Senator Chuck Grassley, Ranking Member
Questions for the Record
Jennifer L. Rochon
Nominee to be United States District Judge for the Southern District of New York

1. **Under what circumstances is it appropriate for a federal judge to reach a decision with respect to a statute or constitutional provision that is unsupported by the text or original understanding of that statute or provision?**

   Response: The starting place for interpreting a statute or constitutional provision is always the text of the statute or provision and its plain meaning. The statute or provision should be interpreted consistent with the plain meaning of the text. Only if there is an ambiguity or gap, should the court then move to other interpretative methods such as canons of construction. The Supreme Court has advised that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *see also Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020). In addition, the Supreme Court has looked to the text and the original meaning of constitutional provisions to interpret certain constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Court examined the Second Amendment and in *Crawford v. Washington*, 541 U.S. 36 (2004) the Court interpreted the Confrontation Clause of the Sixth Amendment based on the original meaning of the terms at the time of adoption.

2. **In your view, does a district court judge have the authority to issue a universal injunction? Why or why not?**

   Response: Rule 65 of the Federal Rules of Civil Procedure provides the standard for granting equitable injunctive relief. The plaintiff must establish, among other things, irreparable harm and that remedies at law are insufficient to compensate for the injury. The Second Circuit has held that it has "no doubt" that district courts are permitted to enter nationwide injunctions in certain circumstances. *See New York v. U.S. Dep't of Homeland Sec*., 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1370 (2021), and *cert. dismissed,* 141 S. Ct. 1292 (2021). However, injunctions are a "drastic and extraordinary remedy" *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and their scope "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

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

   Response: If confirmed, I would implement a process whereby I would closely examine the facts of the case, thoroughly and exhaustively research the law, faithfully follow applicable precedent, and objectively decide only the matter that is properly before the court, without regard to any personal feelings or views.

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

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

   Response: If confirmed as a District Court judge, I would have a duty to faithfully follow all Supreme Court precedent regardless of any personal views as to whether the cases were correctly decided or not. It is also generally inappropriate for judicial nominees to comment on the merits of particular precedent so as to avoid any appearance of prejudging a future case. However, given that it is unlikely that *de jure* segregation or anti-miscegenation laws will come before the court, I feel comfortable stating that *Brown v. Board of Education* and *Loving v. Virginia* were rightly decided.

5. **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 unfamiliar with the context of this quote. However, a federal judge has an obligation to fully and faithfully adhere to applicable law and meet their judicial obligations regardless of whether their opinions are ultimately reviewed at an appellate level.

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

   Response: I do not agree that the personal values of a judge should direct the answer to questions regarding interpretation of the Constitution.

7. **Do you believe that we should defund or decrease funding for police departments and law enforcement? Please explain.**

   Response: I respect law enforcement officers who protect public safety, including my brother-in-law who is a police officer in Michigan, and am thankful for their service. Questions regarding the proper funding for the law enforcement function are important policy determinations that are best left to legislators.

8. **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 7.

9. **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.

10. **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: Daniel L. Goldberg is my brother-in-law and I am in contact with him at many family functions.

    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: Daniel L. Goldberg is my brother-in-law and I have been in contact with him at family functions for many years; to my knowledge, he is not associated with Demand Justice.

11. **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.

12. **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.

13. **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.

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

Response: On February 22, 2021, I submitted an application for the United States District Court for the Southern District of New York to Senators Charles Schumer and Kirsten Gillibrand. On April 1, 2021, I interviewed with Senator Schumer's judicial selection commission. On April 8, 2021, I interviewed with Senator Gillibrand's staff. On September 7, 2021, I interviewed with attorneys from the White House Counsel's Office, and I had a follow up discussion with them on September 8, 2021. Since that date, I was in contact with officials from the Office of Legal Policy at the Department of Justice and the White House Counsel's Office. On December 15, 2021, my nomination was submitted to the Senate.

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

Response: No.

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

    Response: No.

17. **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: No.

18. **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: No.

19. **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: No.

20. **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 14. In addition, since my nomination on December 15, 2021, I have been in regular contact with the Office of Legal Policy at the Department of Justice regarding the submission of my Senate Judiciary Questionnaire, completing the financial disclosures (FDR), preparing for my appearance before the Senate Judiciary Committee, and completing my Questions for the Record. After my nomination, I was also in contact with the White House Counsel's Office regarding preparations for my appearance before the Senate Judiciary Committee.

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

    Response: I received the questions from the Office of Legal Policy (OLP) on February 8, 2022. I drafted answers to each question based on my personal knowledge and legal

research. The OLP provided feedback on my draft, which I considered, before I finalized my answers for submission to the Committee on February 14, 2022.

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

Questions for the Record for Jennifer L. Rochon, Nominee for the United States District Court for the Southern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. **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, my judicial process would be to approach each case with an open mind, impartially and objectively evaluate the facts, and adhere to binding Supreme Court and Second Circuit precedent. I will also treat all those who come before me with respect and dignity, follow my judicial oath, and be guided by the Code of Conduct for United States Judges. I have not extensively examined the judicial philosophies of the Courts set forth above so I cannot compare them to my own.

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

Response: I would not ascribe a particular label to myself. The Supreme Court has looked to the text and the original public meaning of constitutional provisions to interpret those provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Court examined the Second Amendment and in *Crawford v. Washington*, 541 U.S. 36 (2004) the Court interpreted the Confrontation Clause of the Sixth Amendment based on what is considered an originalist approach. If I am confirmed, I would follow all binding precedent concerning the appropriate method of constitutional interpretation, including applying the original meaning of a constitutional provision where the Supreme Court directs that approach.

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

Response: Black's Law Dictionary defines living constitutionalism as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (11th ed. 2019). I believe that the Constitution contains longstanding principles foundational to our democracy that are as true and relevant today as they were when they were adopted, including principles of equal protection, due process, and fundamental rights.

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 would be unusual to be presented with a constitutional question that has not been addressed by the Supreme Court or the Second Circuit. In that rare case, I would look to Supreme Court precedent to direct the method of interpretation to use. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Court examined the Second Amendment and in *Crawford v. Washington*, 541 U.S. 36 (2004) the Court interpreted the Confrontation Clause of the Sixth Amendment based on the original public meaning of those clauses. If I am confirmed, I will follow all binding precedent concerning the appropriate method of constitutional interpretation, including

applying the original meaning of a constitutional provision where the Supreme Court directs that approach.

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: The Supreme Court has considered changes in community standards in evaluating some constitutional questions. *See, e.g., Miller v. California*, 413 U.S. 15, 24 (1973) (looking to contemporary community standards in evaluation of free speech defense in obscenity prosecution). I would follow all binding Supreme Court and Second Circuit precedent in evaluating the meaning of the Constitution or a statute.

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

Response: I believe that the Constitution contains longstanding principles that are as true and relevant today as they were when they were adopted, including principles of equal protection, due process, and fundamental rights. Amendments to the Constitution are governed by Article V.

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: An evaluation of limits on governmental action based on the Free Exercise Clause would depend upon the particular facts and circumstances of the case at hand.

Generally speaking, the Supreme Court has provided significant guidance for evaluating a claim that a facially neutral state action creates a substantial burden on the free exercise of religion. For example, a law that appears neutral on its face is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). If a law is not neutral or generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32. A law also may not be neutral if it is determined that the law's enforcement was motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has provided further guidance on government action that triggers heightened scrutiny in cases such as *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

In addition, the Religious Freedom Restoration Act (RFRA) provides that the federal government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a). If a substantial burden is shown, the government must "demonstrate[] that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 695 (2014) (citing 42 U.S.C. §2000bb-1(b)).

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

Response: It is not permissible for the government to unlawfully discriminate against religious organizations or religious people.

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 (2020), the Supreme Court found that the applicants made a strong showing that the challenged restrictions were not neutral to religion. *Id.* at 66. The Court therefore applied strict scrutiny and held that the regulations did not survive this heightened scrutiny because they were not narrowly tailored. *Id.* 66–67. In terms of evaluating the request for injunctive relief, the Court determined that the restrictions would cause irreparable harm and harm to the public. *Id*. at 68. Accordingly, the Court enjoined the New York Governor's restriction. *Id.* at 69.

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 addressed restrictions on gathering during the COVID-19 pandemic. The Court held that government restrictions in California on at-home religious gatherings were not neutral or generally applicable because comparable secular activities were treated more favorably than religious activities despite presenting similar risks of spreading COVID-19. *Id.* at 1297. The Supreme Court applied strict scrutiny and found that the restrictions were not narrowly tailored because other secular activities were permitted. *Id.* The Court also rejected the claim that the challenge was moot because there was a threat that the restrictions could be reinstated by the state. *Id.*

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, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the United States Supreme Court held that the order by the Colorado Civil Rights Commission regarding a cake shop's refusal to sell a wedding cake to a same-sex couple violated the Free Exercise Clause. *Id*. at 1724. The Court found that the application of the law was motivated by religious animus based on hostile statements by officials at public meetings. *Id.* at 1729-31.

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: An individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 833–34 (1989). The Second Circuit has reiterated that plaintiff's membership in a particular sect "or on any tenet of the sect involved" is not determinative and advised that "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 589-90 (2d Cir. 2003).

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

Response: The touchstone is that the beliefs must be religious and not secular. The Supreme Court and Second Circuit have provided guidance as to the parameters around evaluating sincerely held religious beliefs, including that set forth in my response to Question 13. If confirmed, I would follow that precedent.

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 13.

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

Response: I am not aware of whether the official position of the Catholic Church is that abortion is acceptable and morally righteous.

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 Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court precluded two lay Catholic school teachers from bringing Age Discrimination in Employment Act and Americans with Disabilities Act claims against their religious school employer. The Court held that these claims were barred by the "ministerial exception" even though the teachers did not hold the title of minister. The Supreme Court held that an employee is subject to the ministerial exception if they perform "vital religious duties," including "[e]ducating and forming students in the Catholic faith." *Id.* at 2066. According to the Court, the application of the ministerial exception did not turn on an employee's formal title but instead on "what an employee does." *Id*. at 2064.

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 City of Philadelphia determined that it would not refer foster children to Catholic Social Services (CSS) based on section 3.21 of its standard foster care contract, which states that a provider may not reject a child or foster family based upon their sexual orientation unless the Commissioner grants an exception, which may be exercised in the Commissioner's sole discretion. *Id.* at 1878. The Supreme Court held that "the inclusion of a formal system of entirely discretionary exceptions in section 3.21 render[ed] the contractual non-discrimination requirement not generally applicable." *Id.* Because Philadelphia offered "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others," Philadelphia's 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: *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021) concerned a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by an Amish community protesting the obligation to use a specified technology to filter grey water. Relying on *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court granted the petitioners' petition for a writ of certiorari, vacated the judgment below, and remanded.

In Justice Gorsuch's concurrence, he stated that the "courts below erred by treating the County's *general* interest in sanitation regulations as "compelling" without reference to the *specific* application of those rules to *this* community." 141 S. Ct. at 2432 (Gorsuch, J., concurring) (emphasis in original). He also noted that due weight should have been provided to the exemptions given to other groups and the efficacy of alternatives for filtering the water. *Id.* at 2432-33. Finally, Justice Gorsuch noted that the Court should have held the county to its burden of proving that its rules were narrowly tailored to achieve a compelling state interest "with respect to the specific persons it seeks to regulate." *Id.* at 2433. This meant proving that alternatives, such as mulch basins, would not work "on these particular farms with these particular claimants." *Id.*

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: I am not familiar with the trainings that courts provide, having never been a judicial officer or employee of the courts (other than as a judicial law clerk over 20 years ago). That said, the statements above do not seem to provide appropriate guidance.

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: If confirmed, insofar as I am responsible for any trainings, I will follow all applicable laws in instituting those trainings.

19. **Is it appropriate, for a government actor, to consider skin color or sex when selecting a judge? Is it constitutional under the Equal Protection Clause?**

Response: Federal judges are nominated by the President and evaluated by the Senate through an advice and consent process. Both the executive branch and legislative branch are obligated to follow the United States Constitution.

20. **You have worked as General Counsel for the Girl Scouts of America for nearly ten years. The Girl Scouts' website advertises its clubs with this catch-line: "In a world of boys' clubs, give her one of her own." In your capacity with the Girl Scouts, you have advocated for the importance of a girl-only space, saying in 2019 that you "firmly believe that having an all-girl, girl-led safe space for girls is critical and it changes lives."**

   a. **How do you define what a girl is?**

   Response: The definitions and legal interpretations of sex and gender are presently before the courts. As a judicial nominee, it would not be appropriate for me to opine on this topic so as to avoid any indication that I have prejudged a case that may come before me if confirmed. In addition, if confirmed, I would have a duty to faithfully follow all Supreme Court and Second Circuit precedent regardless of any personal views I may hold.

   b. **What is the difference between boys and girls?**

   Response: Please see my response to Question 20a.

   c. **To the extent that you do not believe there is a difference between boys and girls, what purpose does the Girl Scouts serve to give girls a club of their own?**

   Response: The purpose and mission of the Girl Scouts of the USA is set forth by statute in its Congressional Charter that directs Girl Scouts to serve girls and to fix standards that inspire rising generations with the highest ideals of character, patriotism, and conduct. *See* 36 U.S.C. § 80302.

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

Response: Questions about whether the criminal justice system is systemically racist are important policy discussions for lawmakers to consider. If confirmed, my role would be to fully, fairly, and impartially review every case and to evenhandedly apply legal precedent from the Supreme Court and Second Circuit with regard to any claims of race discrimination in any criminal case brought before me.

22. **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: As a judicial nominee, it is not appropriate for me to comment on the merits or demerits of changing the composition of the Supreme Court, whose precedent I would be bound to follow if confirmed.

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), that the Second Amendment secures "an individual right to keep and bear arms" without regard to service in a militia. The Supreme Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and detailed three examples of presumptively valid firearm regulations: (1) "prohibitions on the possession of firearms by felons and the mentally ill," (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-627. In *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010), the Court further held that the right that the Second Amendment guarantees is a fundamental right that applies to the states as well as the federal government.

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

Response: Please see my response to Question 23 that details limitations on the right to keep and bear arms as articulated by the Supreme Court in *Heller*. I am not aware of any Supreme Court or Second Circuit precedent that holds that this Second Amendment right is less protected than other enumerated rights in the Constitution.

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

Response: Please see my response to Question 24.

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

Response: Article 2 of the Constitution vests the President with "executive Power" and states that the President "shall take Care that the Laws be faithfully executed." With respect to criminal cases, the Supreme Court has recognized that "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, I would follow all binding

Supreme Court and Second Circuit precedent in evaluating a challenge to the executive's decision not to enforce a law.

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

Response: Generally speaking, substantive or legislative administrative rules "affect[] individual rights and obligations," are issued by an agency "pursuant to statutory authority," have the "force and effect of law," and require a notice and comment opportunity. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02, 313 (1979). Because courts continue to work through what type of administrative conduct qualifies as substantive administrative rule changes, *see, e.g., PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.,* 139 S. Ct. 2051, 2055 (2019), as a judicial nominee it would not be appropriate for me to comment on whether particular acts would qualify. If confirmed, I would follow all binding Supreme Court and Second Circuit precedent regarding questions of whether acts, including those considered prosecutorial discretion, constitute substantive administrative rule making.

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

Response: Congress determines the penalties for unlawful conduct and passed the Federal Death Penalty Act (FDPA). *See* 18 U.S.C. § 3591(a). The Supreme Court has held that the death penalty is not unconstitutional and the Second Circuit has held that the FDPA was within Congress's Article I powers under the Constitution. *See United States v. Aquart*, 912 F.3d 1 (2d Cir. 2018). The President does not have the authority to unilaterally abolish duly enacted Congressional legislation.

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

Response: In *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021), the Supreme Court reviewed a nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention Center (CDC) for certain residential rental properties in response to the COVID-19 pandemic. The Court determined that the 1944 statute upon which the CDC relied did not provide the CDC with authority to impose the moratorium. *Id.* at 2486. Therefore, the Court vacated the stay and rendered enforceable the district court's judgment vacating the moratorium. *Id.* at 2485-86.

Senator Josh Hawley
Questions for the Record

Jennifer Rochon
Nominee, U.S. District Court for the Southern 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: If confirmed as a District Court judge, I would faithfully follow the law and binding precedent.

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

      Response: The judicial oath requires judges to "faithfully and impartially" discharge their duties under "the Constitution and laws of the United States." The duty of a District Court judge is to follow the legal precedent that is binding on that court.

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

   Response: There are several types of abstention doctrines that may arise in the Southern District of New York. The standards for some of these abstention doctrines are as follows.

   The Second Circuit standard for the *Pullman* abstention doctrine directs that abstention is appropriate "when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)). *Pullman* abstention is discretionary; therefore, "although a court may invoke *Pullman* abstention when the three conditions listed above are met, it is not required to do so." *November Team, Inc. v. N.Y. State Joint Comm'n on Pub. Ethics*, 233 F. Supp. 3d 366, 372 (S.D.N.Y. 2017).

The Second Circuit has directed that court should abstain under the *Younger* abstention doctrine where "1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has an avenue open for review of constitutional claims in the state court." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 647 (2d Cir. 2009) (quoting *Philip Morris, Inc. v. Blumenthal,* 123 F.3d 103, 105 (2d Cir.1997)) (internal quotation marks omitted); see *also Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003).

The Supreme Court has "distilled" the *Burford* abstention doctrine as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Liberty Mut. Ins. Co. v. Hurlbut, 585 F.3d 639, 649–50 (2d Cir. 2009) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)). The Second Circuit has held that there are:

> three factors to consider in connection with the determination of whether federal court review would work a disruption of a state's purpose to establish a coherent public policy on a matter involving substantial concern to the public. Those factors are as follows: (1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern.

Liberty Mut. Ins., 585 F.3d at 650 (quoting *Hachamovitch v. DeBuono,* 159 F.3d 687, 697 (2d Cir.1998)) (internal quotations omitted).

Next, under the *Colorado River* abstention doctrine, a federal court may abstain in "'exceptional circumstances' where the resolution of existing concurrent state-court litigation could result in 'comprehensive disposition of litigation.'" *Woodford v. Cmty. Action Agency of Greene Cty., Inc.*, 239 F.3d 517, 522 (2d Cir. 2001) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976)). The Second Circuit has directed that the court should consider:

> (1) whether the controversy involves a *res* over which one of the courts has assumed jurisdiction, (2) whether the federal forum is less inconvenient than the other for the parties, (3) whether staying or dismissing the federal action will avoid piecemeal litigation, (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other, (5) whether federal law provides the rule of decision, and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

Woodford, 239 F.3d at 522 (internal citations omitted). No single factor is determinative and dismissal is warranted only if there is a clear justification. *Id.*

The *Brillhart/Wilton* abstention doctrine applies in cases where declaratory relief is sought and there is a parallel, pending state-court action. The Second Circuit has enumerated five factors to consider: "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; "(2) whether a judgment would finalize the controversy and offer relief from uncertainty"; (3) "whether the proposed remedy is being used merely for procedural fencing or a race to *res judicata*," (4) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court," and (5) "whether there is a better or more effective remedy." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 105 (2d Cir. 2012) (internal quotation marks omitted) (citing to *Dow Jones & Co. v. Harrods Ltd.,* 346 F.3d 357, 359-60 (2d Cir.2003)).

Finally, the *Rooker-Feldman* abstention doctrine prohibits parties who have lost in state court from seeking federal district court review of those judgments. The Second Circuit has articulated four requirements that must be met for *Rooker-Feldman* abstention doctrine to apply: "(1) the federal-court plaintiff must have lost in state court[;] (2) the plaintiff must complain of injuries caused by a state-court judgment[;] (3) the plaintiff must invite district court review and rejection of that judgment[;] and (4) the state-court judgment must have been rendered before the district court proceedings commenced." *Dorce v. City of N.Y*, 2 F.4th 82, 101 (2d Cir. 2021) (quoting *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005)).

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

Response: I do not recall working on a legal case or representation opposing a party's religious liberty claim.

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: The Supreme Court has looked to the text and the original meaning of constitutional provisions to interpret certain constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Court examined the Second Amendment and in *Crawford v. Washington*, 541 U.S. 36 (2004) the Court interpreted the Confrontation Clause of the Sixth Amendment based on what is considered an originalist approach. If I am confirmed, I would follow all binding precedent concerning the appropriate method of constitutional interpretation, including applying the original meaning of a constitutional provision where the Supreme Court directs that approach.

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 and would faithfully follow this precedent in interpreting any federal statute. If binding precedent does not resolve the matter, I would examine the text of the statute and apply the statute's plain language as written. Only if the statute is ambiguous, would I look to canons of statutory construction such as avoiding surplusage and considering the text as a whole, persuasive authority from other circuits in interpreting the statute, and then legislative history in limited circumstances. *See, e.g., Green v. City of N.Y.*, 465 F.3d 65, 78 (2d Cir. 2006).

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

      Response: The Supreme Court has advised that committee reports on the bill are more probative of legislative intent than comments of a member or statements during floor debates. *See, e.g., 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: The Constitution is a domestic document and the laws and judicial decisions of foreign nations do not bind the United States courts.

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 Supreme Court has held that "prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citing to *Baze v. Rees*, 553 U.S. 35, 50 (2008)) (internal quotations omitted). The prisoner must show that there is "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Glossip*, 576 U.S. at 877 (internal citations omitted). The petitioner must also proffer "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

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: The Supreme Court held in *Glossip* that a petitioner was required to establish "an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008)). Later in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Court reinforced that the petitioner must offer "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125.

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: The petitioner in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 61-62 (2009), asserted that he had "a right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing." The Supreme Court characterized the prisoner's claim as requesting that the Court "recognize a freestanding right to DNA evidence untethered from the liberty

interests he hopes to vindicate with it." *Id.* at 72. The Court "reject[ed] the invitation and conclude[d], in the circumstances of th[e] case, that there is no such substantive due process right." *Id.* The Second Circuit subsequently acknowledged the Supreme Court's statement in *Osborne* that there is "no freestanding substantive due process right to DNA evidence" and instead engaged in a state liberty interest analysis. *Newton v. City of New York*, 779 F.3d 140, 147-48 (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: If confirmed, I would faithfully and impartially discharge and perform all the duties incumbent upon me as a District Court judge under the Constitution and laws of the United States.

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: The Supreme Court has provided significant guidance for evaluating a claim that a facially neutral state action creates a substantial burden on the free exercise of religion. For example, a law that appears neutral on its face is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). If a law is not neutral or generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32. A law also may not be neutral if it is determined that the law's enforcement was motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has held that a law or regulation may not be neutral and generally applicable, and therefore trigger strict scrutiny, as articulated in cases such as *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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 11, that includes precedent for evaluating claims regarding whether state actions are neutral or discriminate based on religion.

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: An individual receives protection for sincerely held religious beliefs regardless of "disagreement among sect members" or whether the beliefs are "responding to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 833–34 (1989). The Second Circuit has reiterated that plaintiff's membership in a particular sect "or on any tenet of the sect involved" is not determinative and "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 589-90 (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: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), that the Second Amendment protects "an individual right to keep and bear arms" without regard to service in a militia. The Supreme Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and detailed three examples of presumptively valid firearm regulations: (1) "prohibitions on the possession of firearms by felons and the mentally ill," (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-627.

    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: I am not a judge and have not issued any judicial opinions, orders, or decisions.

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: This statement appears to be made in support of Justice Holmes' argument that "a constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

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

       Response: If confirmed as a District Court judge, I would have a duty to faithfully follow all Supreme Court precedent regardless of any personal views as to whether the cases were correctly decided or not. It is also generally inappropriate for judicial nominees to comment on the merits of particular precedent so as to avoid any appearance of prejudging a future case. However, it is my understanding that the Supreme Court has abrogated much of *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and stated in *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), that the "doctrine that prevailed in *Lochner* . . . has long since been discarded."

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?**

    Response: Only the Supreme Court can overrule its prior precedent and it has a detailed *stare decisis* jurisprudence that it employs in evaluating such questions. I am not aware of Supreme Court opinions that have not been implicitly or explicitly overruled by the Supreme Court but that 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: I pledge to faithfully apply Supreme Court precedent.

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?**

   Response: If confirmed as a District Court judge, I would have a duty to faithfully follow all Second Circuit precedent regardless of any personal views as to whether I agree with the decisions. It is also generally inappropriate for judicial nominees to comment on their personal views of the merits of particular precedent so as to avoid any appearance of prejudging a future case.

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

   Response: Please see my response to Question 16a.

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: If confirmed, I would follow applicable Supreme Court and Second Circuit law in determining whether the market share is sufficient to support a monopoly claim in a particular case. This would include cases such as *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), and *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

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

Response: Black's Law Dictionary defines federal common law as "[t[he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern." *Common Law*, Black's Law Dictionary (11th ed. 2019). In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court held that in cases of diversity jurisdiction, substantive state law and federal procedural law should be applied, and that there is "no federal general common law." The Supreme Court has further advised that "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied," one of which is that "[i]n the absence of congressional authorization, common lawmaking must be necessary to protect uniquely federal interests." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (quotations omitted). For example, federal common law has been developed in areas such as admiralty. *Id.*

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: If confirmed, in examining the scope of a state constitutional provision, I would look to the decisions of the state whose constitution is before me. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The "views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

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

Response: The Federal Constitution should be interpreted pursuant to federal binding precedent by the Supreme Court and Second Circuit. Please see my response to Question 18 above as to the interpretation of state constitutions by a federal court.

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

Response: States may provide their own protections in state constitutions, but under the Supremacy Clause all states are bound by the provisions of the federal Constitution.

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

Response: If confirmed as a District Court judge, I would have a duty to faithfully follow all Supreme Court precedent regardless of any personal views as to whether the cases were correctly decided or not. It is also generally inappropriate for judicial nominees to comment on the merits of particular precedent so as to avoid any appearance of prejudging a future case. However, given that it is unlikely that *de jure* segregation will come before the court, I feel comfortable stating that *Brown v. Board of Education* was rightly 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: Rule 65 of the Federal Rules of Civil Procedure provides the standard for granting equitable injunctive relief. The plaintiff must establish, among other

> things, irreparable harm and that remedies at law are insufficient to compensate for the injury. The Second Circuit has held that it has "no doubt" that district courts are permitted to enter nationwide injunctions in certain circumstances. *See New York v. U.S. Dep't of Homeland Sec*., 969 F.3d 42, 88 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1370 (2021), and *cert. dismissed,* 141 S. Ct. 1292 (2021). However, injunctions are a "drastic and extraordinary remedy" *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and their scope "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

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: The balance of powers between federal and state governments is an important aspect of our democracy and constitutional system. The Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) has stated that a federalist structure:

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

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

Response: There are various abstention doctrines that may apply, depending on the facts and circumstances of a particular case. Please see my response to Question 2 for the standards that would be applied with respect to the various doctrines.

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

Response: Whether to award monetary damages or injunctive relief is highly dependent on the facts of the particular case, the relief sought by parties, and in the case of an injunction, an assessment of the equities. Importantly, injunctive relief is an extraordinary equitable remedy and can only be granted if, among other things,

irreparable harm is demonstrated and monetary damages are insufficient to compensate for the injury.

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

Response: The Supreme Court has held that the Constitution protects rights even if they are not expressly enumerated in the Constitution. In *Washington v. Glucksberg*, the Supreme Court set forth the two primary features of its substantive due process analysis under the Fifth and Fourteenth Amendments. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). First, the Court observed that the Due Process clause protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" *Id.* at 721 (internal quotations omitted). Second, the Court requires a "careful description of the asserted fundamental liberty interest protected." *Id.* (internal quotations omitted). Examples of liberties protected by the Due Process clause in addition to those in the Bill of Rights include the rights to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy and contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952), and to terminate a pregnancy in certain circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

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: The First Amendment right to the free exercise of religion is foundational to our democracy. Laws that "incidentally burden[] religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). However, a law that appears neutral on its face is not neutral if "the object or purpose of the law is suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). If a law is not neutral

or generally applicable, then the law “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Id.* at 531-32. A law also may not be neutral if it is determined that the law’s enforcement was motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has held that a law may not be neutral and generally applicable, and therefore trigger strict scrutiny, as articulated in cases such as *Fulton*, 141 S. Ct. at 1877, and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

Response: The Supreme Court has explained that “freedom of worship” is one aspect of the right to free exercise. *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (“[t]he Free Exercise Clause embraces a freedom of conscience and worship”).

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: Please see my response to Question 2. In addition, the Religious Freedom Restoration Act (RFRA) provides that the federal government cannot “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. §2000bb-1(a). If a substantial burden is shown, the government must “demonstrate[] that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 695 (2014) (citing 42 U.S.C. §2000bb-1(b)).

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

Response: Please see my response to Question 12.

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, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). The Supreme Court noted in *Little Sisters of the Poor Saints Peter & Paul Home v. Pa.*, 140 S. Ct. 2367, 2383 (2020), that "RFRA also permits Congress to exclude statutes from RFRA's protections" pursuant to § 2000bb–3(b).

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: I am not a judge and have not issued any judicial opinions.

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: Judges should issue their opinions objectively, impartially, and in accordance with the law, regardless of whether the judge personally likes the result.

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

a. If yes, please provide appropriate citations.

Response: Yes. Based on a Westlaw search and my recollection, the following cases are responsive to this question:

Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001)

Danesh v. Jenifer, No. 01. 1735 (6th Cir. 2001)

Ng v. Demore, No. 01-16609 (9th Cir. 2001)

Radoncic v. Zemski, No. 01-1074 (3d Cir. 2002)

Welsh v. Ashcroft, 293 F.3d 213 (4th Cir. 2002)

Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002)

Girl Scouts of Middle Tennessee v. Girl Scouts of the USA, No. 3:21-cv-00433 (M.D. Tenn. 2021).

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: I generally do not use social media. I have never had accounts with Twitter, Snapchat, Tik Tok, or Instagram. I previously had an old Facebook account to which I would very infrequently post personal messages like well wishes on a birthday, and I deleted that account in September 2021. I understand that I am not able to recover the contents of that account. I currently have a LinkedIn account and have not deleted any content.

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

Response: Questions about whether America is systemically racist are important policy discussions for lawmakers to consider. If confirmed, my role would be to fully, fairly, and impartially review every case and to evenhandedly apply legal precedent from the Supreme Court and Second Circuit with regard to any claims of race discrimination in an individual case before me.

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

Response: Yes.

32. How did you handle the situation?

Response: I take seriously my obligation, as an advocate, to vigorously represent my client, in accordance with the law, without regard to my personal views.

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

Response: If confirmed, I commit to applying the law without regard to my personal policy beliefs.

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

Response: My views on the law have not been shaped by a particular Federalist Paper.

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

Response: The question of whether an unborn child is a human being implicates religious, scientific, philosophical, and policy considerations. If confirmed, I will follow all applicable law with respect to any case that involves this question.

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: I do not recall testifying under oath in any circumstance other than my Senate Judiciary Committee hearing on February 1, 2022.

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)?**

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

    c. **Systemic racism?**

    d. **Critical race theory?**

    Response: No.

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

    a. **Apple?**

    b. **Amazon?**

    c. **Google?**

    d. **Facebook?**

    e. **Twitter?**

    Response: Neither I (nor my spouse) hold any shares of the aforementioned companies. I understand that some mutual funds that we own may contain them, but we do not own any individual shares.

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

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

Response: Yes. As General Counsel of Girl Scouts of the USA from September 2013 to the present date, I regularly edit briefs that are filed by outside counsel on behalf of Girl Scouts of the USA in litigations across the country. *See, e.g., Girl Scouts of Middle Tenn. v. Girl Scouts of the USA*, 770 F.3d 414 (6th Cir. 2014); *Farthest North Girl Scout Council v. Girl Scouts of the USA*, 454 P.3d 974 (Alaska 2019); *Girl Scouts of Middle Tenn. v. Girl Scouts of the USA*, 2021 WL 4894604 (M.D. Tenn. Oct. 20, 2021).

40. Have you ever confessed error to a court?

Response: Not that I recall.

a. If so, please describe the circumstances.

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 that I should provide honest answers to the best of my ability and recollection, and to be guided by the Code of Conduct for United States Judges.

Senator Mike Lee
Questions for the Record
Jennifer Rochon, Nominee to the United States District Court for the Southern District of New York

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

   Response: If confirmed, my judicial approach would be to approach each case with an open mind, impartially and objectively evaluate the facts, and adhere to binding Supreme Court and Second Circuit precedent. I would also treat all those who come before me with respect and dignity, follow my judicial oath, and be guided by the Code of Conduct for United States Judges.

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

   Response: If confirmed as a District Court judge, I would be bound by Supreme Court and Second Circuit precedent and would faithfully follow this precedent in interpreting any federal statute. If binding precedent does not resolve the matter, I would then examine the text of the statute and apply the statute's plain language as written. Only if the statute is ambiguous, would I look to canons of statutory construction such as avoiding surplusage and considering the text as a whole, persuasive authority from other circuits in interpreting the statute, and legislative history in limited circumstances. *See, e.g., Green v. City of N.Y.*, 465 F.3d 65, 78 (2d Cir. 2006).

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, I would be bound by the precedent of the Supreme Court and Second Circuit in interpreting a constitutional provision. The Supreme Court has provided guidance on most constitutional provisions, including methods of analysis for the constitutional provision and tests to apply and I would follow that precedent faithfully. In the rare occasion where the Supreme Court or Second Circuit has not provided guidance on interpreting a constitutional provision, I would look to the text of that provision, persuasive authority from other circuits on that provision, and methods of interpretation that have been directed by the Supreme Court for analogous provisions.

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

   Response: The Supreme Court has looked to the text and the original meaning of constitutional provisions to interpret certain constitutional provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Court examined the Second Amendment and in *Crawford v. Washington*, 541 U.S. 36 (2004) the Court interpreted the Confrontation Clause of the Sixth Amendment based on what is

considered an originalist approach. If I am confirmed, I would follow all binding precedent concerning the appropriate method of constitutional interpretation, including applying the original meaning of a constitutional provision where the Supreme Court directs that approach.

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: The starting place for interpreting a statute is always the text of the statute and its plain meaning. Unless there is an ambiguity, the statute should be interpreted consistent with the plain meaning of the text.

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

Response: The Supreme Court has advised that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *see also Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020).

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

Response: Under Section 2 of Article III of the Constitution, federal judicial power is limited to "Cases" and "Controversies." The Supreme Court has held that at an "irreducible minimum," plaintiff must establish "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food and Com. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996).

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

Response: Yes, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that under the Necessary and Proper Clause of Article I, Congress has implied powers. Examples include the power to incorporate a national bank, *id.* at 425, and the power to criminalize graft of taxpayer dollars, *Sabri v. United States*, 541 U.S. 600, 605 (2004). These implied powers stem from the enumerated powers in the Constitution as the Supreme Court has also advised that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000).

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

Response: I would follow Supreme Court and Second Circuit precedent in evaluating the constitutionality of a law enacted by Congress that does not reference a specific

Constitutional enumerated power. The Supreme Court has advised that courts must analyze whether the law falls within the enumerated powers regardless of the recitals of the statute. *See National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948)) (the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise").

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

Response: Yes. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In *Washington v. Glucksberg*, the Supreme Court set forth the two primary features of its substantive due process analysis. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). First, the Court observed that the Due Process clause protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" *Id.* at 721 (internal quotations omitted). Second, the Court requires a "careful description of the asserted fundamental liberty interest protected." *Id.* (internal quotations omitted). Examples of liberties protected by the Due Process clause in addition to those in the Bill of Rights include the rights to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy and contraception, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952), and to terminate a pregnancy in certain circumstances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

10. What rights are protected under substantive due process?

Response: Please see my answer 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: Any personal beliefs that I may have regarding substantive due process protections would not be relevant to my role as a jurist, if I am confirmed. Rather, if confirmed, I pledge to follow all Supreme Court and Second Circuit precedent regarding substantive due process protections. With respect to *Lochner v. New York*, the Supreme Court has stated that the "doctrine that prevailed in *Lochner* . . . has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed and presented with a controversy regarding the right to terminate a pregnancy, I

would follow Supreme Court precedent such as *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and related cases.

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

Response: The Commerce Clause in Article I, Section 8 of the Constitution provides that Congress shall have the power to "regulate commerce with foreign Nations, and among several States, and with the Indian Tribes." The Supreme Court has held that Congress has the power under this clause to: (1) "regulate the use of the channels of interstate commerce," (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "regulate those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

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

Response: The Supreme Court has held that the "traditional indicia" of whether a particular group is a suspect class include whether the group has an "immutable characteristic determined solely by the accident of birth," or if the group is "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." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). Examples of suspect classifications include race and national origin. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

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

Response: The role of checks and balances and the separation of powers is fundamental to our democracy. Balancing the roles of the judiciary, executive and legislative branches protects individual rights and prevents tyranny. The Supreme Court has underscored that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

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

Response: If confirmed, I would thoroughly examine the facts and record, scrutinize the constitutional text, and apply Supreme Court and Second Circuit precedent that

evaluates whether exercises of authority by the respective branches were authorized or not.

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

Response: If empathy is interpreted as personal sympathies or biases for a particular party, it should not play a role. A judge should impartially and objectively evaluate each case presented under the law, without regard to biases, treating everyone with dignity and respect throughout the process.

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

Response: Statutes are presumed to be constitutional, and challenges should be examined by the courts carefully because both outcomes are objectionable and should be avoided.

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

Response: The judiciary is empowered to review the constitutionality of federal statutes. *See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803). While I have not formed a view as to the trend set forth in this question, generally speaking an aggressive exercise of judicial review could potentially risk impinging upon the legislature's role in advancing the democratic and representative process, while judicial passivity could be detrimental to upholding important constitutional protections.

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

Response: Black's Law Dictionary defines judicial review as "[a] court's power to review the actions of other branches or levels of government, esp. the courts' power to invalidate legislative and executive actions as being unconstitutional." *Judicial Review*, Black's Law Dictionary (11th ed. 2019). Judicial supremacy is defined 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." *Judicial Supremacy*, 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: Legislators are bound by an oath to support the Constitution and should enact laws that are constitutional. Const., Art. VI. Courts have the power and responsibility of judicial review of the constitutionality of statutes, *see, e.g., Marbury v. Madison*, 5 U.S. 137 (1803), and elected officials should not disregard duly rendered judicial decisions regarding the constitutionality of statutes. Both obligations are important.

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: Hamilton reminds us in Federalist 78 that the judiciary has limited power in that it interprets the laws, as opposed to making or enforcing them. It is critical that the judiciary act impartially, objectively, and with fidelity to the rule of law and precedent, so that parties respect the decisions and the judgment of the court.

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

Response: If confirmed as a District Court judge, I would follow binding precedent – from both the Supreme Court as well as Second Circuit – regardless of any personal views of the precedent. If Supreme Court and Second Circuit precedent does not appear to speak directly to the issue at hand, I would diligently review the facts presented in the case and the arguments of the parties and look to analogous precedent that might provide possible guidance as to the issue presented.

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: A sentencing decision should not discriminate on the basis of the defendant's group identity. In sentencing, a judge should consider the factors in 18 U.S.C. § 3553(a). In addition, section 5H1.10 of the Sentencing Guidelines Manual

states that race, sex, national origin, creed, religion, and socio-economic status are "not relevant in the determination of a sentence."

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 the Biden Administration's statement regarding equity or the context in which this statement was promulgated. Presuming that this is a policy consideration, law makers are better equipped to evaluate this definition and its applicability. The judicial function would be to fully, fairly, and impartially review every case and to evenhandedly apply legal precedent, including any precedent related to legal discrimination, if applicable.

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

Response: Equity and equality are separately defined in Black's Law Dictionary. Equity is defined as "[f]airness; impartiality; evenhanded dealing" as well as "[t]he body of principles constituting what is fair and right[.]" *Equity*, Black's Law Dictionary (11th ed. 2019). Equality is defined as "[t[he quality, state, or condition of being equal[.]" *Equality*, Black's Law Dictionary (11th ed. 2019)

26. Should equity be taken into consideration in determining the outcome of a case?

Response: The outcome of a case should be determined by closely examining the facts of the case, thoroughly researching the law, faithfully following applicable law, and objectively deciding only the matter that is properly before the court. Insofar as equity entails concepts of impartiality and fairness, judges should endeavor to be impartial and fair pursuant to the Code of Conduct for United States Judges.

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

Response: Section 1 of the Fourteenth Amendment states in relevant part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." If confirmed, I would examine issues under the Fourteenth Amendment by applying Supreme Court and Second Circuit precedents, rather than any executive statement.

28. How do you define "systemic racism?"

Response: Policy makers, social scientists, and others have interpreted the term "systematic racism" in different ways. I understand that this phrase has generally been used to refer to policies, practices, or other systemic conditions that cause or exacerbate racial disparities.

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

Response: I understand that critical race theory is an academic framework that examines the role of race in society.

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

Response: Please see my answers to Questions 28 and 29.

Senator Ben Sasse
Questions for the Record for Jennifer Louise Rochon
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
February 1, 2022

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

   Response: No.

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

   Response: No.

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

   Response: If confirmed, my judicial process would be to approach each case with an open mind, impartially and objectively evaluate the facts, and adhere to binding Supreme Court and Second Circuit precedent. I will also treat all those who come before me with respect and dignity, follow my judicial oath, and be guided by the Code of Conduct for United States Judges.

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

   Response: I would not ascribe a particular label to myself. The Supreme Court has looked to the text and the original meaning of constitutional provisions to interpret those provisions. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the Court examined the Second Amendment and in *Crawford v. Washington*, 541 U.S. 36 (2004) the Court interpreted the Confrontation Clause of the Sixth Amendment based on what is considered an originalist approach. If I am confirmed, I would follow all binding precedent concerning the appropriate method of constitutional interpretation, including applying the original meaning of a constitutional provision where the Supreme Court directs that approach.

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

   Response: I would not ascribe a particular label to myself. In examining a statute, I would look first to the text of the statute and its plain language, as well as binding Supreme Court and Second Circuit precedent. Only if the statute is ambiguous, would I look to canons of statutory construction such as avoiding surplusage and considering the text as a whole, persuasive authority from other circuits in interpreting the statute, and

legislative history in limited circumstances. *See, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006).

6. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: I believe that the Constitution contains longstanding principles foundational to our democracy that are as true and relevant today as they were when they were adopted, including principles of equal protection, due process, and fundamental rights.

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

   Response: I admire many justices who were appointed after January 20, 1953 but most of all I admire and respect the role of the Court as a whole and, if confirmed, will follow the precedent of the Supreme Court regardless of which Justice authored the decision.

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

   Response: The Second Circuit must follow circuit precedent unless a Supreme Court decision or an *en banc* holding of the Second Circuit implicitly or explicitly overrules the prior decision. *See Anderson v. Recore*, 317 F.3d 194, 201 (2003). Federal Rule of Appellate Procedure 35(a) directs that, in determining when to grant *en banc* review, the court must decide whether: "(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2). If confirmed as a District Court judge, I would be bound to follow Second Circuit precedent unless and until that precedent is overturned explicitly or implicitly by the Supreme Court.

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

   Response: Please see my response to Question 8.

10. **What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?**

    Response: If confirmed, in interpreting a statute, I would examine the text of the statute and apply the statute's plain language as written. If the statute is unambiguous, that is the end of the analysis. Only if the statute is ambiguous, would I look to canons of statutory construction such as avoiding surplusage and considering the text as a whole, persuasive

authority from other circuits in interpreting the statute, and legislative history in limited circumstances. *See, e.g., Green v. City of N.Y.,* 465 F.3d 65, 78 (2d Cir. 2006).

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

    Response: Policy questions regarding sentencing disparities are important discussions for lawmakers to debate, and legislators have done so in examining, for example, sentencing variation related to crack cocaine versus powdered cocaine. However, judges must determine the appropriate sentence for each defendant individually in accordance with the factors laid out in 18 U.S.C. § 3553(a), rather than pursuant to any personal policy beliefs. Section 3553(a) instructs courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). In addition, section 5H1.10 of the Sentencing Guidelines Manual states that race and national origin are "not relevant in the determination of a sentence."

<u>Questions from Senator Thom Tillis</u>
<u>for Jennifer Louise Rochon</u>
<u>Nominee to be United States District Judge for the Southern District of New York</u>

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

   Response: The role of a judge is to impartially and objectively apply the law to the facts of the case without regard to the judge's personal views.

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

   Response: Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions[.]" *Judicial Activism*, Black's Law Dictionary (11th ed. 2019). It is not appropriate for judges to be directed by their personal views in deciding cases. Judges must impartially and objectively apply the law to the facts, faithfully follow binding precedent, and decide only the matter properly before the court.

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

   Response: Impartiality is an expectation for all judges, as reflected in the Code of Conduct for United States Judges.

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: It is possible that faithfully interpreting and applying the law could result in an outcome that is undesirable from the judge's personal perspective. A judge should apply the law dispassionately and impartially to the facts regardless of whether the outcome is one that is personally desirable and I would pledge to do that.

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

   Response: No.

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

Response: If I am confirmed, I would fully and faithfully apply Supreme Court and Second Circuit precedent in evaluating any case that involves the Second Amendment. This includes 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 lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

   Response: The Supreme Court has stated that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). If confirmed, I would evaluate the arguments raised by all parties. I would do so objectively and impartially and would analyze all relevant precedent, including any binding Supreme Court or Second Circuit precedent regarding the constitutional rights at issue. The Supreme Court has issued precedent regarding constitutional questions concerning COVID restrictions or limitations, *see, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and I would follow the Supreme Court's precedent, if applicable to the specific facts presented.

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

   Response: If confirmed, in considering a question regarding qualified immunity, I would follow Supreme Court and Second Circuit precedent. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This test is evaluated as of the time of the governmental official's conduct. *See Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020). Furthermore, "[a] right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)).

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: I respect law enforcement officers who protect public safety, including my brother-in-law who is a police officer in Michigan, and am thankful for their service. If confirmed, I would follow the Supreme Court and Second Circuit precedent regarding qualified immunity, including that set forth in Question 9 above. It would not be appropriate to deviate from that precedent regardless of personal beliefs, if any, regarding the sufficiency of that protection.

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

    Response: Please see my answer to Question 10.

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

    Response: I understand that the Supreme Court has addressed patent eligibility in numerous cases, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014), and that parties are seeking review by the Supreme Court on patent issues in *American Axle & Manufacturing, Inc., v. Neapco Holdings LLC, et al.*, 967 F.3d 1285 (Fed. Cir. 2020). As a judicial nominee, I do not believe it would be appropriate for me to provide any personal opinions on the Supreme Court's patent eligibility jurisprudence and matters that may come before the court. If confirmed, I would thoroughly research the relevant precedent in any patent case that was presented to me and follow such precedent regardless of any views I may hold.

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?**

       Response: If presented with a case with the aforementioned facts, I would thoroughly examine the facts and record, research the applicable law, and faithfully apply binding precedent. As a judicial nominee, I do not believe it would be appropriate for me to provide a determination of patent eligibility as it could suggest that I am prejudging an issue that may come before the court.

    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?**

       Response: Please see my response to Question 13a.

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?**

   Response: Please see my response to Question 13a.

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?**

   Response: Please see my response to Question 13a.

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?**

   Response: Please see my response to Question 13a.

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?**

   Response: Please see my response to Question 13a.

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?

Response: Please see my response to Question 13a.

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?**

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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: Please see my response to Question 13a.

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: As a judicial nominee, I do not believe it would be appropriate for me to provide any personal opinions on the clarity of the Supreme Court's jurisprudence and its impact on policy areas such as innovation. If confirmed, I would thoroughly research the relevant precedent regarding patent ineligibility in any case that was presented to me and follow such precedent regardless of any personal views I may hold.

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: As an advocate, I represented a defendant in a case with various copyright claims, including a claim of fraudulent copyright notice. *See Joshi-Topi v. Cold Spring Harbor Lab.*, CV 07-3346, 2008 WL 11449238, at **4-5 (E.D.N.Y. Apr. 14, 2008). As the General Counsel of the Girl Scouts of the USA, I work with our team to maintain the copyrights of Girl Scouts, protect the copyrights of the organization against infringement and misuse, and grant permission to third parties to use the organization's copyrighted materials.

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

Response: As the General Counsel of the Girl Scouts of the USA, I work with our team to protect the copyrights of the organization and to ensure that the organization is respecting the copyrights of others. In connection with this, my team implemented procedures for Girl Scouts of the USA under the Digital Millennium Copyright Act (DMCA) for receiving written notification of claimed copyright infringement and an agent on my team has been designated to receive such notices. My team has also filed numerous DMCA take down notices where the copyrights of Girl Scouts are being infringed.

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

Response: I do not recall addressing intermediary liability for online service providers that host unlawful content by users.

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

Response: I do not recall litigating cases that dealt with the First Amendment and free speech issues. My experience with copyright issues is listed in my response to Question 15a. I also have experience litigating cases involving intellectual property, including trademark infringement cases and false advertising matters. As General Counsel of Girl Scouts of the USA, I manage the intellectual property portfolio of Girl Scouts of the USA, protect the portfolio against unauthorized uses, provide permissions to use Girl Scouts intellectual property, and provide legal advice and counsel to the organization regarding intellectual property rights and obligations.

16. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to**

address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

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

   Response: The interpretation of any statute begins with the plain language of the statute. If the text is clear, it must be applied to the facts as written without resort to legislative history. *See NLRB v. SW Gen., Inc.,* 137 S. Ct. 929, 942 (2017). If the text is ambiguous, the court may look to canons of statutory construction, precedent from the Supreme Court and the relevant circuit (in my case, the Second Circuit) and, in some instances, legislative history. *See, e.g. Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) ("[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms").

   In terms of the Digital Millennium Copyright Act (DMCA), if confirmed, I would follow Second Circuit precedent regarding the DMCA, "red flag" knowledge, and willful blindness, including *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

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: In interpreting the DMCA, as with any statute, one must start with the text of the statute and only move beyond the plain language if there is ambiguity or a gap. Advice or analysis from the expert federal agency such as the U.S. Copyright Office that do not carry the force of law are not entitled to *Chevron*-style deference. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). However, such advice may be "entitled to respect" if persuasive. *Id.* (citing *Skidmore v. Swift*, 323 U.S. 134 (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: If presented with a copyright infringement matter, I would follow all Supreme Court and Second Circuit precedent in evaluating the individualized facts

of the case to determine whether any alleged notice was sufficient. This would include cases such as *Viacom Int'l, Inc. v. YouTube, Inc*., 676 F.3d 19 (2d Cir. 2012).

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

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

Response: If confirmed and presented with a DMCA case, I would thoroughly review the facts of the case and record before me and apply the statute by its plain terms, consistent with the relevant Supreme Court and Second Circuit precedent. The Supreme Court has advised that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *see also Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020).

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: Developments in technology have been evaluated by the Supreme Court in examining its prior jurisprudence such as in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (taking into account the technological advancements in cell site location information (CSLI) in evaluating Fourth Amendment rights), and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (reviewing Internet and e-commerce realties in evaluating contacts for purposes of sales tax assessments). If confirmed as a District Court judge, I would follow binding Supreme Court and Second Circuit precedent, even if the technology landscape has changed, unless and until that precedent has been overturned.

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 been nominated to serve as a District Court judge in the Southern District of New York and I understand that this court does not have any single judge divisions. Generally speaking, though, if confirmed, I would follow all Supreme Court and Second Circuit precedent regarding venue, *forum non conveniens*, and personal jurisdiction questions, including jurisprudence that examines alleged judge shopping or forum shopping such as *Iragorri v. United Techs. Corp*., 274 F.3d 65 (2d Cir. 2001).

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

Response: District Court judges have an obligation to follow Supreme Court and binding circuit court precedent in evaluating questions of venue, *forum non conveniens*, and personal jurisdiction.

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: As a judicial nominee, it is not appropriate for me to comment on the appropriateness of the conduct of other judges. However, generally speaking, District Court judges have an obligation to follow Supreme Court and binding circuit court precedent in evaluating questions of venue, *forum non conveniens*, and personal jurisdiction.

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

Response: I commit to following Supreme Court and Second Circuit precedent in evaluating questions of venue, *forum non conveniens*, and personal jurisdiction. I will also follow the Federal Rules of Civil Procedure, the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, and the Code of Conduct for United States Judges.

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: Judges are obligated to apply binding case law. As a judicial nominee, it is not appropriate for me to comment on the conduct of other judges or how the

Federal Circuit should address a situation if there have been repeated mandamus orders.

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 Supreme Court and the Second Circuit have issued opinions regarding venue, *forum non conveniens*, and personal jurisdiction questions. Following binding precedent, as I commit to do, enhances the perceptions of fairness and the evenhanded administration of justice.

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

       Response: Please see my response to Question 20 above. Evaluating court procedures or rules to determine if they bias the administration of justice is appropriate.

    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: I support court procedures and rules that promote the fair and unbiased administration of justice.

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: The Supreme Court has stated that mandamus against judges is an "extraordinary" and "drastic" remedy. *See Will v. United States*, 389 U.S. 90, 106 (1967). Mandamus orders should provide guidance to the district court as the Supreme Court has further advised that "the writ serves a vital corrective and didactic function." *Id.* at 107. As a judicial nominee, it is not appropriate for me to comment on the conduct of other judges and how a circuit court should evaluate repeated mandamus orders.

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

Response: Please see my response to Question 21a.