Senator Chuck Grassley, Ranking Member
Questions for the Record
Hector Gonzalez
Judicial Nominee to the United States District Court for the Eastern District of New York

1. In the context of federal case law, what is the academic or scholarly definition of super precedent? Which cases, if any, count as super precedent?

Response: I am not familiar with the term "super precedent," and to my knowledge neither the Supreme Court nor the Second Circuit has used the term. If confirmed as a district court judge, I would faithfully follow all precedent from the Supreme Court and Second Circuit.

2. You can answer the following questions yes or no:

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

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

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

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

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

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

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

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

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

j. Was *Sturgeon v. Frost* correctly decided?

k. Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?

Response to all subparts: As a district court judge nominee, I am constrained by the Code of Conduct for United States Judges from commenting on any case that may come before me in the future. Notwithstanding the above, I am aware that prior judicial nominees have identified *Brown v. Board of Education* and *Loving v. Virginia* as foundational cases unlikely to be the subject of future controversy and have therefore commented on those two cases. Consistent with that approach, I believe it is appropriate for me to state my opinion that both *Brown* and *Loving* were rightly decided.

3. Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?

Response: I am not familiar with Judge Jackson's remarks or the context in which they were made. If I am confirmed as a district court judge, I would faithfully follow all precedent from the Supreme Court and Second Circuit regarding the interpretation of Constitutional provisions.

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

Response: I am not familiar with the term "social equity." According to Black's Law Dictionary, "equity" is defined as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019). Judicial decisions should be based on the fair and impartial application of binding precedent to the facts of the case before the court.

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

Response: I disagree with the statement. A judge's personal views and values are irrelevant when it comes to interpreting and applying the law.

6. Is climate change real?

Response: The question of whether climate change is real is one within the purview of policy makers. If I am confirmed as a district court judge and a case came before me that raised a question regarding the existence of climate change, I would faithfully apply any binding Supreme Court and Second Circuit precedent to the relevant facts of the case.

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

Response: The Supreme Court has held that parents have the right to direct the education of their children. *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923) ("[The plaintiff's] right thus to teach and the right of parents to engage [the plaintiff] so to instruct their children, we think, are within the liberty of the [Fourteenth Amendment]".).

8. Is whether a specific substance causes cancer in humans a scientific question?

Response: To the extent this question is directed at the role of expert testimony in federal cases, district courts play a gate-keeping function to ensure that "all scientific testimony or evidence admitted is not only relevant, but reliable," and that the expert testimony will assist the trier of fact in better understanding the evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *see also* Federal Rule of Evidence 702.

9. Is when a "fetus is viable" a scientific question?

Response: The Supreme Court appears to have indicated as much when it explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992) (emphasis added), that "*advances in neonatal care* have advanced viability to a point somewhat earlier" than in the year the Court decided *Roe v. Wade*, 410 U.S. 113 (1973), and further referenced how "fetal respiratory capacity can somehow be enhanced in the future." *Id.* Please see also my response to Question 8.

10. Is when a human life begins a scientific question?

Response: While some may consider this a scientific question, there are also religious, moral, political, and philosophical implications to the question. If confirmed as a district court judge and a case came before me presenting this issue, I would faithfully apply any binding Supreme Court and Second Circuit precedent to the relevant facts of the case. Please see also my response to Question 8.

11. Can someone change his or her biological sex?

Response: To the extent this question is directed at the role of expert testimony in federal cases, please see my response to Question 8.

12. Is threatening Supreme Court justices right or wrong?

Response: As a general matter, any threat, which I understand to mean the expression of an intent to cause harm or other hostile action, against a Supreme Court justice is wrong. Depending on the nature of the threat, it may also be a crime pursuant to 18 U.S.C. § 115.

13. Does the president have the power to remove senior officials at his pleasure?

Response: As a general matter, the President's authority to remove executive-branch employees is defined by the Constitution, Supreme Court precedent, and applicable federal law. There are, however, certain limitations to this power. For example, Congress may "create expert agencies led by a group of principal officers removable by the President only for good cause." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020). If confirmed as a district court judge and a case involving the President's removal power came before me, I would faithfully apply Supreme Court and Second Circuit precedent to the specific facts of the case.

14. Do you believe that we should defund or decrease funding for police departments and law enforcement, including the law enforcement entities responsible for protecting the federal courthouses in Portland from violent rioters? Please explain.

Response: The question of the appropriate level of funding for police departments is the sort of issue within the purview of policy makers. Under our system of checks and balances, governmental powers are separated among the three branches of government. The role of the judiciary is limited to interpreting the law. If confirmed as a district court judge, I would have no role in making policy.

15. Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.

Response: Please see my response to Question 14.

16. What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?

Response: The question of how to manage the prison population during the COVID-19 pandemic is the sort of issue within the purview of policy makers. If I am confirmed as a district court judge and a case presenting this issue comes before me, I would faithfully apply any binding Supreme Court and Second Circuit precedent to the facts presented in the case, and would also look to the sentencing factors set forth in 18 U.S.C. §§ 3582(c)(1)(A) and 3553(a).

17. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

Response: If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit precedent, such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

18. Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?

Response: I am unaware of any Supreme Court or Second Circuit precedent that would determine the answer to this question.

19. Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?

Response: While I am aware of the Born-Alive Infants Protection Act of 2002, as well as the Supreme Court's decision in *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833 (1992), and its progeny, I am not aware of any Supreme Court or Second Circuit precedent that would determine the answer to this question.

20. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: While courts "have no business addressing" whether a religious belief is reasonable, the question of whether a law substantially burdens the free exercise of religion, is a determination for the court. *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014).

b. How is a burden deemed to be "substantial[]" under current caselaw?

Response: The Supreme Court addressed this issue in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Applying a two-part analysis, courts must first determine whether non-compliance with the challenged law would impose "severe" economic costs, *id.* at 720, and second whether compliance with the challenged law would force plaintiffs to violate their sincere religious beliefs. *Id.* at 720-26.

21. Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?

Response: I am not familiar with this quote or the context in which it was made. If confirmed as a district court judge, I would faithfully apply Supreme Court and Second Circuit precedent and would strive to render decisions consistent with that precedent.

22. 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 canon of legal ethics that stands for the proposition that some civil clients do not deserve representation on account of their identity. Under the American Bar Association's Model Rules of Professional Conduct, "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule 1.2(b).

23. Do Blaine Amendments violate the Constitution?

Response: I understand Blaine Amendments to be a reference to efforts in the late 19th century to prohibit government aid to religiously affiliated schools. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Supreme Court held that a state-based scholarship program that provides public funds for students to attend private schools cannot discriminate against religiously affiliated schools under the Free Exercise Clause of the First Amendment.

24. Is the right to petition the government a constitutionally protected right?

Response: Yes. The First Amendment provides for the right "to petition the government for a redress of grievances."

25. What is the operative standard for determining whether a statement is not protected speech under the "fighting words" doctrine?

Response: This issue was addressed by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). There, the Court found that "fighting words" fall under the category of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. Subsequent Supreme Court precedent has

defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971).

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

Response: In *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Supreme Court defined "true threats" to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The Court went on to hold that the First Amendment does not prohibit a state from "ban[ning] a true threat." *Id.*

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

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

Response: No.

b. Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?

Response: No.

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

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

Response: No.

b. Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No.

c. Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?

Response: No.

29. Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."

a. Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund.

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: In July 2018, I submitted an application for a position on the United States District Court for the Eastern District of New York to Senator Charles Schumer's Judicial Screening Committee. On February 19, 2020, I was contacted by the chair of Senator Schumer's Committee and asked to update the application I had submitted in 2018. On May 1, 2020, I interviewed with the Committee's chair. On May 10, 2020, I was interviewed by Senator Schumer. On June 12, 2020, I heard from a member of Senator Schumer's staff that the Senator was submitting my name to the White House for consideration regarding a federal district court vacancy in the Eastern District of New York. On June 12, 2020, I was contacted by the White House Counsel's Office regarding the vacancy. On June 15, 2020, I was interviewed by attorneys from the White House

Counsel's Office and the Office of Legal Policy at the United States Department of Justice. On June 26, 2020, I was contacted by the White House Counsel's Office to provide additional information as part of my application process. Thereafter, I was in contact with attorneys from the White House Counsel's Office and the Office of Legal Policy. On August 12, 2020, President Donald Trump announced his intent to nominate me. On September 8, 2020, the President submitted my nomination to the Senate. My nomination expired at the close of the 116th Congress on January 3, 2021.

Subsequently, I heard from a member of Senator Schumer's staff that my name would be resubmitted to the White House during the next congressional session. On August 31, 2021, I was notified by an official from the White House Counsel's Office that my name had been resubmitted. On September 2, 2021, I was interviewed by attorneys from the White House Counsel's Office. Since that time, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy. On December 15, 2021, my nomination was submitted to the Senate.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: I did not. I am not aware of anyone doing so on my behalf.

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

Response: Please see my response to Question 32. Additionally, I was in contact with lawyers from the Office of Legal Policy and the White House Counsel's Office regarding preparations for my confirmation hearing.

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

Response: I received the questions on January 19, 2022. I drafted answers to each question based on my own knowledge and research. I also reviewed some of the questions posed to prior nominees, and their responses. I submitted draft answers to the Office of Legal Policy for feedback, and finalized my answers for submission on January 31, 2022.

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

Questions for the Record for Hector Gonzalez, Nominee for the Eastern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

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

Response: If confirmed as a district court judge, I would take an oath requiring me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. Consistent with that oath, I would approach each case in a similar manner and would strive to master the facts of each case, understand the arguments presented by the parties, determine the applicable law considering controlling Supreme Court and Second Circuit precedent, and apply that law to the relevant facts in a fair and impartial

manner. Beyond this approach, I do not have a judicial philosophy to compare to another Supreme Court justice.

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

Response: I understand the interpretive method known as originalism to mean that words in the Constitution or a statute are to be given the meaning they had when the Constitution or statute was drafted. If confirmed as a district court judge and I am called upon to interpret the Constitution or a statute, I would look to the original, public meaning of the relevant text consistent with binding Supreme Court and Second Circuit precedent.

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

Response: I understand the term "living constitutionalism" to mean the method of constitutional interpretation that takes into account societal changes that have occurred since the time when the relevant Constitutional provision was adopted. I would not characterize myself as a "living constitutionalist."

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

Response: If confirmed as a district court judge, it is unlikely that I would confront a constitutional interpretation question of first impression. If I did, however, I would be bound by Supreme Court and Second Circuit precedent and would look to that precedent to determine the most applicable method or framework within which to analyze the relevant constitutional provision. In doing so, I would look to Supreme Court precedent, such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), to guide my analysis.

5. Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?

Response: While the Supreme Court has held that core constitutional principles do not change, contemporary values may impact the application of certain constitutional provisions. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (identifying contemporary community standards in context of evaluating free speech defense in obscenity prosecution). If confirmed as a district court judge, I would be bound to follow Supreme Court and Second Circuit precedent regarding issues of constitutional and statutory interpretation.

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

Response: No. Article V provides the sole mechanism for amending the Constitution. Beyond the amendment process, the Constitution is an enduring document that establishes the framework for our system of government.

7. 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 applicable limits to government action in the context of First Amendment and statutory protections of the free exercise of religion will depend on the specific facts of the case. For example, with respect to actions by the federal government, Congress enacted the Religious Freedom Restoration Act, which provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). In the context of state government action, the Supreme Court has articulated a framework under which to analyze the extent to which state action is violative of the Free Exercise Clause of the First Amendment. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

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

Response: No.

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020), the Supreme Court enjoined enforcement of a New York state executive order limiting capacity in certain religious gatherings. The Court concluded that the religious entities had "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* at 66. Applying "strict scrutiny," the Court further concluded that it was "hard to see

how the challenged regulations [could] be regarded as 'narrowly tailored.'" *Id.* 66–67.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' application for a preliminary injunction pending appeal on the issue of whether restrictions on at-home religious gatherings imposed by California passed constitutional muster. The Court concluded that the restrictions did not satisfy strict scrutiny because they were not narrowly tailored, since the restrictions permitted gatherings at places such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," and thus treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. *Id.* at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's decision to issue a cease-and-desist order against a bakery that refused to make a wedding cake for a same-sex couple was not based on "the religious neutrality that the [Free Exercise Clause of the] Constitution requires." *Id.* at 1724. According to the Court: "The neutral and respectful consideration to which [the plaintiff] was entitled was compromised here . . . . The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729.

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

Response: The Supreme Court has held that an individual's religious belief is protected regardless of whether it comports with the tenets of a religious organization so long as the religious belief is sincerely held. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834–35 (1989).

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

Response: In *Frazee v. Illinois Department of Employment Security, et al.*, 489 U.S. 829, 834 (1989), the Supreme Court determined that individuals are entitled to invoke First Amendment protections for "sincerely held religious beliefs."

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

Response: Please see my response to Question 13a.

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

Response: As a district court judge nominee, it would be inappropriate for me to comment on what is or is not the official position of any religion.

14. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court applied the "ministerial exception" to preclude two teachers' discrimination claims against religious schools under various federal statutes. The Court found that the exception applies where the employees perform "vital religious duties," including "[e]ducating and forming students in the [religious institution's] faith." *Id.* at 2066.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court considered the City of Philadelphia's decision not to refer foster children to Catholic Social Services (CSS) unless CSS agreed to certify same-sex couples as foster parents. The Court determined that the City's standard foster care contract was not neutral and generally applicable because the non-discrimination requirement was discretionary and allowed for individualized exemptions. *Id.* at 1878. The Court then held that because the City offered "no compelling reason why it has a particular interest in denying an exception to CSS," its decision did not satisfy strict scrutiny and violated the First Amendment. *Id.* at 1882.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), members of the Swartzentruber Amish community claimed that compliance with a county ordinance that required they install a specific type of septic system impinged on their religious beliefs in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Supreme Court remanded to the Court of Appeals of Minnesota for consideration in light of its decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In his concurrence, Justice Gorsuch pointed out several errors in the state court's application of RLUIPA. Those errors included, among others, the state court's failure "to give due weight to exemptions other groups enjoy," such as those that live in "rustic cabins," *id.* at 2432, and its failure to hold the county to its burden of "prov[ing] with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." *Id.* at 2433.

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

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

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

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

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

Response to all subparts: No. I am not aware of what role, if any, the judges of the District Court for the Eastern District of New York play in the training programs for court employees.

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

Response: Yes. Please see my response to Question 17.

19. Is the criminal justice system systemically racist?

Response: Whether or not the criminal justice system is systemically racist is a question within the purview of policy makers. If confirmed as a district court judge, and a case of discrimination based on race comes before me, I would apply Supreme Court and Second Circuit precedent to the facts of the case in a fair and impartial manner.

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

Response: As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from commenting on a pending or impending matter that may come before me if I am confirmed as a district court judge. If confirmed and this issue were to be presented in a case before me, I would faithfully apply Supreme Court and Second Circuit precedent.

21. 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: The size of the Supreme Court is a question within the purview of policy makers. If confirmed as a district court judge, I am bound by the Supreme Court's precedent regardless of its size.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms."

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

Response: I am not aware of any Supreme Court or Second Circuit precedent that holds that the right to own a firearm receives less protection than other individual rights enumerated in the Constitution.

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

Response: I am not aware of any United States Supreme Court or Second Circuit precedent that holds that the right to own a firearm receives less protection than the right to vote under the Constitution.

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

Response: Article II, § 3, of the Constitution, provides that the President "shall take Care that the Laws be faithfully executed." As a general matter, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). If confirmed as a district court judge and presented with a case that challenges the executive's refusal to enforce a law, I would apply these and other binding authorities to the relevant facts of the case before me.

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

Response: The Supreme Court has found that "a substantive rule" is one that "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). The issue of what administrative conduct falls into the definition of substantive rulemaking does not appear to be well settled. *See, e.g.*, *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). Because the distinction between an act of "prosecutorial discretion" and that of a substantive administrative rule change is a matter currently pending in federal courts, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from commenting on a matter that may come before me if I am confirmed as a district court judge.

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

Response: Because the death penalty is established by statute, *see* 18 U.S.C. § 3591, it would take an act of Congress to repeal the statute.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court vacated a stay of a judgment declaring that a nationwide COVID-related eviction moratorium mandated by the Centers for Disease Control and Prevention (CDC) was unlawful. The Court determined that the statute on which the CDC relied did not grant the CDC authority to impose the moratorium.

Senator Josh Hawley
Questions for the Record

Hector Gonzalez
Nominee, U.S. District Court for the Eastern District of New York

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

a. Do you agree with that philosophy?

Response: No. If confirmed as a district court judge, I would take an oath requiring me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. A judge's personal views and values are irrelevant when it comes to interpreting and applying the law.

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

Response: Please see my response to Question 1(a).

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

Response: Under the *Pullman* abstention doctrine, the federal court should abstain from deciding a case challenging state action under the federal Constitution when an unsettled issue of state law would be dispositive of the issue. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–501 (1941). The framework in the Second Circuit for addressing a *Pullman* abstention issue is set forth in *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004).

The *Younger* abstention doctrine precludes a federal court from enjoining or otherwise interfering with pending state judicial proceedings absent extraordinary circumstances. Y*ounger v. Harris,* 401 U.S. 37, 91 (1971). In the Second Circuit *Younger* abstention is "mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003).

The *Burford* abstention doctrine provides that a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies when there are important or difficult questions of state law that would affect policy in that state beyond the specific results of the case presented in federal court. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). The framework in the Second Circuit for analyzing a *Burford* abstention issue is set forth in *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 650 (2d Cir. 2009).

The *Colorado River* abstention doctrine raises the issue of whether a federal court should exercise its jurisdiction where there is a parallel state proceeding addressing similar claims. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The framework in the Second Circuit for how to apply the *Colorado River* factors is set forth in *Woodford v. Cmty. Action Agency of Greene Cty.*, *Inc.*, 239 F.3d 517, 521–22 (2d Cir. 2001).

Under the *Rooker-Feldman* abstention doctrine, federal courts should abstain from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In the Second Circuit, the framework district courts should follow in determining whether to apply this doctrine is set forth in *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021).

The *Brillhart/Wilton* abstention doctrine applies in those cases where a plaintiff seeks "purely declaratory relief" and there is a pending, parallel state-court action. *Kanciper v. Suffolk Cty. Soc. for the Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013); *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995).

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

Response: No.

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

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

Response: If confirmed as a district court judge, I would apply the original public meaning of the Constitution's text as required by Supreme Court and Second Circuit precedent. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Second Circuit precedent setting forth the methods of constitutional and statutory interpretation. If there is no binding precedent, I would begin my analysis by reviewing the text of the relevant provision and would construe that text according to its plain or ordinary meaning. If there was ambiguity in the text, I would look to any relevant canons of statutory construction. If these steps did not yield an answer, I would then look to legislative history.

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

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Second Circuit precedent setting forth the proper use of legislative history for ascertaining legislative intent. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017); *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: Never.

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

Response: The standard for determining whether an execution protocol violates the Eighth Amendment is set forth in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Under *Bucklew*, a prisoner must demonstrate the existence of an alternative method of execution that would significantly reduce a substantial risk of severe pain. Not only must this alternative method be feasible and readily implemented, but the record must also show that the state refused to adopt the alternative method without a legitimate penological reason. *Id. at* 1125. I am not aware of a Second Circuit precedent applying this standard.

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

Response: Please see my response to Question 6.

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

Response: In *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that a habeas corpus petitioner does not have a substantive due process right to access DNA evidence for testing. This standard has been applied by the Second Circuit. *See Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015).

9. 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.

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

Response: Generally, where a law affecting the free exercise of religion is either not neutral or is not generally applicable, the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). For example, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' application for a preliminary injunction pending appeal on the issue of whether COVID-related restrictions on at-home religious gatherings imposed by California passed constitutional muster. The Court concluded that the restrictions did not satisfy strict scrutiny because they were not narrowly tailored, since the restrictions permitted gatherings at places such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," and thus treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. *Id.* at 1297.

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

Response: Please see my response to Question 10.

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

Response: The Second Circuit has held that a district court may not consider whether an individual's interpretation of religious doctrine is correct and, as such, may not look beyond whether an individual's religious belief is sincerely held. *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003).

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms."

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

Response: No.

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

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

Response: While I am not sure what Justice Holmes meant by that statement, based on the context of the statement within his dissenting opinion, it seems as if Justice Holmes was attempting to advance the position that the Constitution does not endorse an economic theory.

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

Response: In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated its decision in *Lochner*. In a subsequent decision, the Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

a. If so, what are they?

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

Response to all subparts: I am not aware of a Supreme Court opinion that has not been formally overruled by the Supreme Court but that is no longer good law. If confirmed as a district court judge, I commit to faithfully applying all Supreme Court precedents as decided.

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

a. Do you agree with Judge Learned Hand?

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

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

Response to all subparts: If confirmed as a district court judge for the Eastern District of New York, I am bound to follow all Second Circuit precedent. To my knowledge, *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), has not been overruled and I would therefore be bound to apply its holding. If a case came before me presenting the issue of what percentage of market share was necessary to constitute a monopoly, I would look to binding Supreme Court and Second Circuit precedent and faithfully apply that precedent to the relevant facts of the case.

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

Response: "Federal common law" is defined as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between states and foreign relations, but excluding all cases governed by state law." *Black's Law Dictionary* (11th ed. 2019). *See also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

Response: One of the pillars of our federal system of government is that states may provide greater protections than what is provided for in the U.S. Constitution, but all states are bound by the provisions of the U.S. Constitution. The scope of a state constitutional right is determined by the highest court of that state. Therefore, federal courts must defer to decisions of the highest court in the state when interpreting that state's constitution. *See Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938).

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

Response: Please see my response to Question 18.

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

Response: Please see my response to Question 18.

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

Response: As a judicial nominee, I am constrained by the Code of Conduct for United States Judges from commenting on any case that may come before me in the future. Notwithstanding the above, I am aware that prior judicial nominees have identified *Brown v. Board of Education* as a foundational case unlikely to be the subject of future

controversy and have therefore commented on the case. Consistent with that approach, I believe it is appropriate for me to state my opinion that *Brown* was correctly decided.

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

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

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

Response to all subparts: If confirmed as a district court judge, I would be bound to follow Supreme Court and Second Circuit precedent regarding the propriety of issuing a nationwide injunction. In that regard, the Second Circuit has noted that it has "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree[s] that such injunctions may be an appropriate remedy in certain circumstances." *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted sub nom.*, 141 S. Ct. 1370 (2021), *and cert. dismissed sub nom.*, 141 S. Ct. 1292 (2021). The authority to issue a nationwide injunction, however, is not unlimited. The Second Circuit has cautioned that nationwide injunctions should only be issued when circumstances necessitate it. *Id*.

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

Response: Please see my response to Question 20.

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

Response: "Federalism" is defined as the "legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments." *Black's Law Dictionary* (11th ed. 2019). In *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), the Supreme Court noted that "a healthy balance of power between the States and the Federal Government . . . reduce[s] the risk of tyranny and abuse from either front."

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

Response: Please see my response to Question 2.

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

Response: If confirmed as a district court judge and a case came before me presenting this issue, the answer to the question would turn on the particular facts and

applicable law of the case before me. Based on those case-specific factors, there may be situations where one form of relief is more appropriate than the other.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." These "rights and liberties" include, among others: (i) the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); (ii) to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); (iii) to direct the upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); (iv) to marital privacy and use of contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); (v) to terminate a pregnancy under certain circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); and (vi) to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999).

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

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

Response: In *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020), the Supreme Court recognized that the First Amendment's free exercise "guarantee lies at the heart of our pluralistic society." Generally, where a law affecting the free exercise of religion is either not neutral or is not generally applicable, the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). For example, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted the plaintiffs' application for a preliminary injunction pending appeal on the issue of whether COVID-related restrictions on at-home religious gatherings imposed by California passed constitutional muster. The Court concluded that the restrictions did not satisfy strict scrutiny because they were not narrowly tailored, since the restrictions permitted gatherings at places such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," and thus treated some comparable secular activities more favorably despite presenting similar risks of spreading COVID-19. *Id.* at 1297.

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

Response: Yes. *See Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691–92 (2014), the Supreme Court held that a substantial burden on the free exercise of religion exists where adhering to a religious belief results in the payment of a "very heavy" financial price for failing to comply with the challenged law.

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

Response: The Second Circuit has held that a district court may not consider whether an individual's interpretation of religious doctrine is correct and, as such, may not look beyond whether an individual's religious belief is sincerely held. *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003).

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

Response: The Religious Freedom Restoration Act (RFRA) applies to all federal law, but "permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: My understanding of this statement is that judges should not base their legal decisions on personal views, values or opinions.

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

Response: In my nearly thirty-four years of practice, I have worked on a wide variety of matters. To the best of my recollection, I do not believe that I have ever taken the position in litigation or a publication that a federal or state statute was unconstitutional.

a. If yes, please provide appropriate citations.

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

Response. No.

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

Response: Whether or not the criminal justice system is systemically racist is a question within the purview of policy makers. If confirmed as a district court judge and a case of discrimination based on race comes before me, I would faithfully apply Supreme Court and Second Circuit precedent to the facts of the case in a fair and impartial manner.

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

Response: In my nearly thirty-four years of practice, I have worked on a wide variety of matters. I am unable to definitively answer this question yes or no because I do not recall a specific instance of taking a position in litigation that conflicted with my personal views.

32. How did you handle the situation?

Response: Please see my response to Question 31.

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

Response: Yes.

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

Response: There is no one Federalist Paper that has particularly shaped my view of the law.

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

Response: As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from expressing my opinion on an issue implicating legal, ethical, religious, political and public policy questions such as this one. If confirmed as a district court judge and a case came before me presenting this issue, I would faithfully apply Supreme Court and Second Circuit precedent to the facts of the case in a fair and impartial manner.

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

Response: In approximately 2000, shortly after leaving the United States Attorney's Office for the Southern District of New York, I recall testifying in two trials related to my tenure as an Assistant United States Attorney in that office. One matter involved the chain of custody related to an item of evidence in the trial; the second matter involved the application of a sentencing guideline related to cooperation-related credit. I do not recall the name of either case and therefore cannot provide a citation or any further information regarding the testimony.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

38. Do you currently hold any shares in the following companies?

a. Apple?

Response: I do not own any individual shares in Apple.

b. Amazon?

Response: I do not own any individual shares in Amazon.

c. Google?

Response: I do not own any individual shares in Google.

d. Facebook?

Response: I do not own any individual shares in Facebook.

e. Twitter?

Response: I do not own any individual shares in Twitter.

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

Response: At this time, I cannot recall authoring or editing a brief that was filed in court without my name on the brief. Throughout my nearly thirty-four years as a practicing attorney, I have on occasion provided comments or feedback on briefs for colleagues, but I cannot recall any specific brief where I did so that was filed in court without my name on it.

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

Response: Please see my response to Question 39.

40. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: Not that I can think of.

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

Response: I understand I have a responsibility to answer all questions truthfully and honestly and have tried to do so to the best of my ability.

Questions for the Record for Hector Gonzalez
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Hector Gonzalez, Nominee to the District Court for the Eastern District of New York

1. How would you describe your judicial philosophy?

Response: If confirmed as a district court judge, I would take an oath requiring me to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. Consistent with that oath, I would approach each case in a similar manner and would strive to master the facts of each case, understand the arguments presented by the parties, determine the applicable law considering controlling Supreme Court and Second Circuit precedent, and apply that law to the relevant facts in a fair and impartial manner.

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

Response: I would be bound by Supreme Court and Second Circuit precedent setting forth the methods of statutory interpretation. If there is no binding precedent, I would begin my analysis by reviewing the text of the relevant provision and would construe that text according to its plain or ordinary meaning. If there was ambiguity in the text, I would look to any relevant canons of statutory construction. If necessary, I would consider legislative history to the extent permitted by Supreme Court and Second Circuit precedent.

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

Response: If confirmed as a district court judge, it is unlikely that I would confront a constitutional interpretation question of first impression. If I did, however, like the response to Question 2, above, I would be bound by Supreme Court and Second Circuit precedent and would look to that precedent to determine the most applicable method or framework within which to analyze the relevant constitutional provision. In doing so, I would look to Supreme Court precedent, such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), to guide my analysis.

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

Response: Please see my response to Question 3.

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

Response: I would begin the analysis with the statutory text. If the meaning of the text is plain and resolves the relevant question, the analysis ends there.

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

Response: The "plain meaning" of a statute or constitutional provision refers to the "ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: There are three necessary elements for constitutional standing: (i) an "injury in fact"; (ii) a nexus between the injury and the challenged conduct; and (iii) the injury would likely be "redressed by a favorable decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

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

Response: In *McCulloch v. State of Maryland*, 17 U.S. 316 (1819), the Supreme Court recognized Congress's authority to pass laws necessary for it to execute the powers conferred to Congress under the Constitution. In particular, the Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

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

Response: My analysis would begin by reviewing Supreme Court and Second Circuit precedent to see if those courts have previously reviewed a similar law. The absence of a reference to a specific Constitutional enumerated power, however, is not dispositive of the question whether the challenged law is constitutional. Rather, the analysis must first look to whether the law falls within one of Congress's enumerated powers. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted), the Supreme Court held that the Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." These "rights and liberties" include, among others: (i) the right to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); (ii) to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); (iii) to direct the upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); (iv) to marital privacy and use of contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); (v) to terminate a pregnancy under certain

circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); and (vi) to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999).

10. What rights are protected under substantive due process?

Response: Please see my response to Question 9.

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

Response: The Supreme Court has distinguished between these two types of rights. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court abrogated its decision in *Lochner*. In a subsequent decision, the Court stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). With respect to the right to abortion, the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), constitute binding precedent. If confirmed as a district court judge, I am bound to apply binding Supreme Court and Second Circuit precedent regarding these rights.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the Supreme Court noted that under the Commerce Clause, Congress has the power to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and activities that "substantially affect interstate commerce." Congress, however, does not have the power to "compel[] individuals to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: The Supreme Court has stated that a "suspect class" is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Court has identified race, national origin, religion, and alienage as suspect classifications. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: The Constitution establishes a mechanism of "checks and balances" by explicitly separating the powers of government among the legislative, executive, and

judicial branches. This system of divided government protects against the concentration of power in one branch and thus serves to secure liberty.

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

Response: I would look to Supreme Court and Second Circuit precedent analyzing the relevant Constitutional text to determine whether the assumed authority exceeded the constitutional authority of that branch.

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

Response: If confirmed as a district court judge, personal views and values can play no role in the adjudication of a case. I would faithfully and impartially apply Supreme Court and Second Circuit precedent to the relevant facts of every case before me.

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

Response: Neither outcome is desirable, and judges should strive to avoid both.

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

Response: I have not studied this trend in Supreme Court practice and therefore do not have a basis upon which to form an opinion.

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

Response: Judicial review is the power of the judicial branch to review the actions of the other branches of government and determine whether such actions are constitutional. *See Marbury v. Madison*, 5 U.S. 137 (1803). "Judicial supremacy" is defined in Black's Law Dictionary as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, esp. U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states." *Black's Law Dictionary* (11th ed. 2019).

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

Response: While these are decisions that individual elected officials must make for themselves, as a general matter, elected officials take an oath to uphold the Constitution and, by extension, to follow decisions of the federal judiciary when interpreting the Constitution.

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

Response: The idea that courts "have neither force nor will" is an important reminder for judges that they should not be making or enforcing laws. Rather, the role of the judiciary is limited to interpreting the law. If confirmed as a district court judge, this idea would serve as a useful guide in carrying out the duties of the position.

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

Response: If confirmed as a district court judge, I would be bound to apply controlling Supreme Court and Second Circuit precedent. If there is no controlling precedent that "speak[s] directly to the issue at hand," I would look to analogous precedent from the Supreme Court and Second Circuit and persuasive authority from other circuits. In addition, I would apply the methods of interpretation described in the response to Question 3.

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

Response: None.

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

Response: I am not familiar with this quote or the context in which it was made, nor do I have a personal definition of "equity." The quote appears to relate to the sort of issues within the purview of policy makers. If confirmed as a district court judge, I would have no role in making policy. Please see also my response to Question 21.

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

Response: According to Black's Law Dictionary, "equity" is defined as "fairness; impartiality; evenhanded dealing" and "[t]he body of principles constituting what is fair and right." Black's Law Dictionary (11th ed. 2019). "Equality" is defined as "[t]he quality, state, or condition of being equal." Black's Law Dictionary (11th ed. 2019).

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

Response: The Fourteenth Amendment refers to the "equal protection of the laws." The word "equity" does not appear in the equal protection clause of the Fourteenth Amendment.

27. How do you define "systemic racism?"

Response: I do not have a personal definition of "systemic racism." If confirmed as a district court judge and a case of discrimination based on race comes before me, I would fairly and impartially apply Supreme Court and Second Circuit precedent to the facts of the case.

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

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

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

Response: Because I do not have a personal definition of either term, I am unable to distinguish the two terms. Please see my responses to Questions 27 and 28.

Questions from Senator Thom Tillis for Hector Gonzalez
Nominee to be United States District Judge for the Eastern District of New York

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

   Response: Yes.

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

   Response: The term "judicial activism" may have different meanings to different people. If by "judicial activism" the question refers to a judge resolving a case based on the judge's personal view or opinion of what the law should be, rather than what the law is, I consider "judicial activism" to be inappropriate.

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

   Response: An expectation.

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: Yes, there may be occasions where faithfully interpreting the law may result in an outcome that is at odds with a judge's personal views. The duty of a judge, however, is to put aside his or her personal views and faithfully and impartially apply the law regardless of the outcome.

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

   Response: No.

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

   Response: If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit precedent, such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

8. **How would you evaluate a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit**

someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: If confirmed as a district court judge and a case came before me presenting this question, I would consider Supreme Court and Second Circuit precedent, as well as any other relevant constitutional and statutory provisions, and faithfully apply that law to the facts presented by the parties in the case.

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: Under the qualified immunity doctrine, a government official is entitled to the defense of qualified immunity when the alleged unlawfulness of their conduct is not "clearly established" at the time of the alleged misconduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Wesby*, 138 S. Ct. at 589. If confirmed as a district court judge, I would faithfully follow all binding Supreme Court and Second Circuit precedent related to the issue of qualified immunity.

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

Response: If confirmed as a district court judge, my role would be to apply the qualified immunity doctrine faithfully as set forth in binding precedent from the Supreme Court and the Second Circuit.

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

Response: Please see my responses to Questions 9 and 10.

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

Response: In my nearly thirty-four years of experience as both a prosecutor and in private practice, I do not recall working on a case involving patent law. However, if I am confirmed as a district court judge and a patent case came before me, I would carefully research the applicable law, including any binding Supreme Court precedent, and faithfully and impartially apply that law to the relevant facts.

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

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

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

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

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

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

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

computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

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

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

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

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

Response to all subparts: If confirmed as a district court judge and presented with facts like any of the hypotheticals set forth above, I would faithfully apply any relevant precedent to the specific facts of the case. As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges constrains me from elaborating further on how I would resolve any of the issues presented in these hypotheticals.

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

Response: Please see my response to Question 12.

15. Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has

become increasingly important as it informs the lawfulness of a use of digital content and technologies.

a. What experience do you have with copyright law?

Response: In my nearly thirty-four years of experience as both a prosecutor and in private practice, I do not recall working on a case involving copyright law. If I am confirmed as a district court judge and a copyright case came before me, I would carefully research the applicable law, including any binding Supreme Court and Second Circuit precedent, and faithfully and impartially apply that law to the relevant facts.

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

Response: None.

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

Response: None.

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

Response: In my nearly thirty-four years of experience as both a prosecutor and in private practice, I do not recall working on a case addressing free speech or intellectual property issues. If I am confirmed as a district court judge and a case involving these issues came before me, I would carefully research the applicable law, including any binding Supreme Court and Second Circuit precedent, and faithfully and impartially apply that law to the relevant facts.

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

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

Response: If I am confirmed as a district court judge, I would faithfully apply Supreme Court and Second Circuit precedent. In the absence of controlling

precedent, I would apply the ordinary and plain meaning of the relevant statutory text. If that text is ambiguous, I would consider any relevant canon of statutory interpretation, as well as persuasive authority from other circuits. If necessary, I would consider legislative history to the extent permitted by Supreme Court and Second Circuit precedent.

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

Response: It is my understanding that interpretations, such as those in the report referenced in this question, do not warrant *Chevron*-style deference. At most, such interpretations are "entitled to respect," but only to the extent that those interpretations have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

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

Response: As a judicial nominee, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, I am constrained from commenting on a matter that could potentially come before me. If presented with similar facts, I would faithfully apply Supreme Court and Second Circuit precedent to the specific facts of the case.

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

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

Response: If I am confirmed as a district court judge, I would faithfully apply the Digital Millennium Copyright Act as written and would be bound to apply controlling Supreme Court and Second Circuit precedent related to the Act.

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

Response: Please see my response to Question 17a.

18. In some, judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only

one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

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

Response: I have not studied this issue and therefore do not have a basis upon which to form an opinion. Moreover, in the Eastern District of New York there is no one-judge division, and it is my understanding that cases are randomly assigned.

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

Response: If confirmed as a district court judge, I would faithfully apply all binding precedent regarding issues of venue and would adhere to all local rules regarding the assignment of cases.

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

Response: Please see my response to Question 18b.

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

Response: Please see my response to Question 18b.

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

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

Response: As a judicial nominee, it would not be appropriate for me to comment on how the Federal Circuit should address this hypothetical. If confirmed as a district court judge, I would faithfully apply all binding precedent regarding issues of venue and would adhere to all local rules regarding the assignment of cases.

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

Response: Please see my response to Question 19a.

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

Response: The question of whether a particular type of litigation is overwhelmingly concentrated in just one or two judicial districts and what effect this would have on the administration of justice is a question within the purview of policy makers. Please see also my response to Question 18b.

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

Response: Please see my response to Question 20.

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

Response: Please see my response to Question 20.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

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

Response: As a judicial nominee, it would not be appropriate for me to comment on the conduct of other judges.

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

Response: Please see my response to Question 21a.