirsten Gillibrand. On March 9, 2021, I spoke by telephone with a member of Senator Schumer's Screening Committee. On March 13, 2021, I interviewed with Senator Schumer. On March 19, 2021, I spoke by telephone with a member of Senator Gillibrand's staff. On March 22, 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 Department of Justice. On May 11, 2021, I interviewed with President Biden and White House Counsel Dana Remus. On May 12, 2021, the President announced his intent to nominate me.

45. You mentioned in your SJQ that you met with President Biden before being nominated. What was the nature of that meeting?

Response: I spoke with President Biden via a Zoom call. We discussed my professional background and my interest in being a judge.

46. Have you had any conversations with individuals associated with the group Demand Justice—including, but not limited to, Brian Fallon or Chris Kang—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: I had conversations with Chris Kang while I was in the process of submitting my application to Senator Schumer's Judicial Screening Committee. Having never applied for a judgeship previously, I had no familiarity with the nature of the screening process. I spoke with Mr. Kang about how the screening committee operates and the application process generally. I have had no conversations with any other individuals who are, to my knowledge, affiliated with Demand Justice.

a. To your knowledge, has anyone had such conversations on your behalf?

Response: No.

47. Have you had any conversations with individuals associated with the American Constitution Society—including, but not limited, to Russ Feingold—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: No.

a. To your knowledge, has anyone had such conversations on your behalf?

Response: No.

48. Please explain with particularity the process by which you answered these questions.

Response: On June 16, 2021, the Office of Legal Policy at the Department of Justice forwarded these questions to me. I reviewed all the questions, conducted legal research as necessary, reviewed my prior cases and writings, and then drafted answers to the questions. I shared my draft responses with the Office of Legal Policy, which provided feedback to me. I considered this feedback before submitting my final answers to the Committee.

49. Do these answers reflect your true and personal views?

Response: Yes.

Senator Blackburn
Questions for the Record to Eunice C. Lee
Nominee to be United States Circuit Judge for the Second Circuit

1. **During the hearing, I asked you a question about your remarks during a 2013 New York State Association of Criminal Defense Lawyers CLE program. You said that the attendees should strive to "avoid cop-talk" because it "legitimizes the behavior of the police", among other things. In response to my question, you had articulated that you needed to explore the context in which you said this to explain what you meant. Could you please elaborate on what you meant by "legitimizes the behavior of the police"?**

   Response: The CLE presentation was on drafting a persuasive statement of facts and arguments as an appellate criminal defense practitioner. The idea that "using institutional police language legitimizes" police behavior referred to the particular behavior of the police in a given case. As an appellate advocate, it may be necessary in the course of effectively representing one's client to challenge the behavior of the police during an incident or the version of events to which they testified at trial. As the materials note, using "institutional police language suggests that everything that happened in your case was normal and routine." The CLE materials suggest that if an advocate simply echoes the language that the police used, it tends to bolster or legitimize the police testimony and the prosecution's theory of the case.

Nomination of Eunice C. Lee
to be United States Circuit Judge for the Second Circuit Questions
for the Record
Submitted June 16, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

3. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: *Heller* is binding precedent, and if I am confirmed, I will adhere to it and all Supreme Court precedent. In general, it is inappropriate under the Code of Conduct for U.S. Judges, which applies to judicial nominees, for judges to comment on the merits of Supreme Court decisions.

4. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: The Supreme Court held in *District of Columbia v. Heller*, 561 U.S. 742 (2010), that the Second Amendment protects an individual's right to possess a firearm.

5. **Please describe what you believe to be the Supreme Court's holding in *Greer v. United States*, 593 U.S. _____ (2021).**

   Response: In *Greer v. United States*, the Supreme Court examined two cases in which the defendants, one in guilty plea case and one in a trial case, moved to vacate their felon-in-possession convictions based on the government's failure to establish the required knowledge element of the offense. Because neither defendant raised the issue in the lower court, the "plain-error" standard applied. Under the plain-error standard, a defendant must show (i) that there was an error, (ii) that the error was plain, and (iii) that the error affects "substantial rights," i.e., that there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." In the plea case, the Supreme Court held that for a defendant to establish that the error had an effect on

substantial rights, the defendant must argue, on appeal, that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed the firearm. In the trial case, the Court held that in assessing the substantial-rights prong, an appellate court can examine evidence from the entire record, including information in the presentence report.

6. **Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 593 U.S. _____ (2021).**

   Response: In *Terry v. United States*, the defendant had moved for a sentence reduction under the Fair Sentencing Act of 2010, which modified the sentencing penalties for certain drug offenses that triggered mandatory minimums. The First Step Act of 2018 made the statutory penalties of the Fair Sentencing Act retroactive for certain offenses committed before August 3, 2010. The Supreme Court held that because the Fair Sentencing Act did not expressly amend § 841(b)(1)(C), the offense of which the defendant had been convicted, his offense was not a "covered offense" under the First Step Act, and therefore he was not eligible for relief.

7. **Please describe what you believe to be the Supreme Court's holding in *Jones v. Mississippi*, 593 U.S. _____ (2021).**

   Response: In *Jones v. Mississippi*, the Supreme Court held that a court need not find that a juvenile is permanently incorrigible before imposing a sentence of life without the possibility of parole, so long as the sentence resulted from a discretionary sentencing procedure.

8. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 593 U.S. _____ (2021).**

   Response: In reversing the denial of an emergency injunction pending appeal, the Supreme Court held in *Tandon v. Newsom* that the COVID-19 gathering restrictions at issue were not neutral and generally applicable because they treated secular activity more favorably than religious exercise. As such, the restrictions triggered strict scrutiny under the Free Exercise Clause, and the government failed to establish that the law satisfied that standard.

9. **Please describe what you believe to be the Supreme Court's holding in *Sanchez v. Mayorkas*, 593 U.S. _____ (2021).**

   Response: In *Sanchez v. Mayorkas*, the petitioners had entered the United States unlawfully but subsequently applied for and received Temporary Protected Status (TPS), and then later applied for an adjustment of status to lawful permanent resident. The Supreme Court held that because the conferral of TPS under 8 U.S.C. § 1254a does not

constitute an "admission" into the United States under 8 U.S.C. § 1255, the recipients of such status are not eligible to become lawful permanent residents.

10. **What is your view of arbitration as a litigation alternative in civil cases?**

    Response: My two decades of practice have been focused on appellate litigation, and I have no personal opinion on the merits of arbitration as a litigation alternative in civil cases.

11. **Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.**

    Response: On June 16, 2021, the Office of Legal Policy at the Department of Justice forwarded these questions to me. I reviewed all the questions, conducted legal research as necessary, reviewed my prior cases and writings, and then drafted answers to the questions. I shared my draft responses with the Office of Legal Policy, which provided feedback to me. I considered this feedback before submitting my final answers to the Committee.

12. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.**

    Response: No.

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

Questions for the Record for Eunice Cheryl Lee, Nominee for the United States Court of Appeals for the Second Circuit

I. Directions

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

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

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

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

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

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

II. Questions

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

Response: The executive branch has a duty under Article II, Section 3, of the Constitution to ensure that the laws are "faithfully executed." In terms of whether a refusal to enforce a

particular law is appropriate, it would depend on the circumstances of the case and the issue raised. If confirmed as a judge, should I be presented with such a claim, I would apply the relevant Supreme Court and Second Circuit precedent.

2. 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: I am aware that President Biden has created the Presidential Commission on the Supreme Court of the United States for this purpose, but I have no opinion as to the propriety of an increase or decrease in the size of the Supreme Court. If confirmed as a judge on the Second Circuit, I will be bound by the Supreme Court's precedents, regardless of its size.

3. Do you personally own any firearms? If so, please list them.

Response: No.

4. Have you ever personally owned any firearms?

Response: No.

5. Have you ever used a firearm? If so, when and under what circumstances?

Response: No.

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual's right to possess a firearm. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that this right to possess a firearm is fundamental.

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

Response: The Supreme Court has held that the individual right to own a firearm is fundamental. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Neither *McDonald* nor *Heller* address the issue of whether this right receives less protection than other individual rights that are specifically enumerated in the Constitution. Should I be confirmed, I will adhere to Supreme Court and Second Circuit precedent regarding this issue.

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

Response: The Supreme Court has held that the individual right to own a firearm is fundamental. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Neither *McDonald* nor *Heller* address the issue of whether this right receives less protection than the right to vote. Should I be confirmed, I will adhere to Supreme Court and Second Circuit precedent regarding this issue.

9. Is the Religious Freedom Restoration Act a civil rights law?

Response: Yes. Congress has recognized the Religious Freedom Restoration Act as a civil rights law by including it among the statutes for which attorney fees are available, pursuant to the Civil Rights Attorney's Fee Award Act. *See* 42 U.S.C. § 1988.

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

Response: The Supreme Court has affirmed that the Free Exercise rights of religious organizations may limit the government's power to impose constraints on such organizations. *See, e.g., Fulton v. City of Philadelphia*, No. 19-123, __ S. Ct. __, 2021 WL 2459253, (June 17, 2021) (holding that refusal of Philadelphia to contract with Catholic organization for the provision of foster care services unless the organization agreed to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (addressing COVID gathering restrictions); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (addressing the ministerial exception for religious employers).

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

Response: Yes.

12. President Biden has promised to nominate judges "who look like America." What do you understand this to mean?

Response: I have no direct knowledge of what President Biden means by this, but my interpretation is that he is seeking to appoint judges from a wide array of demographic, personal, and professional backgrounds that are reflective of the diversity in this country.

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

Response: The executive branch has the authority to make political appointments, but it is bound by the Constitution and all relevant statutes. If confirmed, I would adhere to binding Supreme Court and Second Circuit precedent in determining any issues before me relating to political appointments.

14. Is there systemic racism in public policy across America?

Response: The question of whether there is systemic racism is one that currently is being debated among various state and federal policy makers, who are in a position to consider empirical evidence and make policy decisions. If I am confirmed as a judge, my role would be to consider any discrete claims of discrimination that are brought before me, not to weigh in on policy issues. In ruling upon any matters before me, I will adhere to Supreme Court and Second Circuit precedent.

15. Is the criminal justice system systemically racist?

Response: I am generally aware of studies indicating that there have been past disparities created by federal sentencing law, specifically with regard to drug offenses for possession of powder versus crack cocaine, which Congress has acted to correct. To the extent that there currently are debates about other potential disparities in the criminal justice system, those questions are for policymakers to consider. If I am confirmed as a judge, my role would be to consider any discrete claims of discrimination that are brought before me, not to weigh in on policy issues. In ruling upon any matters before me, I will adhere to Supreme Court and Second Circuit precedent.

16. If you are to join the Circuit court, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the Court to provide its employees trainings which include the following:

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

Response: I am not aware of what the HR and training policies are for the Second Circuit, and I do not know if I will be involved with them, should I be confirmed. Any training programs should not violate the Constitution or applicable statutes.

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

Response: Response: I am not aware of what the HR and training policies are for the Second Circuit, and I do not know if I will be involved with them, should I be confirmed. Any training programs should not violate the Constitution or applicable statutes.

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

Response: I am not aware of what the HR and training policies are for the Second Circuit, and I do not know if I will be involved with them, should I be confirmed. Any training programs should not violate the Constitution or applicable statutes.

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

Response: I am not aware of what the HR and training policies are for the Second Circuit, and I do not know if I will be involved with them, should I be confirmed. Any training programs should not violate the Constitution or applicable statutes.

17. Will you commit that the Circuit 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: I am not aware of what the HR and training policies are for the Second Circuit, and I do not know if I will be involved with them, should I be confirmed. Any training programs should not violate the Constitution or applicable statutes.

18. Is racial profiling categorically banned by the Constitution?

Response: The question of whether "racial profiling" is prohibited by the Constitution would be dependent both on how that term is defined and on the specific facts and law at issue in a particular case. If confirmed as a judge, I would adhere to all binding Supreme Court and Second Circuit precedent in determining any issue related to this.

19. Is it appropriate for a witness to a crime to consider the race of the perpetrator when deciding whether to provide information to the police or federal authorities?

Response: This is a determination for the individual witness to make.

20. Is it racist for a person to call police out of concern over the threatening or unlawful conduct of a person of color?

Response: Should I be confirmed as a judge, my role will be to assess the specific legal claims before me, not to determine whether an individual is "racist." If a claim of racial discrimination were before me, I would apply Supreme Court and Second Circuit precedent in making any decision.

21. Does the President have the authority to abolish the death penalty?

Response: Congress has passed laws authorizing a federal death penalty, and the Supreme Court has held that the death penalty is constitutional under certain circumstances. The President does not have the authority to unilaterally change the laws enacted by Congress.

a. **Does the implementation of a criminal punishment prescribed by law depend entirely on the President's discretion?**

Response: Congress is empowered to enact legislation, and the President is tasked with implementing the law. Without more information about the statute at issue and the nature of the hypothetical act of discretion in the above question, I cannot answer this question.

b. **Could a President lawfully declare, as a policy, that he disfavors physical imprisonment and order all federal prosecutors to refuse to seek it?**

Response: The President cannot unilaterally change the laws enacted by Congress, including provisions of punishment, but the President does have the power to grant pardons, commutations, and reprieves. U.S. Const. art. II, § 2. As a pending judicial nominee, it would be inappropriate for me to otherwise opine on the potential propriety of a hypothetical use of presidential power.

22. Do you believe that unlawfully setting a building on fire, amidst general rioting, is a violent act?

Response: Federal criminal statutes, as well as the U.S. Sentencing Guidelines, specifically delineate which offenses are deemed "violent" under the law. Should I be confirmed as a judge, I will apply the law in accordance with these statutes and the relevant Supreme Court and Second Circuit precedent.

23. At his hearing, Attorney General Garland said that an attack on a courthouse while in operation, and trying to prevent judges from actually trying cases, "plainly is domestic extremism." And when pressed, he mentioned also that an attack "simply on government property at night or any other kind of circumstances" is a clear and serious crime. But he seemed to make a distinction between the two, describing the latter (and only the latter) as an "attack on our democratic institutions." If you are confirmed, you will be sitting on a very important court. Do you agree with these statements?

Response: Because I am not familiar with these specific statements and the context in which they were made, I cannot comment on them. If I was confirmed and an appeal came before me where the underlying conduct involved an attack on government property, I would apply the law in accordance with relevant federal statutes and relevant Supreme Court and Second Circuit precedent.

24. Do you agree that free speech is an essential and irreplaceable American value?
Response: Yes. The right of free speech under the First Amendment is fundamental.

a. **What are the present threats to free speech in America?**

Response: The determination of whether a particular action or inaction constitutes a present threat to free speech is a policy question. Should I be confirmed as a judge, my role would be to evaluate the specific legal claims that came before me under Supreme Court and Second Circuit precedent.

b. **What role do the courts have in addressing threats to free speech?**

Response: Courts do not have a role in addressing threats to free speech beyond engaging in an impartial analysis of specific legal claims when they are properly before the courts, in accordance with relevant Supreme Court and Circuit precedent.

c. **Does the First Amendment protect speech that some may consider offensive?**

Response: Yes. *See Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017) ("the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers") (internal quotation marks and citations omitted).

i. **If so, what are the limits to that protection?**

Response: There are a number of exceptions that the Supreme Court has recognized to the protection of offensive speech. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010) (noting that obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are not protected speech).

d. **What is "hate speech"?**

Response: To my knowledge, the Supreme Court has not specifically defined a category of "hate speech."

i. **Is "hate speech," as you have just defined it, protected by the First Amendment?**

Response: Offensive speech generally is protected by the First Amendment, but not all categories of offensive speech, including what might be deemed "hate speech," are protected by the First Amendment. *See Stevens*, 559 U.S. at 468.

ii. **If so, what are the limits to that protection?**

Response: The First Amendment does not protect obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See Stevens*, 559 U.S. at 468. The First Amendment also does not protect threatening speech. *See, e.g., Virginia v. Black*, 538 U.S. 343 (2003)

25. Do public educational institutions have the legal obligation to protect the speech rights of students and employees?

Response: Yes. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), the Supreme Court held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

26. Do private educational institutions have the legal obligation to protect the speech rights of students and employees?

Response: Because the First Amendment protects against the regulation of speech by governmental actors, it does not serve to constrain the actions of a private educational institution with regard to restrictions on speech.

27. Are educational institutions that receive federal funding permitted to discriminate on the basis of speech?

Response: To my knowledge, there is no federal statute barring educational institutions that receive federal funding from discriminating on the basis of speech.

28. What do you understand to be the scope of Section 230 protection?

Response: My understanding of Section 230 is that it provides limited federal immunity to providers and users of interactive computer services from being held liable for information provided by a third party.

a. **Does Section 230 immunize content publishers only?**

Response: The question of when and whether a defendant should be considered a publisher for purposes of Section 230 immunity is being litigated in the courts. As a pending judicial nominee, it would be inappropriate for me to opine on this legal question.

b. **If an internet platform curates content, and specifically selects what a user sees and does not see, is the platform engaged in publishing?**

Response: This issue has not been resolved in the courts. As a pending judicial nominee, it would be inappropriate for me to opine on this legal question.

c. **Do you believe that corporations like Facebook, Twitter, and Google should have a special immunity from liability when publishing material that is unavailable to traditional publishers like the *New York Times*? Please explain why.**

Response: This issue has not been resolved in the courts. As a pending judicial nominee, it would be inappropriate for me to opine on this legal question.

29. Does it promote violence against, or directly attack, a person on the basis of gender identity to say there are only two genders?

Response: This question raises an issue of public debate and policy. Should I be confirmed as a judge, my personal views, if any, on this policy question will have no bearing on my decision-making, which will be based on application of Supreme Court and Second Circuit precedent.

30. Does it promote violence against, or directly attack, a person on the basis of religious affiliation to say there are more than two genders?

Response: This question raises an issue of public debate and policy. Should I be confirmed as a judge, my personal views, if any, on this policy question will have no bearing on my decision-making, which will be based on application of Supreme Court and Second Circuit precedent.

31. In 2011, the U.S. Department of Education issued a dear Deal Colleague Letter to colleges and universities that broadened the definition of sexual harassment and required schools to adopt a lenient "more likely than not" burden of proof when adjudicating claims, among other procedural defects. How does this compare with the standard of proof that governs in criminal prosecutions?

Response: The burden of proof at a criminal trial is more substantial, requiring proof "beyond a reasonable doubt."

32. Are students accused of sexual misconduct entitled to due process?

Response: The Supreme Court has recognized that students at public schools have a constitutional right to due process when faced with suspension or expulsion. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

33. Given the information in the public domain, do you believe that Brett Kavanaugh sexually assaulted Christine Blasey Ford?

Response: I respect the United States Supreme Court and the Justices who serve on it. As a pending judicial nominee to a court that is subject to the authority of the Supreme Court, it would be inappropriate under Canon 3 of the Code of Conduct for me to provide personal views regarding a sitting Supreme Court Justice.

34. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.

Response: I do not have a judicial philosophy per se. As an advocate, my role has been to follow the interpretation of the courts as to specific issues and to urge the most favorable outcome for my client within the boundaries of these precedents. Should I be confirmed as a judge, my approach to legal analysis will be similarly guided by precedent, rather than an overarching theory of judicial interpretation. For this reason, my approach is not analogous to that of any of the justices referenced in the question. As a Circuit Judge, I would apply the method of analysis directed by the precedent of the Supreme Court and the Second Circuit, which will provide guidance in the substantial majority of cases. I would carefully review the factual record in the case and the specific arguments of the parties, and then diligently research the law that applies. Following careful and open-minded consideration of the issues, I would decide the case based solely on the relevant precedent and the facts before me.

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

Response: If I am confirmed as a judge, my interpretation of the Constitution's meaning and application will be based on the precedent of the Supreme Court and the Second Circuit.

36. While an undergraduate at The Ohio State University, you wrote a letter to the school newspaper regarding the nomination and confirmation of Clarence Thomas. You wrote, "After watching Clarence Thomas in the Senate hearings, I find that I like him even less than I did before, but it is not necessarily because
I believe the charges against him. I'm upset about the way Thomas, a black conservative, chose to defend himself." You wrote also: "I might stop short of calling Thomas a hypocrite, but I am reminded of that saying about how there are no atheists when in foxholes. Perhaps you can also say that there are no black 'conservatives' when in the political hot seat."

a. **Do you stand by these comments?**

Response: As I indicated during my hearing testimony before the Committee, this letter to the editor, which I wrote 30 years ago as a college student, does not reflect my current beliefs.

b. **How would you have had Justice Thomas defend himself against the false and malicious accusations made against him?**

Response: I respect the United States Supreme Court and the Justices who serve on it. As a pending judicial nominee to a court that is subject to the authority of the Supreme Court, it would be inappropriate under Canon 3 of the Code of Conduct for me to provide personal views regarding a sitting Supreme Court Justice.

37. During the 12-month period ending March 31, 2020, the Second Circuit had 3,036 civil appeals commenced, and only 619 criminal appeals. That means that approximately 83% of new appeals in that year were criminal. You have spent your entire career in criminal defense.

a. **Have you ever handled a civil appeal?**

Response: No.

b. **Have you ever been the lead attorney on a civil case? Please provide additional details as relevant.**

Response: No.

Senator Josh Hawley
Questions for the Record

Eunice C. Lee
Nominee, U.S. Court of Appeals for the Second Circuit

1. **In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set out the precedent of judicial deference that federal courts must afford to administrative actions.**

   a. **Please explain your understanding of the Supreme Court's holding in *Chevron.***

      Response: In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), the Supreme Court held that "a court review[ing] an agency's construction of the statute which it administers" must defer to the agency's authoritative interpretation of that statute in certain circumstances. In order to determine whether or not to defer under *Chevron*, courts must employ a two-step process. The court decides, first, "whether Congress has directly spoken to the precise question at issue," using "traditional tools of statutory construction." *Id.* at 842, 843 n.9. "If the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue," the court must proceed to determine whether the agency's interpretation is "based on a permissible construction of the statute," *id.* at 843, and, if so, the court must defer to the agency's interpretation.

   b. **Please describe how you would determine whether a statute enacted by Congress is ambiguous.**

      Response: The Supreme Court held in *Chevron* that courts should determine whether the relevant statute is clear by using the "traditional tools of statutory construction." 467 U.S. at 843 n.9. *See also Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) ("If the plain meaning of a statute is susceptible to two or more reasonable meanings, i.e., if it is ambiguous, then a court may resort to the canons of statutory construction.").

   c. **In your view, is it relevant to the *Chevron* analysis whether the agency that took the regulatory action in question recognized that the statute is ambiguous?**

Response: Rather than relying upon any personal views about whether an agency's recognition that a statute is ambiguous should be relevant, I will adhere to Supreme Court and Second Circuit precedent in analyzing these claims.

2. **Under Supreme Court and U.S. Court of Appeals for the Second Circuit precedent, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?**

   Response: To prevail on a claim that a method-of-execution violates the prohibition against cruel and unusual punishment, a petitioner must show that the challenged method creates a substantial risk of severe pain when compared to known and available alternatives that present a significantly reduced risk of severe pain. *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015); *see also Baze v. Rees*, 553 U.S. 35, 51-52 (2008).

3. **Under the Supreme Court's holding in *Glossip v. Gross*, 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.

4. **Have the Supreme Court or the U.S. Court of Appeals for the Second Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

   Response: Neither the Supreme Court nor the Second Circuit has recognized a constitutional right to DNA analysis for habeas corpus petitioners alleging innocence. *See, e.g., Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (finding no substantive due process right to DNA evidence).

5. **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.

6.

a. Under Supreme Court and U.S. Court of Appeals for the Second precedent, 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 has affirmed that the Free Exercise rights of religious organizations may limit the government's power to impose constraints on such organizations. *See, e.g., Fulton v. City of Philadelphia*, __ S. Ct. __, 2021 WL 2459253 (June 17, 2021) (holding that refusal of Philadelphia to contract with Catholic organization for the provision of foster care services unless the organization agreed to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (addressing COVID gathering restrictions); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (addressing the ministerial exception for religious employers). A law is not neutral and "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 2021 WL 2459253, at *5. *See also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 632 (2d Cir. 2020) (applying strict scrutiny to capacity limits on houses of worship because the restrictions lacked general applicability). Neither is a law generally applicable if it "invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 2021 WL 2459253, at *5 (internal quotations omitted). A law that burdens the free exercise of religion in this manner is subject to strict scrutiny. *Id.* at *4.

b. Under Supreme Court and U.S. Court of Appeals for the Second Circuit precedent, 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: See answer to Question 6.a.

c. What is the standard in the U.S. Court of Appeals for the Second Circuit for evaluating whether a person's religious belief is held sincerely?

Response: In the Second Circuit, a religious belief is "sincerely held" when the plaintiff subjectively, sincerely holds a particular belief that is religious in nature. "We refused to evaluate the objective reasonableness of the prisoner's belief, holding that our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. In

upholding the plaintiff's claim, we made clear that to apply an objective test in such cases would require courts to resolve questions that are beyond their competence[.]" *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003) (internal quotations and citations omitted).

7. **What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?***

   Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual's right to possess a firearm, unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home.

8. **Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."**

   Response: I agree with the part of this statement that says statutes should be interpreted based on the plain meaning of the statutory text. If confirmed as a judge and confronted with the need to determine the meaning of ambiguous text, I would apply the method of interpretation dictated by relevant precedent, as well as the canons of statutory construction, as appropriate. *See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env't Prot. Agency*, 846 F.3d 492, 512 (2d Cir. 2017) (employing the traditional tools of statutory construction to ambiguous text, including "examin[ing] the statutory text, structure, and purpose as reflected in its legislative history").

Questions for the Record for Eunice C. Lee
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.

Senate Judiciary Committee - Questions for the Record from Senator John Kennedy
June 9, 2021

Hearing entitled: "Nominations"

Questions for Eunice Lee, Nominee for the U.S. Court of Appeals for the Second Circuit

1. **I want you to provide further clarity regarding your judicial philosophy in the wake of your June 9, 2021, nomination hearing. Do you personally believe, generally and at the most fundamental level, that the provisions of the United States Constitution should be interpreted according to their respective meanings at the time of adoption?**

   Response: Because I have not previously served as a judge, I have not had occasion to develop a personal judicial philosophy. For the past 23 years, my work as an advocate has been based on applying controlling precedent to the specific facts of the case. I do not have an overarching view as to how the provisions of the Constitution should be interpreted, but instead apply the holdings of binding case law. The Supreme Court has at times held that constitutional provisions should be interpreted in accordance with their original public meaning. *See District of Columbia v. Heller*, 554 U.S. 570 (2008) (applying original meaning analysis to the Second Amendment). But the Supreme Court has also applied other methods of constitutional interpretation. For example, in *Crawford v. Washington*, 541 U.S. 36, 50 (2004), the Court analyzed the Confrontation Clause of the Sixth Amendment in the context of the Framers' original intent:

   > First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. *The Sixth Amendment must be interpreted with this focus in mind.*

   Id. (emphasis added). In addition, in the context of the Eighth Amendment, the Supreme Court has held that "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Fla.*, 560 U.S. 48, 58 (2010), *as modified* (July 6, 2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)) (internal quotations omitted). If confirmed as a Circuit Judge, I would be bound by Supreme Court and Second Circuit precedent, regardless of whether those precedents were based on original public meaning or some other method of interpretation.

2. **If you do not subscribe to Original Meaning as your core judicial philosophy, then what is your approach to constitutional interpretation?**

Response: Should I be confirmed as a Circuit Judge, I will interpret the Constitution in accordance with the method of interpretation indicated by the precedent of the Supreme Court and the Second Circuit as to the specific constitutional provision at issue. In the unlikely event of an issue of first impression regarding a constitutional provision, I would employ the method of interpretation consistent with the most analogous Supreme Court precedent.

Senator Mike Lee
Questions for the Record
Eunice C. Lee, Second Circuit Court of Appeals

1. How would you describe your judicial philosophy?

Response: I do not have a judicial philosophy per se. As an advocate for the past 23 years, my role has been to follow the interpretation of the courts as to specific issues and to urge the most favorable outcome for my client within the boundaries of those precedents. Should I be confirmed as a judge, my approach to legal analysis will be similarly guided by precedent, rather than an overarching theory of judicial interpretation. As a Circuit Judge, I would apply the method of analysis directed by the precedent of the Supreme Court and the Second Circuit, which will provide guidance in a substantial majority of cases. I would carefully review the factual record in the case and the specific arguments of the parties, and then diligently research the law that applies. Following careful and open-minded consideration of the issues, I would decide the case based solely on the relevant precedent and the facts before me.

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

Response: Interpretation of a statute always "begin[s] with the text." *Facebook Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). The text of a statute should be interpreted in accordance with its plain meaning, using traditional tools of statutory construction. If there is Supreme Court or Second Circuit precedent interpreting the statute, that interpretation would be authoritative and binding. In the absence of binding precedent or clarity in the plain meaning of the text, I would consider the other canons of construction. I also would look to Supreme Court and Second Circuit precedent interpreting any related or analogous statutory provisions. I also would consider persuasive, but not binding, authority from other circuits. If appropriate and necessary, I would also consider legislative history.

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

Response: I would interpret any constitutional provision in accordance with the method of interpretation applied by the precedent of the Supreme Court and the Second Circuit as to the specific constitutional provision at issue. In the rare circumstance of an issue of first impression regarding a constitutional provision, I would employ the method of interpretation consistent with the most analogous Supreme Court precedent.

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

Response: In interpreting the Constitution, I would be guided by the precedents of the Supreme Court and the Second Circuit as to the appropriate method of interpretation. Analysis of the original meaning of a constitutional provision is an interpretative method that the Supreme Court has often applied in analyzing constitutional text. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

5. What are the constitutional requirements for standing?

Response: The Supreme Court articulated the constitutional requirements for standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

6. Do you believe there is a difference between "prudential" jurisdiction and Article III jurisdiction in the federal courts? If so, which jurisdictional requirements are prudential, and which are mandatory?

Response: The jurisdiction of the federal courts under Article III of the Constitution is explicit and defined. The Constitution vests "[t]he judicial Power" in the courts, U.S. Const. art. III, § 2, and this jurisdiction requires an actual case or controversy. The Supreme Court has developed various doctrines that relate to the exercise of a federal court's jurisdiction. While some of these doctrines are mandatory, the Supreme Court has recognized an ability to exercise jurisdiction, or not, based on "prudential" concerns that are not grounded in the text of Article III.

Standing, for example, relates to whether a plaintiff has made out a "case or controversy" within the meaning of Article III and is thus entitled to have the federal

court adjudicate it. The determination of standing is a mandatory consideration that must be assessed at the outset of a case, and if there is no standing, the court lacks jurisdiction to hear the case. However, the Supreme Court has recognized other limitations on standing that are not grounded in the text, noting that "[t]his inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Thus, the Supreme Court has recognized what are essentially "prudential" limits on when courts should find the requirement of standing to be met. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting that prudential limitations on standing include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interest protected by the law invoked").

Notwithstanding these "prudential" considerations, the Supreme Court has recently reiterated that federal courts must hear cases that have been properly brought, and that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation marks and citation omitted). "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* at 128 (internal citations omitted).

7. How would you define the doctrine of administrative exhaustion?

Response: Administrative exhaustion refers to the requirement that a party challenging an agency's decision first pursue all available agency remedies before seeking judicial review. *See Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006) ("The doctrine [of administrative exhaustion] provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (internal quotations omitted).

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

Response: Article I, section 8 of the Constitution gives Congress power to make "all Laws which shall be necessary and proper for carrying into Execution" other federal powers granted in the Constitution. Known as the "Necessary and Proper Clause," this provision of the Constitution has at times been interpreted by the Supreme Court as recognizing that there are implied powers of Congress. *See, e.g., McCulloch v. Maryland*, 17 U.S. 316 (1819) (holding that Congress has the implied power to incorporate a bank).

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

Response: If called upon to evaluate the constitutionality of a law that Congress passed without reference to a specific enumerated power, I would look to any binding Supreme Court or Second Circuit precedent that addressed the issue. If no binding precedent existed, I likely would apply the method that the Supreme Court has previously used to evaluate such laws in cases like *United States v. Lopez*, 514 U.S. 549 (1995), which looked to the Constitution's text and the Court's prior precedent regarding the Commerce Clause to determine guiding principles.

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

Response: The Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments protect certain unenumerated "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 Court has noted, *id.* at 720, that these substantive due process rights include: the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy and to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to terminate a pregnancy before viability, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

11. What rights are protected under substantive due process?

Response: Please see answer to Question 10.

12. 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: Should I be confirmed as a judge, any personal beliefs that I might have about substantive due process will have no bearing on my decision-making. I will adhere to binding Supreme Court precedent. The Supreme Court has recognized a substantive due process right to abortion in the pre-viability stage, which may be regulated only so long as any restriction does not impose an "undue burden." *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (plurality). The Supreme Court has

not afforded the same level of protection to the economic rights at issue in *Lochner*. *See West Coast Hotel Co. v. Parrish*, 57 S. Ct. 578 (1937).

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

Response: The Supreme Court held in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), that Congress may regulate three categories of activity under its Commerce Clause power. Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and any activity that substantially affects interstate commerce. *Id.*

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

Response: To date, the Supreme Court has identified classifications based on race, alienage, national origin, and religion as inherently suspect and requiring the application of strict scrutiny. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–32 (1971).

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

Response: The structure of the Constitution emphasizes the Framers' intention to develop a government of three co-equal branches, each subject to checks and balances. The careful division of the government into separate legislative, executive, and judicial branches, delineated in separate Articles and given powers both exclusive and complementary, reflects this desire to constrain any branch from exceeding its power. Separation of powers is critical in our Constitution's structure:

> In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[ ] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).

Stern v. Marshall, 564 U.S. 462, 483 (2011).

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

Response: If I was presented with a case in which it was claimed that one branch of government exceeded its constitutional authority, I would analyze the issue in

accordance with the binding precedent of the Supreme Court and the Second Circuit. For example, if the case involved an act of Congress, I might need to examine the Supreme Court body of case law that has analyzed claims of unauthorized use of power under the Commerce Clause. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: A judge's decision-making should be based on an impartial analysis of the relevant facts and law, and personal views should have no bearing.

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

Response: A judge should strive to avoid both of these undesirable outcomes.

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

Response: I have not closely studied the historical trends or changes in the Supreme Court's patterns of invalidating federal statutes, and thus I do not have a basis for opining on this topic.

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

Response: Judicial review refers to the power of the judiciary "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). There is some debate as to how this is distinct from judicial supremacy, which refers to the idea that the Supreme Court should be viewed as the authoritative interpreter of the Constitution, whose decisions are binding on the legislative and executive branch, absent constitutional amendment or overruling by subsequent decision.

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

to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Individuals in the various branches of government should strive to fulfill their respective constitutional obligations. Elected officials are obligated to follow both the Constitution and duly rendered judicial decisions. As a pending judicial nominee, whose role would be to issue decisions in accordance with the Constitution, it is not appropriate for me to opine on the issue of how and whether elected officials should respect duly rendered judicial decisions.

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

Response: Hamilton's assertion in Federalist 78 serves as a reminder of the judiciary's limited role, which is to determine what the law is, not to legislate or enforce the law. It reinforces the dictates of Article III of the Constitution, which constrains courts to consideration of only actual cases or controversies before them. Federalist 78 is a reminder that courts do not exercise unlimited power.

23. How would you describe your approach to reading statutes—how much weight do you give to the plain meaning of the text? When we talk about the plain meaning of a statute, are we talking about the public understanding at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: Interpretation of a statute always "begin[s] with the text." *Facebook Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). The text of a statute should be interpreted in accordance with its plain meaning, which does not change over time based on social norms or linguistic conventions. If there is ambiguity in the plain meaning of the statute, I would look to guidance from the Supreme Court and the Second Circuit as to meaning of the text or the appropriate method for interpreting it, which would be binding. In the absence of such guidance, I would employ the canons of statutory construction. I would also consider Supreme Court or Second Circuit precedent analyzing an analogous statute, as well as persuasive but non-binding precedent from other circuits.

24. As a circuit 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: As a circuit judge, I would be bound by all Supreme Court and Second Circuit precedent, regardless of any personal beliefs about the legitimacy or basis of the decision's underpinning. I would be required to follow that precedent in any case for which it is controlling. If a precedent is not controlling, then I would determine whether or not it should be extended to the new circumstances, given the nature of its underpinnings.

25. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

Response: No.

26. 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: 18 U.S.C. § 3553(a) describes the factors that a judge should consider when imposing a sentence. A defendant's group identity can be considered only to the extent it relates to one of the sentencing factors set forth in the statute.

27. Would it ever be appropriate to sentence a defendant who belongs to a historically disadvantaged group less severely than a similarly situated defendant who belongs to a historically advantaged group to correct systemic sentencing disparities?

Response: No.

28. Have you spoken with anyone affiliated with Demand Justice or the Leadership Conference on Civil Rights regarding your nomination either before or after it was announced?

Response: I had conversations with Chris Kang while I was in the process of submitting my application to Senator Schumer's Judicial Screening Committee. Having never applied for a judgeship previously, I had no familiarity with the nature of the screening process. I spoke with Mr. Kang about how the screening committee operates and the application process generally. I have had no conversations with any other individuals who are, to my knowledge, affiliated with either Demand Justice or the Leadership Conference on Civil Rights.

29. Given your vast experience as an appellate public defender, should you be confirmed to this position, you will no doubt hear criminal appeals in which an

alternative—and perhaps more efficacious—appeal could have been made. Under what circumstances may a Circuit Court panel, *sua sponte*, propose alternative, non-argued grounds for overturning a sentence other than those briefed and argued before the panel?

Response: In rare circumstances, appellate courts may "notice[], and order[] correction of, plain errors not raised by defendants." *Greenlaw v. United States*, 554 U.S. 237, 247 (2008); *see also Silber v. United States*, 370 U.S. 717, 718 (1962) (per curiam) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.") (internal quotations and citations omitted). As indicated by this authority, appellate courts should exercise their ability to address errors not raised by the parties on appeal only when it is "plain error" that seriously calls into question the fairness and integrity of the proceedings.

30. **You have been nominated to the United States Court of Appeals of the Second Circuit. I have no doubt that throughout your many years of experience as an appellate federal defender you have become an expert in appealing criminal cases—particularly in New York courts. I am less convinced that you have the qualifications to sit on the Second Circuit which hears not just criminal appeals but civil appeals as well. What assurances can you give this Committee that you have the requisite experience and qualifications for this position?**

Response: Like most individuals appointed to the bench, I do not have familiarity with all the topics that may come before me as a judge. Should I be confirmed as a Circuit Judge, I will endeavor to immerse myself in those areas of the law with which I am less familiar, and I also would look forward to discussing with my Second Circuit colleagues what they found to be most helpful in getting up to speed on areas of the law with which they may have been less familiar when they first joined the bench. To the extent that I am confronted with civil law issues with which I am less familiar, I will take a similar approach to gaining mastery over novel issues on appeal that I have successfully employed in my 23 years as an appellate advocate. Appellate judges are presented with a limited factual record and a discrete legal claim to evaluate on appeal. I would approach a case by first carefully reviewing the facts in the record and the arguments presented by the parties, as well as the underlying statute or other legal provision at issue. I would review the case law cited by the parties and relied upon by the judge in the lower court, as well as conduct independent research as to any other relevant Supreme Court and Second Circuit precedent. To the extent that I needed additional general background on the specific legal topic, I would review treatises and other academic sources, and perhaps consider case law in an analogous context. Following careful consideration of all this information, I would apply the law to the specific facts of the case.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
June 9, 2021

For Ms. Eunice Lee:

1. **Why did you choose to work for the Office of the Appellate Defender and Federal Defenders of New York?**

   Response: I have always known that I wanted to use my law degree to serve the public, and I recognized early in law school the need for attorneys willing to uphold the constitutional right to counsel by defending those who are accused or convicted of crimes but cannot afford an attorney. This desire to serve, along with a strong interest in appellate litigation, was what motivated my decision to work at the Office of the Appellate Defender and the Appeals Bureau of the Federal Defenders of New York.

2. **Were you ever concerned that your work for the Office of the Appellate Defender and Federal Defenders of New York would result in more violent criminals—including gun criminals and sex criminals—being put back on the streets?**

   Response: It has been my ethical and constitutional duty to zealously advocate for my clients, regardless of personal views or beliefs about the client, the offense, or public opinion. The legitimacy of the justice system requires that all the participants fulfill their respective roles, and I have served many years in the critical role of protecting the constitutional right of due process for those who cannot afford an attorney.

<u>For all nominees:</u>

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: I do not have a judicial philosophy per se. As an advocate for the past 23 years, my role has been to follow the interpretation of the courts as to specific issues and to urge the most favorable outcome for my client within the boundaries of those precedents. Should I be confirmed as a judge, my approach to legal analysis will be similarly guided by precedent, rather than an overarching theory of judicial interpretation. As a Circuit Judge, I would apply the method of analysis directed by the precedent of the Supreme Court and the Second Circuit, which will provide guidance in a substantial majority of cases. I would carefully review the factual record in the case and the specific arguments of the parties, and then

diligently research the law that applies. Following careful and open-minded consideration of the issues, I would decide the case based solely on the relevant precedent and the facts before me.

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

   Response: I do not have an overarching theory of judicial interpretation, and thus I would not embrace or reject any particular label. (See answer to Question 3.) If confirmed, I would interpret the law in accordance with Supreme Court and Second Circuit precedent, whether or not those precedents were categorized as "originalist."

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

   Response: I do not have an overarching theory of judicial interpretation, and thus I would not embrace or reject any particular label. (See answer to Question 3.) If confirmed, I would interpret the law in accordance with Supreme Court and Second Circuit precedent, whether or not those precedents were categorized as "textualist." I would also note that in general the interpretation of a statute always "begin[s] with the text." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021).

6. **Do you believe the Constitution is a "living" document? Why or why not?**

   Response: What is meant by the characterization of the Constitution as a "living" document is not unambiguous. I believe that the Constitution is an enduring document with a fixed nature.

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

   Response: Because I do not have an overarching judicial philosophy, there is no one specific Justice whose jurisprudence I most admire or whose philosophy I would emulate. Instead, the judicial traits that I most admire in any jurist are fidelity to the law and awareness of its power, respect for the parties, clarity in decision-writing, and collegiality.

8. **Was Marbury v. Madison correctly decided?**
9. **Was Lochner v. New York correctly decided?**
10. **Was Brown v. Board of Education correctly decided?**
11. **Was Bolling v. Sharpe correctly decided?**
12. **Was Cooper v. Aaron correctly decided?**
13. **Was Mapp v. Ohio correctly decided?**
14. **Was Gideon v. Wainwright correctly decided?**
15. **Was Griswold v. Connecticut correctly decided?**
16. **Was South Carolina v. Katzenbach correctly decided?**
17. **Was Miranda v. Arizona correctly decided?**
18. **Was Loving v. Virginia correctly decided?**
19. **Was Katz v. United States correctly decided?**
20. **Was Roe v. Wade correctly decided?**
21. **Was Romer v. Evans correctly decided?**
22. **Was United States v. Virginia correctly decided?**
23. **Was Bush v. Gore correctly decided?**
24. **Was District of Columbia v. Heller correctly decided?**

25. Was Crawford v. Marion County Election Bord correctly decided?
26. Was Boumediene v. Bush correctly decided?
27. Was Citizens United v. Federal Election Commission correctly decided?
28. Was Shelby County v. Holder correctly decided?
29. Was United States v. Windsor correctly decided?
30. Was Obergefell v. Hodges correctly decided?

Response to Questions 8-30: The above Supreme Court decisions are all binding precedent, and if I am confirmed, I would adhere to them. In general, it is inappropriate under the Code of Conduct for U.S. Judges, which applies to judicial nominees, for judges to comment on the merits of Supreme Court decisions. However, prior judicial nominees have made three exceptions to the practice of avoiding comment on the merits of Supreme Court decisions to acknowledge that *Marbury v. Madison*, *Brown v. Board of Education*, and *Loving v. Virginia*, were correctly decided.

Marbury warrants this special status because the principle of judicial review that the decision established—i.e., its holding that, under the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803)—is a foundational finding that is beyond dispute. *See* Federalist No. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

Brown v. the Board of Education warrants this special status because that decision overruled the manifest injustice of *Plessy v. Ferguson*, which had given rise to legally enforceable segregation in various places in the United States by endorsing "separate but equal" as consistent with the Constitution's Equal Protection Clause. The underlying premise of the *Brown* decision—i.e., that "separate but equal is inherently unequal"—is beyond dispute.

Loving v. Virginia warrants this special status because it reaffirmed the rejection of the "notion that the mere 'equal application' of a statute containing racial classifications" comports with the Fourteenth Amendment, 388 U.S. 1, 8 (1967), and as such, it is a direct outgrowth of *Brown*.

Therefore, just as other judicial nominees have done, I can confirm that *Marbury*, *Brown*, and *Loving* were rightly decided without calling into question my duties under the Code of Conduct.

31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: Any panel of the Second Circuit is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of [the] Court or by the Supreme Court . . . and thus ordinarily [the court] cannot overturn an existing Circuit precedent." *United States v. Smith*, 949 F.3d 60, 65 (2d Cir. 2020) (internal quotations and citations omitted). Absent such factors, an appellate panel of the Second Circuit must reaffirm its prior precedent. Federal Rule of Appellate Procedure 35 contains factors a circuit judge must consider when deciding whether to hear or rehear a case en banc. En banc proceedings are "not favored." F.R.A.P. 35(a). However, en banc proceedings may be appropriate if a panel decision "conflicts with a decision of the Supreme Court or of the court to which the petition is addressed" or "the proceeding involves one or more questions of exceptional

importance." F.R.A.P. 35(b)(1)(A) & (B).

32. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: Please see answer to Question 31.

33. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: No. The factors that may be considered by a court during sentencing are set forth in 18 U.S.C. § 3553(a), which does not authorize consideration of the need to treat similarly-situated defendants differently in order to correct systemic sentencing disparities.

Questions for the Record for
Senator Thom Tillis for
Questions for Ms. Eunice Cheryl Lee

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

   Response: Yes.

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

   Response: People have different definitions of judicial activism. My definition of judicial activism is when a judge makes a decision that goes beyond what is required by the specific issue presented in the case in order to effectuate the judge's personal views and opinions. Judicial activism is not appropriate.

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

   Response: Impartiality is a requirement for a judge. This is confirmed by Canon 3 of the Code of Conduct for United States Judges, which states that "a judge should perform the duties of the office fairly, impartially, and diligently."

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

   Response: No.

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

   Response: Should I be confirmed as a Circuit Judge, I will not allow any personal views or opinions to influence my decision-making. Faithful interpretation of the law, without regard to the perceived desirability of the outcome, is a critical obligation of a judge.

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

   Response: No.

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

   Response: If I am confirmed as a Circuit Judge, I will faithfully follow all Supreme Court precedent pertaining to the Second Amendment, including the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *Heller*, the Supreme Court held that the Constitution protects the right

of an individual to possess a lawful firearm, including a handgun, and to use that firearm for traditionally lawful purposes, such as self-defense within the home. In *McDonald*, the Supreme Court held that the Second Amendment right to possess and carry weapons is a fundamental right applicable to the states through the Fourteenth Amendment.

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: Should I be confirmed, in evaluating any case that raises issues of constitutional rights and state emergency powers, I would apply all binding Supreme Court and Second Circuit precedent to the specific facts of the case before me. Given that cases related to COVID-19 restrictions are currently being litigated in the courts, *see, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021), it would be inappropriate for me, as a pending judicial nominee, to opine on this hypothetical.

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: I have never served as a judge, and therefore I have not had occasion to either grant or consider the application of qualified immunity to law enforcement. Should I be confirmed as a Circuit Judge, I would apply all binding Supreme Court and Second Circuit precedent to the specific case at issue. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

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: The question of the adequacy of qualified immunity to protect law enforcement is a policy matter that is the province of the legislative and executive branches. As a Circuit Judge, should I be confirmed, I will adhere to Supreme Court and Second Circuit precedent regarding the application of qualified immunity. Any personal views that I might have on this issue would be irrelevant to my decision-making.

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

Response: Please see answer to Question 10.