Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Nina R. Morrison
Judicial Nominee to the United States District Court for the Eastern District of New York

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

   Response: "Super precedent" is not a term used or defined by the Supreme Court. I am generally aware that some legal academics have discussed the concept of so-called "super precedents," but I am not familiar with that debate, and I have never used the term myself. If confirmed, my role as a district court judge would be to strictly adhere to and follow all precedents of the Supreme Court and the Second Circuit.

2. **You can answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**
   b. **Was *Loving v. Virginia* correctly decided?**
   c. **Was *Griswold v. Connecticut* correctly decided?**
   d. **Was *Roe v. Wade* correctly decided?**
   e. **Was *Planned Parenthood v. Casey* correctly decided?**
   f. **Was *Gonzales v. Carhart* correctly decided?**
   g. **Was *District of Columbia v. Heller* correctly decided?**
   h. **Was *McDonald v. City of Chicago* correctly decided?**
   i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
   j. **Was *Sturgeon v. Frost* correctly decided?**
   k. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

   Response to all subparts: If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, including each of the cases listed above. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to apply, interpret or enforce. The constitutionality of *de jure* racial segregation in public schools or anti-miscegenation laws, however, are extremely unlikely to arise in pending or prospective litigation. Therefore, like prior judicial nominees, I believe that I can permissibly comment on the correctness of precedent for *Brown v. Board of Education*

and *Loving v. Virginia*, and to state that I agree that *Brown* and *Loving* were correctly decided.

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

   Response: I am not familiar with Judge Jackson's statement. I have never used the phrase "living constitution" in my work as an attorney or in my academic writings. The Constitution is an enduring document that sets forth the fundamental rights enjoyed by all Americans and the core principles that govern our nation. The Constitution does not change unless amended pursuant to Article V.

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

   Response: Judicial decisions should take into consideration the factual and evidentiary record before the court, and decide the limited issues presented in any case or controversy by applying precedent to the facts at hand.

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

   Response: Courts should interpret constitutional provisions by using interpretative methodologies as instructed by the United States Supreme Court. The Supreme Court has never instructed or authorized judges to substitute their own "value judgments" or personal beliefs for controlling precedent or other methods of legal analysis. If confirmed as a district judge for the Eastern District of New York, I would interpret and apply any constitutional provisions in the cases before me by faithfully following United States Supreme Court and Second Circuit precedent.

6. **Is climate change real?**

   Response: Climate change is an important issue for the executive and legislative branches of government to consider. If confirmed as a district judge, I would decide the limited issues before me in individual cases by carefully reviewing the record on any factual, legal, or scientific matters presented and applying United States Supreme Court and Second Circuit precedent. Given the possibility that questions involving climate science may become an issue in impending litigation, it would be inappropriate for me to express any personal views on those. *See* Code of Conduct for

United States Judges, Canon 3(A)(6).

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

Response: Nearly a century ago, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1925). If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow, all precedent from the Supreme Court and Second Circuit, including on the issue of parental rights to make decisions regarding the education of their children.

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

Response: I understand this question to ask about the role of expert scientific testimony in tort cases alleging that a specific substance was the cause of the plaintiff(s)'s cancer. The Second Circuit has instructed that in such cases, it is the plaintiff's burden to "establish[] a causal link" between the specific substance and cancer." *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1131 (2d Cir. 1995). If confirmed as a district judge, my role in such cases may include evaluating the admissibility of proffered expert testimony on this question. Should such a case come before me, I would apply the standards of Federal Rule of Evidence 702, and, specifically, the test of *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993), to ensure that any such testimony on the question of causation that either party seeks to have admitted is both relevant and reliable.

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

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), the Supreme Court relied upon scientific evidence in its discussion of the "advances in neonatal care" that contributed to a likelihood of fetal viability at an earlier point in time in pregnancy than when the Court had last considered the matter in *Roe v. Wade* in 1973, and further discussed the possibility of future scientific and medical advancements that may render a fetus viable at an even earlier point in pregnancy. As a district judge, I would be bound by all Supreme Court and Second Circuit precedent as to the proper role of scientific and medical evidence in evaluating questions of fetal viability and any related legal and factual issues in specific cases that may come before me.

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

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), the United States Supreme Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." In *Roe v. Wade*, 410 U.S. 113, 159 (1973), the Supreme Court stated, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." I read the precedents of *Roe* and *Casey* as guidance from the Supreme Court that the question of when life begins is one that may be seen as either scientific, religious, and/or philosophical, and that the judiciary – including federal district court judges – need not and should not determine or opine on this question.

11. **Can someone change his or her biological sex?**

Response: It is my understanding that there are medical procedures that purport to change one's biological sex, and that some persons choose to identify as a sex other than the one indicated on the person's birth certificate following such procedures. *See, e.g.*, New York Civil Rights Law § 67(2). If confirmed as a district court judge, and a case were to come before me involving a legal claim or issue arising from an alleged change of a person's biological sex, I would apply Supreme Court and Second Circuit precedent to resolve the issue. *See, e.g.*, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741-42 (2020).

12. **Is threatening Supreme Court justices right or wrong?**

Response: Under 18 U.S.C. § 111(a)(2) and 18 U.S.C. § 1114, it is a crime to "forcibly assault[], resist[], oppose[], impede[], intimidate[], or interfere[]" with any federal officer or employee "while engaged in or on account of the performance of official duties," including judicial officers.

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

Response: The Supreme Court has found that the president has broad and largely unrestricted authority to remove officials who wield executive power. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191-92 (2020) (discussing general rule, and limited exceptions to president's authority to remove senior officials pursuant to congressional action). To determine whether the president properly exercised his or her power to remove a senior official, I would consider and apply the standards set forth by the United States Supreme Court and its interpretation of any related statutory provisions, including but not limited to precedents regarding the circumstances when Congress may (or may

not) constrain the president's removal power. *See, e.g.*, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654 (1988).

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

    Response: The levels of funding that federal, state, and local governments may choose to provide to police departments and other law enforcement agencies are important policy questions reserved for the legislative branch, not the judicial branch.

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

    Response: The relative funding levels that federal, state and local governments may choose to provide to police departments and social services agencies is an important policy question that is reserved for the legislative branch, not the judicial branch.

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

    Response: Applications for re-release into the community by incarcerated persons convicted of crimes involving firearms during the COVID-19 pandemic are considered by federal district courts under the procedures set forth in 18 U.S.C. § 3582(a)(1)(C) and are commonly referred to as "compassionate release" motions. That statute directs courts to apply the factors listed in 18 U.S.C. § 3553(a); these factors include the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; and "to protect the public from further crimes of the defendant," among other factors. Courts may also be guided by the United States Sentencing Commission's policy statement regarding compassionate release.

    Because the 18 U.S.C. § 3553(a) factors specifically include a directive for courts to consider whether the convicted person's incarceration is necessary to "protect the public" from the risk of further crimes by that person, I interpret the statute to direct district courts to consider "the safety of the community" in evaluating the merits of any motion for compassionate release, including but not limited to motions made by any person convicted of a crime involving the use of a firearm.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms," and struck down certain firearms restrictions in the District of Columbia that infringed upon those rights. The Supreme Court has not (in *Heller,* nor in any subsequent case) yet determined what standard of scrutiny shall apply to all Second Amendment cases challenging the constitutionality of firearms regulations or legislation, except to rule out rational basis review. *See id.* at 628, 628 n.27. Following *Heller,* the Second Circuit has adopted its own "two-step framework to determine the constitutionality" of governmental restrictions on firearms within the Second Circuit, *see United States v. Perez*, 6 F.4th 448, 451-54 (2d Cir. 2021). And the Supreme Court has granted certiorari and heard oral argument in a pending challenge to New York State's concealed-carry statute, *see New York State Rifle & Pistol Association Inc. v. Bruen*, 141 S. Ct. 2566 (2021); a decision by the Supreme Court in *Bruen* may provide additional guidance and standards for lower courts, including federal district courts, to follow when considering such Second Amendment claims. If confirmed, I would faithfully follow all Supreme Court and viable Second Circuit precedent regarding the methods and standards of review to be applied in evaluating whether or not a regulation or proposed legislation infringes on citizens' Second Amendment rights, including *Heller* and any forthcoming decision in *Bruen*.

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

Response: I am unaware of any United States Supreme Court or Second Circuit precedent that squarely addresses the issue of whether private schools may be considered state actors under the ADA. If I were confirmed to the district court and a case came before me that presented this issue, I would resolve it by carefully researching the law and impartially applying the law to the facts in the record.

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

Response: I am unaware of any United States Supreme Court or Second Circuit precedent that squarely addresses this issue. If I were confirmed to serve as a district court judge for the Eastern District of New York and a case came before me that presented this issue, I would resolve it by carefully researching the law and impartially applying the law to the facts in the record.

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

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

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

    Response to both subparts: The Religious Freedom Restoration Act of 1993 (RFRA) provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014) (quoting 42 U.S.C. §§ 2000bb–1(a)). Under the RFRA, "[i]f the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government 'demonstrates 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.'" *Id.* (quoting 42 U.S.C. §§ 2000bb–1(b).3)).

    In *Hobby Lobby*, the United States Supreme Court found that certain aspects of the contraceptive mandate in the Affordable Care Act violated the RFRA because the statute "substantially burden[ed]" the plaintiffs' exercise of religion. The Court's opinion in *Hobby Lobby* provides guidance to lower courts considering future RFRA claims by enumerating certain factors that courts may use to determine whether a proffered burden on a plaintiff's free exercise of his or her religion is a "substantial one" under the RFRA. *See id.* at 720-26 (finding, *inter alia*, that the "substantial burden" test was met because of the substantial economic costs imposed by the contraceptive mandate, and the extent to which compliance with the challenged regulation would cause the plaintiffs to violate sincerely held religious beliefs). Although the court is the ultimate arbiter of whether a proffered burden on the plaintiff's rights violates the RFRA, the Supreme Court underscored that the court's role is a "narrow" one when considering whether the burden asserted is substantial: to determine only "whether the line drawn reflects 'an honest conviction'" on the part of the religious adherent. *Id.* at 725 (quoting *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 716 (1981)).

    If confirmed, I would follow Supreme Court and Second Circuit precedent, including but not limited to *Hobby Lobby,* in determining whether a "substantial burden" exists under the RFRA in any such case to come before me.

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

Response: A federal judge must fulfill his or her judicial oath to "administer justice . . . [and] faithfully and impartially discharge and perform all the duties incumbent upon" the judge "under the Constitution and laws of the United States[,]" and to do so without regard to the likelihood of potential reversal by an appellate court.

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

Response: Unlike in criminal cases, in which an accused defendant may be legally entitled to the assistance of counsel under the Sixth Amendment, including at government expense if he or she is indigent, *see, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963), there is no constitutional right to counsel in civil cases. In civil matters, lawyers should decide whom they choose to represent consistent with their ethical obligations.

23. **Do Blaine Amendments violate the Constitution?**

Response: In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the United States Supreme Court held that a "no-aid" provision of the Montana state constitution excluding religious schools from a state-funded scholarship program that was open to sectarian private schools was unconstitutional because Montana's program violated the Free Exercise Clause of the First Amendment. Although the law at issue in *Espinoza* was a state constitutional provision, the Supreme Court's opinion demonstrates certain similarities between Montana's "no aid" provision and the Blaine Amendment of the 1870s, which Congress considered but did not pass. While the Code of Conduct for United States Judges makes it inappropriate for a judge or judicial nominee to comment on the potential constitutionality of a law that Congress has not passed but may, in the future, enact and which could therefore become the subject of impending litigation, *Espinoza*'s holding and reasoning would provide federal district courts with important precedential guidance should Congress enact such a law and should that law be subject to constitutional challenge. If confirmed and such a case were to come before me, I would apply all governing Supreme Court and Second Circuit precedent, including but not limited to *Espinoza.*

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

Response: The First Amendment to the Constitution expressly protects the right "to petition the Government for a redress of grievances." U.S. Const. Amend. I. Further, "[t]he right to petition the government "is implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (internal citation omitted).

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

Response: The "fighting words" doctrine is one of the few areas in which the First Amendment permits the government to restrict speech based upon its content. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). In determining whether the "fighting words" doctrine permits the government to regulate speech based on the content of the statement, courts shall deny protection to "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971); *see also Virginia v. Black*, 538 U.S. 343, 359 (2003).

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

Response: The First Amendment "permits [the government] to ban a true threat." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (internal quotation marks and citation omitted). "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* (internal quotation marks and citation omitted).

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

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

    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?

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 to subpart (a): No.

Response to subparts (b) and (c): I have spoken with Christopher Kang, who has provided me with information regarding the judicial nomination process generally, based on his experience in the White House Counsel's Office. I have not been in contact with any of the other individuals listed, nor with anyone else known to be associated with Demand Justice, although I am unaware of the current or former employers of all persons with whom I speak.

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

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

Response: I do not recall and have no record of providing any such services to Alliance for Justice or anyone associated with Alliance for Justice.

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

Response: No.

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

Response. Please see my response to Question 27 regarding my prior contact with Christopher Kang of Demand Justice.

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

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

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

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

    Response to all subparts: No, as far as I know. However, I am not always aware of the employer of every person with whom I speak.

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

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

    Response: No, insofar as I can recall.

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

    Response: No, insofar as I am aware; however, I am not always aware of the employer of every person with whom I speak.

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

Response: The Open Society Foundations (OSF) has at various times provided grants to support the Innocence Project's programmatic work in the 20 years that I have been an employee at the Innocence Project. I do not recall personally participating in any presentations, meetings, or proposals regarding those grants. In addition, it is my understanding that some of my former classmates, acquaintances, and colleagues have been or are employed by OSF. For example, my former law school classmate Thomas Hilbink is the director of the Grant Making Support Group at OSF; and Tanya Coke, a fellow former clerk for the Hon. Pierre N. Leval and fellow graduate of NYU School of law, is a former program director for criminal justice at OSF.

31. **Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."**
    a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response to subparts (b) and (c): No, as far as I know. However, I am not always aware of the employer of every person with whom I speak.

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

Response: On March 7, 2021, I submitted an application to Senator Charles Schumer to be considered for positions on the United States District Courts for the Eastern and

Southern Districts of New York. On March 11, 2021, I submitted an application to Senator Kirsten Gillibrand. On March 23, 2021, I interviewed with Senator Schumer's Judicial Screening Committee. On April 7, 2021, I interviewed with Senator Gillibrand's staff. On May 31, 2021, I interviewed with Senator Schumer and his staff. On September 2, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On December 15, 2021, the President announced his intent to nominate me to the United States District Court for the Eastern District of New York.

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

Response: Please see my answer to Question 27 regarding my prior contact with Christopher Kang. At no point has Mr. Kang or anyone from Demand Justice discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

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

Response: I have spoken with Jill Dash, who provided me with information about the judicial nomination process generally. At no point has Ms. Dash or anyone from the American Constitution Society discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

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

Response: No, insofar as I am aware. However, I am not always aware of the employer or associations of every person with whom I speak.

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

Response: No, insofar as I am aware. However, I am not always aware of the employer or associations of every person with whom I speak.

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

Response: No, insofar as I am aware. However, I am not always aware of the employer or associations of every person with whom I speak.

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

Response: On September 1, 2001, Senator Schumer announced his intent to recommend me for nomination to the White House. On September 2, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in periodic contact with officials from the Office of Legal Policy at the United States Department of Justice as well as officials from White House Counsel's Office.

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

Response: On February 23, 2022, I received questions from the Committee via the Department of Justice Office of Legal Policy (OLP). I drafted my answers, and, where necessary, conducted legal research and reviewed my available records to refresh my recollection. I shared my draft responses to the Committee's questions with OLP, which provided feedback. I reviewed and considered OLP's feedback, and then submitted my answers to the Committee.

Senator Marsha Blackburn
Questions for the Record to Nina Morrison
Nominee to be United States District Judge for the Eastern District Of New York

1. **In a 2019 article for The Appeal, you applauded certain so-called progressive prosecutors, including then-Suffolk County District Attorney Rachael Rollins, who refused to prosecute certain crimes as a matter of official policy. You also praised St. Louis Circuit Attorney Kim Gardner—who has declined to prosecute a record number of criminal cases—and Chesa Boudin—who most recently has been accused of withholding evidence in a case of police brutality against a civilian. Each of these prosecutors has played a role in making communities more dangerous all across the country. Do you still align yourself with what you, in 2019, called the "new approach to justice" that these progressive prosecutors espouse?**

   Response: As noted in the essay's title ("Prosecutors can right ***past*** wrongs – if only the system lets them") (available at https://theappeal.org/prosecutors-can-right-past-wrongs-if-only-the-system-lets-them/) (emphasis supplied), and further explained in its text, the focus of this essay was to highlight the important work being done by prosecutors across the ideological spectrum (not just those who ascribe to the label "progressive") in one specific area of the law: prosecutor-led review of earlier wrongful convictions obtained by their offices, particularly those in which new evidence emerges that the convicted person may be actually innocent of any crime. That issue, known as "conviction integrity," is my primary field of expertise in the area of prosecutorial conduct and discretion. As explained in my testimony before the Committee, I have played no role in the development of any policies by the elected prosecutors mentioned in this essay (or other prosecutors) on "front end" prosecutorial discretion, including policies related to what current charges or sentences they will authorize their line prosecutors to seek.

   The focus of the 2019 essay was the case of Lamar Johnson, a Missouri man convicted of murder more than a quarter-century ago. Although prosecutors had concluded that Mr. Johnson was actually innocent of the murder for which he remained incarcerated, the convicting court concluded that Missouri law lacked a procedural vehicle to vacate Mr. Johnson's conviction. After the essay was published, the Republican-controlled Missouri Legislature went on to pass a new law that now provides prosecutors like Ms. Gardner with a legal vehicle to return to court to correct wrongful convictions, which was signed into law by Gov. Parson last year. *See* https://www.senate.mo.gov/21info/BTS_Web/Bill.aspx?SessionType=R&BillID=54105455.

   As an advocate, I have supported the "new approach to justice" referenced in the essay in the specific area of conviction integrity, which has been incorporated into the policies and practices of many elected prosecutors from both political parties. If confirmed as a district judge, however, I would no longer advocate for or against any such policies or practices. Instead, my duty would be to impartially consider and rule upon the legal issues presented in a case through briefing, argument, and evidence in the record.

2. **You have been highly critical of prosecutors. You have stated that "official findings of [prosecutorial] misconduct represent only a fraction of the misconduct that actually occurs" and that disciplinary proceedings for prosecutors are inadequate and biased. If you are confirmed as a district court judge, you will have federal prosecutors coming before you every week. How can these prosecutors trust that you will be a fair and unbiased arbiter of the case at hand when you have such a demonstrated bias against the prosecution in criminal cases?**

Response: I have great respect for the work that prosecutors do to ensure the rule of law, often under highly demanding conditions. If I am confirmed as a federal district judge, I would provide a fair and impartial forum for all litigants and counsel who appear before me, including federal prosecutors.

I believe the best evidence of my ability to fulfill that commitment comes from the respectful and collegial relationships I have forged with prosecutors around the country -- and across the ideological spectrum -- over the last two decades. I was humbled to receive letters submitted to the Committee in support of my confirmation from current and former prosecutors who have spent their careers working to do justice and protect public safety. These included Alan Vinegrad, who formerly served as the United States Attorney (*i.e.,* the chief federal prosecutor) in the Eastern District of New York, where I would preside as a judge if confirmed; the Hon. Sharen Wilson, the Republican elected Criminal District Attorney in Fort Worth, Texas, whose office prosecutes over 50,000 cases each year in the nation's fifteenth most populous county, including by seeking and defending death sentences; and Robert J. Masters, a former Executive District Attorney and bureau chief in Queens, New York, whose thirty-year career as a prosecutor "has been devoted to issues of public safety, law enforcement, and criminal prosecution[.]"

My respect and admiration for prosecutors who serve justice has also been reflected in my litigation efforts. In 2018, for example, I became the first Innocence Project attorney to enter an appearance on behalf of a current or former prosecutor in contested litigation, serving as lead *amicus* counsel in a wrongful termination lawsuit brought by a conscientious former Texas prosecutor who was fired from his position for refusing a supervisor's order to withhold exculpatory evidence. *Hillman v. Nueces County*, 579 S.W.3d 354 (Tex. 2019); *see also* Chuck Lindell, *In Change, Innocence Project Goes to Bat for Texas Prosecutor*, Austin Am.-Statesman (Sept. 25, 2018). I urged my supervisors to allow me to join Mr. Hillman's legal team because of my view that prosecutors who embody the highest ideals of their profession – even when doing so may pose a risk to their own careers – should be championed and supported.

In my work as an advocate, I have been critical of the conduct of some – but by no means all – individual prosecutors. Specifically, I have called attention to the actions of certain prosecutors who have committed serious and intentional misconduct in violation of their legal and ethical duties. In that role, I have also cited research and individual case examples documenting the failure of some state bar disciplinary bodies to meaningfully address certain proven cases of intentional misconduct. *See, e.g.,* N. Morrison, "What happens when prosecutors break the law?" *New York Times*, June 18, 2018 (available at

https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html) (discussing, *inter alia*, lack of disciplinary action taken against New York prosecutor who was fired from his job for intentional misconduct, resulting in the dismissal of at least five murder charges); N. Morrison, "A reckoning for prosecutors in drug lab scandal?" *CommonWealth*, available at https://commonwealthmagazine.org/courts/a-reckoning-for-prosecutors-in-drug-lab-scandal/ (discussing evidence presented in disciplinary proceedings against three Massachusetts prosecutors, whose alleged misconduct – as previously found by the courts – led to the dismissal of more than 24,000 criminal convictions).

However, my advocacy in this area is rooted in a longstanding consensus among judges, victims' rights advocates, and prosecutors themselves regarding the unique power and responsibility with which prosecutors are entrusted in our criminal justice system. When prosecutorial misconduct results in the wrongful conviction of an innocent person, public safety is compromised, because the real perpetrator of the crime has not been brought to justice. For this reason, many courts have forthrightly acknowledged and sought to correct those instances where an individual prosecutor violated legal and ethical norms. To take just one example, in *State v. Jackson,* 444 S.W.3d 554 (Tenn. 2014) the Tennessee Supreme Court unanimously reversed a murder conviction based on evidence that the prosecution had committed multiple violations of the defendant's constitutional rights. The Court's opinion was highly critical of conduct by the lead trial prosecutor, which the Court found "should be considered off limits to any conscientious prosecutor" under state and federal law. *See id.* at 586 (internal quotation marks and citation omitted).

At the same time, I have been careful in my written and oral advocacy to make clear my view that prosecutors who commit such intentional, serious misconduct are but a tiny fraction of the total. I have repeatedly emphasized that the vast majority of American prosecutors are conscientious public servants who strive each day to fulfill their legal and ethical obligations under highly demanding conditions. *See, e.g.,* "What happens when prosecutors break the law?", *supra* ("Most prosecutors are hard-working public servants and committed to fair play"); "A reckoning for prosecutors in drug lab scandal?", *supra,* ("Most prosecutors play by the rules and care deeply about fairness"); *Why Holding Prosecutors Accountable is So Difficult,* April 23, 2020, available at https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/ ("Prosecutors have demanding jobs and high caseloads, and we recognize that they sometimes make honest mistakes").

If confirmed as a district judge, I would strive, in each case, to uphold the solemn judicial oath to "administer justice . . . [and] faithfully and impartially" to all parties and counsel who appear before me, including federal prosecutors.

Nomination of Nina Morrison
to be United States District Judge for the Eastern District of New York Questions for the Record
Submitted February 23, 2022

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

3. **During your confirmation hearing, you refused to say whether you believed that Ledell Lee, a serial rapist and murderer who you represented, actually committed the crimes that he was convicted of and executed for committing. Specifically, you said that you could not comment on your "client, or certainly on a former client's, guilt or innocence." Have you ever publicly stated whether you believed that any of your clients or former clients were guilty or not guilty?**

   Response: As an attorney at the Innocence Project, while representing persons convicted of serious crimes, I have conducted numerous factual investigations that yielded new, exculpatory evidence not available at the time of a client's original conviction. In some of these cases, I concluded that the newly discovered evidence met the legal standard for post-conviction relief under applicable state or federal law – including, in some cases, relief from a conviction based on "actual innocence." In such cases, consistent with my ethical duty to vigorously represent my client, I made all legally available arguments supported by the facts and law. I do not recall if I have ever publicly expressed a personal view as to my own "belie[f]" in a client's innocence, but I have asserted, in my capacity as an attorney, that the totality of the evidence in the record was sufficient to establish a client's actual innocence. In some cases, I have also argued that the totality of the evidence in the record would have likely led a jury to render a verdict of "not guilty," which in many jurisdictions is the standard for post-conviction relief.

   In each such case, however, I first conferred with my clients regarding the newly discovered evidence; discussed the totality of evidence with my clients and, as appropriate, with others whose communications were covered by attorney-client privilege, such as my clients' former counsel; and obtained my clients' informed consent to pursue a particular legal strategy, including consent to make public representations as to the nature and significance of certain facts and evidence. *See* ABA Model Rule of Professional Conduct 1.2(a) (Scope of Representation and Allocation of Authority

Between Client and Lawyer); *see also* ABA Model Rule of Professional Conduct 1.9 (Duties to Former Clients); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest…[which include] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution").

In the Ledell Lee case, such consultations, waivers, and informed consent are not possible. This is because (1) Mr. Lee was executed by the State of Arkansas on April 20, 2017, and (2) despite seeking DNA testing on evidence from the murder for which he was convicted and sentenced to death prior to his 2017 execution, we did not obtain those court-ordered DNA test results until 2021, after successfully litigating for access to the evidence under Arkansas' Freedom of Information Law.

I do not believe that I have ever publicly stated that one of my Innocence Project clients was "guilty" of a crime. Such assertions would be inconsistent with the continuing ethical duties that exist between defense counsel and their current and former clients. *See Strickland, supra,* 466 U.S. at 688. However, in some cases where DNA testing is conducted and the results are inculpatory, inconclusive, or otherwise do not provide any legally cognizable grounds for relief, I have conferred with my client and secured his or her consent to terminate the representation; depending on the procedural posture of the case, I have also, on occasion, filed a Notice of Withdrawal or otherwise sought the court's permission to withdraw. In all such cases, however, I have endeavored in both my public statements and legal filings to adhere to the applicable Rules of Professional Conduct with respect to any continuing duties owed to my current and former clients, including but not limited to the duties outlined by the Supreme Court in *Strickland*.

4. **During your confirmation hearing, you refused to say whether you believed that Ledell Lee, a serial rapist and murderer who you represented, actually committed the crimes that he was convicted of and executed for committing. Specifically, you said that you could not comment on your "client, or certainly on a former client's, guilt or innocence." You have been with the Innocence Project for two decades. The Innocence Project's website contains a large fundraising banner that says only, "Help free the innocent." On the "About" page of the Innocence Project's website, it describes the work of the organization as working "to restore freedom for the innocent, transform the systems responsible for their unjust incarceration, and advance the innocence movement." In your experience does the Innocent Project only represent individuals who the Innocence Project believes to be "innocent," as suggested by their website and fundraising appeals, or does the Innocence Project also "help free" convicted criminals who the Innocence Project does not believe to be innocent of the crimes for which they were convicted?**

Response: As stated on the Innocence Project's website, the Innocence Project "represents clients seeking post-conviction DNA testing to prove their innocence." *See* https://innocenceproject.org/exonerate/. The Innocence Project has thousands of requests for legal assistance pending review by our staff at any given time, and our organization

accepts only a tiny fraction of those requests for legal representation. Prior to agreeing to represent a client in post-conviction litigation, the Innocence Project's "intake and evaluation staff conduct extensive research into each case to determine whether DNA testing could be conducted to prove innocence." *Id.* The Innocence Project does not determine whether our staff "believe[s]" a prospective client "to be innocent" before we will take on his or her legal representation. Instead, we require that (1) the convicted person asserts his or her actual innocence, and (2) the available record establishes that newly conducted, post-conviction DNA testing has the scientific *potential* to prove the convicted person's actual innocence, in light of all the facts and evidence on record. Because the Innocence Project's mandate is to "free the innocent," and because we operate on limited resources with a high demand for our legal services, as a condition of representation, we further require all of our clients to sign a retainer which specifies that the Innocence Project may withdraw from our *pro bono* legal representation at any time if we determine that, *inter alia*, (1) DNA test results or other evidence developed during our representation do not advance the convicted person's claim of innocence, or (2) there are no remaining legal avenues to obtain DNA testing or post-conviction relief that, in our professional judgment, are reasonably likely to succeed. In cases where we may seek to terminate our representation, however, we do so only after making good-faith efforts to confer with our clients about the evidence, applicable law, and other matters relevant to the client's legal interests and options.

5. **During your confirmation hearing, when questioned by Senators Kennedy and Cruz, you described the specific topics on which you advised Philadelphia District Attorney Larry Krasner and his transition team after his election as District Attorney. You served in a similar advisory role to George Gascon, the radical "progressive" District Attorney whose policies are fueling the rise of violent and property crime in Los Angeles. Have you ever advised Gascon or his team, in any capacity, regarding whether to issue blanket declinations to charge certain offenses or enhancements, or whether to decline to seek sentences of life without parole?**

   Response: No.

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

   Response: On February 23, 2022, I received questions from the Committee via the Department of Justice Office of Legal Policy (OLP). I drafted my answers, and, where necessary, conducted legal research and reviewed my available records to refresh my recollection. I shared my draft responses to the Committee's questions with OLP, which provided feedback. I reviewed and considered OLP's feedback, and then submitted my answers to the Committee.

7. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your**

answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.

Response: No.

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

Questions for the Record for Nina Rauh Morrison, Nominee for the Eastern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

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

   Response: In terms of an overall approach to judging, the Court of Appeals judge for whom I clerked, the Hon. Pierre N. Leval, frequently emphasized the importance of refraining from deciding issues not necessary to the outcome of a case, to honor the principles of judicial modesty and economy. I would strive to follow that approach if confirmed as a district judge.

In general, the sworn duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed to serve a district judge for the Eastern District of New York, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods or judicial philosophy. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

My respect and admiration for the many able Justices who have served on the Supreme Court does not derive from their jurisprudence or how they may have voted in any particular case. Rather, as with the many lower court judges (at the state and federal level) before whom I have had the privilege to appear, I admire Supreme Court Justices for their open-minded but rigorous approach to the law; fidelity to precedent; careful attention to detail; and judicial temperament, among many other qualities.

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

Response: A description of originalism can be found in *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Supreme Court explained that, in interpreting the Constitution, courts are "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Id.* at 576 (quotation marks and citation omitted). I have never served as a judge, and have never used the term "originalist" or any other label to describe my approach to the law. However, if confirmed as a district judge, I would faithfully follow all precedent from the Supreme Court regarding interpretive methods and sourcing in constitutional cases.

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

Response: I have never used the phrase "living constitutionalism," nor have I been able to identify a consensus definition of an interpretive method referred to as "living constitutionalism." It is not a term found in Supreme Court precedent, and I do not have a personal definition. Please also see Response to Question 2.

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: In interpreting the Constitution, courts are "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quotation marks and citation omitted). And where "the Constitution's text does not alone resolve" a question of interpretation, the

Supreme Court has "turn[ed] to the historical background of [the text] to understand its meaning." *Crawford v. Washington,* 541 U.S. 36, 43-44 (2004).

If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Heller* and *Crawford.* Thus, if presented with a situation where the original public meaning was both clear and fully resolved the issue presented, I would be bound by that interpretation.

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 "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020). However, the Court has also instructed that in the years following a statute's enactment, if "a new application [of statutory text] emerges that is both unexpected and important," courts must "enforce the plain terms of the law" as set forth in the text, even if the proffered application was not necessarily contemplated by the legislature at the time of enactment. *Id*. at 1750; *see also id.* at 1753 ("[T]he same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them").

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

Response: The Constitution is an enduring document that sets forth the principles that govern our nation. The Constitution does not change unless amended pursuant to the procedures set forth in 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: In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990), the Supreme Court held that a law that incidentally burdens religion ordinarily is not subject to strict scrutiny under the Free Exercise Clause if the law is neutral and generally applicable. If a law is neutral and generally applicable, rational basis scrutiny applies. *Id.*

In the wake of *Smith,* Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA expressly prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates 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." 42 U.S.C. §§ 2000bb–1(a), (b).

The United States Supreme Court has held that RFRA applies both to religious organizations such as Little Sisters of the Poor, *see Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020), and to small businesses or corporations operated by observant owners with sincerely held religious beliefs, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014).

As for constitutional challenges to government regulations that burden religious believers under the Free Exercise Clause, the Supreme Court has instructed courts to first determine whether a law is neutral – both on its face, and in its enactment or enforcement. If the law is not facially neutral, and/or if the record establishes that the law's enactment or enforcement was motivated by religious animus, the law is subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 533-42 (1993).

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

Response: Please see my response to Question 7.

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, 66 (2020), the Supreme Court held that the religious-entity applicants were entitled to a preliminary injunction blocking enforcement of the executive order in question. The Court concluded that the applicants had presented persuasive evidence "that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id*. Applying strict scrutiny, the Court concluded that it was "hard to see how the challenged regulations [could] be regarded as 'narrowly tailored.'" *Id.* at 66–67. Next, the Court determined that the challenged restrictions would cause irreparable harm and that it had "not been shown that granting the applications [would] harm the public." *Id.* at 68. This showing led the Court to conclude that the Governor's "severe restrictions on the applicants' religious services must be enjoined." *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 invalidated California's restrictions on private gatherings during the COVID-19 pandemic, holding that such restrictions violated the First Amendment rights of plaintiffs who wished to

gather for at-home religious exercise. In *Tandon*, the Court also clarified that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. The Court explained that "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* For where a regulation treats comparable religious and secular activities differently, the regulation survives strict scrutiny only if the government "show[s] that the religious exercise at issue is more dangerous than [secular] activities even when the same precautions are applied." *Id.* at 1297. "The State cannot 'assume the worst when people go to worship but assume the best when people go to work.'" *Id.* (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)).

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

Response: Yes. The Free Exercise Clause applies whether or not Americans to exercise their religious beliefs inside their houses of worship or their homes. Nor does the Religious Freedom Restoration Act contain any such limitations.

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. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the government's application of a facially neutral public accommodations law violates the Free Exercise Clause where the record indicates that government officials demonstrated animus towards a citizen's religious beliefs in that application. In *Masterpiece Cakeshop,* the Court found that the evidentiary record supported a conclusion that state civil rights commissioners had openly expressed hostility towards the petitioner's religious beliefs in the issuance of a cease-and-desist order, which the Court found sufficient to show animus in violation of the Free Exercise Clause under the foregoing test. *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?**

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

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

Response to Question 13, subparts (a) and (b): If presented with a case in which the issue of a party's sincerely held religious belief were challenged or otherwise at issue, I would follow binding precedent of the Supreme Court and the Second Circuit. A

sincerely held religious belief must be "rooted in religion" rather than "[p]urely secular." *Frazee v. Ill. Dep't of Emp. Sec*., 489 U.S. 829, 833 (1989). In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court addressed this question in a case brought under the Religious Freedom Restoration Act, holding that "[t]o qualify for RFRA's protection, an asserted belief must be sincere," and that "the federal courts have no business addressing" the question "whether the religious belief asserted in a RFRA case is reasonable." *Id.* at 717 (quotation marks omitted); *see also Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

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

Response: As a judicial nominee, it would not be appropriate for me to comment on what is or is not the official position of any church or other religious organization.

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

Response: In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), the Supreme Court held that the ministerial exception barred the plaintiffs' employment discrimination claims brought under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). The Court explained that, while religious organizations are normally not exempt from the requirements of generally applicable anti-discrimination statute, the ministerial exception – which is grounded in the First Amendment's Religion Clauses – provides that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id*. at 2060. In *Morrissey-Berru,* the Court concluded that the evidence in the record regarding the duties of the teacher-plaintiffs, "who were entrusted most directly with the responsibility of educating their students in the faith," entitled their employers to claim the ministerial exception. *Id.* at 1267.

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, 1878-81 (2021), the Supreme Court invalidated a portion of the City of Philadelphia's foster care contract, which requires an agency to provide services to prospective foster parents without regard

to their sexual orientation. The Court found that the contract was "not generally applicable as required by [*Employment Division v.*] *Smith*" and thus, strict scrutiny applied. The Court then concluded that the provision at issue "incorporates a system of individual exemptions" and that the inclusion of such "a formal mechanism for granting exceptions renders a policy not generally applicable." *Id.* at 1878-79; *see also id.* at 1877 (government may not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.") Applying strict scrutiny, the Court concluded that "the interest of the City in the equal treatment of prospective foster parents and foster children . . . cannot justify denying [plaintiff] an exception for its religious exercise" under the Free Exercise Clause. *Id.*

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), Justice Gorsuch joined the full Court in granting the application for a writ of certiorari filed by members of an Amish community, who had challenged a county ordinance that required they install a modern subsurface septic system for the disposal of gray water as a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA); in vacating the judgment below; and in remanding to the Court of Appeals of Minnesota for reconsideration in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch's concurring opinion proceeded to detail the Justice's view that the state court had erred in its application of RLUIPA, including in how the state court had analyzed the "compelling interest" test on the facts presented and failing to give due weight to evidence presented by the applicants in support of their RLUIPA claims. *See id.,* 141 S. Ct. at 2432-33 (Gorsuch, J., concurring).

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

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

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

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

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

Response to all subparts: No. I am not aware of the content of trainings provided by the Eastern District of New York or the Second Circuit, or what role, if any, I would have in determining the content of trainings if confirmed. All trainings provided by

federal courts should be consistent with the Constitution and laws of the United States (including, but not limited to, the Equal Protection Clause) and should be consistent with sound pedagogy.

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

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

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

Response: I do not have a personal definition of the term "systemically racist," and I do not recall ever using that term in litigation on behalf of my clients.

In my work as an advocate, I have become aware of certain research regarding potential correlations between racial bias and wrongful convictions. In 2017, for example, the National Registry of Exonerations released a study entitled "Race and Wrongful Convictions in the United States." The study's authors reviewed over 1,900 exonerations in the NRE's database, focusing primarily on three crime categories: murder, sexual assault, and drug crimes. The data from this study led the authors to conclude that the risk of wrongful convictions in America falls more heavily on Black Americans than on other racial groups, even while controlling for other factors. Furthermore, this research showed that Black exonerees had originally received longer sentences, on average, than others who had been exonerated for the same type of crime. *See* *https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf*.

I am also aware that in *Kimbrough v. United States*, 552 U.S. 85, 98 (2007), the United States Supreme Court acknowledged the United States Sentencing Commission's finding that the 100-to-1 ratio for crack cocaine versus powder cocaine sentencing had created the perception that the criminal justice system promoted racial disparities. Thereafter, Congress passed the Fair Sentencing Act of 2010 (21 U.S.C § 801) in an effort to address and remedy some of the disparities identified by the Sentencing Commission. *See, e.g., id.* at Sec. 2 ("Cocaine Sentencing Disparity Reduction").

20. **In February 2017, you provided comments to Time Magazine in which you stated that it was "hardly unreasonable to conclude that there is some racial bias at work" in the American criminal justice system, including bias on the part of judges and juries.**

a. Do you still believe that racial bias is "at work" in the United States' criminal justice system?

Please see my answer to Question 19.

b. Do you still believe that juries are racially biased?

Response: The Supreme Court has held that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers v. Mississippi,* 139 S. Ct. 2228, 2242 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). In a series of decisions whose aim is to "eradicate racial discrimination from the jury selection process," the Court has vigorously endeavored "to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system." *Id.* I have never opined that juries are "racially biased." Under *Batson* and *Flowers,* judges have a legal obligation to ensure that the procedures used to select jurors in criminal cases protect the defendant's right to trial by a jury that represents a fair cross-section of the community, and that peremptory strikes are not used to discriminate against any prospective jurors on the basis of race.

c. Do you still believe that judges are racially biased? If so, which judges?

Response: I have never opined that judges are "racially biased." The duty of a judge is to impartially apply the law and treat all parties who come before them equally and without regard to race or ethnicity.

i. Are there any racially biased judges on the district courts in the metropolitan region to which you have been nominated, on either the Southern District of New York or the Eastern District of New York? If so, who?

Response: I am unaware of any racially biased judges in either the Southern District of New York or the Eastern District of New York.

ii. Are there racially biased judges on the Court of Appeals for the Second Circuit? If so, who?

Response: I am unaware of any racially biased judges on the Court of Appeals for the Second Circuit.

iii. You are a nominee for a judicial position. Do you hold any racial biases? If so, against which groups do you hold such biases?

Response: I unaware of any racial biases I may hold against any groups or individuals.

21. **At your hearing, you refused to answer whether the murder rate in Philadelphia was higher or lower today than it was when District Attorney Krasner was elected because you "had not studied those statistics."**

a. Please take a few moments to look up the murder rate in Philadelphia over the past few years, as reported by the Philadelphia Police Department. Please state the statistics on the murder rate over those years as reported by the Philadelphia Police Department.

Response: According to the Philadelphia Police Department's publicly available statistics, it appears that the Department recorded 353 homicides in 2018; 356 homicides in 2019; 499 homicides in 2020; and 562 homcides in 2021. *See* https://www.phillypolice.com/crime-maps-stats/.

b. In light of your search results, is the murder rate in Philadelphia higher or lower today than it was the day Mr. Krasner was sworn in as District Attorney?

Response: The Philadelphia Police Department's website does not reflect or report a "murder rate" for January 1, 2018, the day that Mr. Krasner was sworn in as District Attorney. For published statistics reflecting total number of reported homicides for the calendar years 2018-2021, please see my response to Question 21(a).

To the extent this question concerns the role that District Attorney Krasner's policies and practices may have played in contributing to the reported increase in Philadelphia's annual murder rate between 2018 and the present day, it is my understanding that the issue of whether such a causal connection exists in Philadelphia and similar jurisdictions is subject to considerable debate among policymakers and researchers. For example, it has been noted that the most significant increases in violent crime in many cities and counties across the country began in 2020, after the onset of the Covid-19 pandemic – as is reflected in the Philadelphia statistics above. Philadelphia's increased murder rate during this period is also reportedly below the average increases seen in America's 50 largest cities. *See https://www.cityandstatepa.com/content/murder-rate-soars-da-larry-krasner-plays-good-cop-good-cop*.

Additional data on this complicated question may be found in Dallas County, Texas, where in 2018, the District Attorney adopted new policies directing his deputy prosecutors not to charge or prosecute certain categories of lower-level offenses. In the wake of these new policies, Dallas County experienced a significant decrease in violent crime over several years – including, but not limited to, murder cases – according to the Dallas Police Department. *See* Hayden Sparks, "Dallas District Attorney Touts Prosecution Strategy as City Experiences Declining Crime Rate," *The Texan,* February 15, 2022 (*available at* https://thetexan.news/dallas-district-attorney-touts-prosecution-strategy-as-city-experiences-declining-crime-rate/).

Whether policies such as those adopted by prosecutors in Philadelphia, Dallas, and similar jurisdictions have contributed to either an increase or decrease in crime is a question for executive and legislative branch officials and the citizens who elect them.

If confirmed to the federal district court, my role as a judge will be to preside fairly and impartially over the individual cases that come before me, by applying the law to the evidence in the record.

22. **In December 2019, you penned an article in which, among other things, you complimented District Attorney Krasner for his efforts to retroactively reduce "draconian" sentences of duly convicted offenders when an undefined "public good" would be served. According to a June 2021 press release by the Philadelphia District Attorney's Office, this internal review of prior sentences would be conducted by the office's Conviction Integrity Unit, the same unit about which you advised the Krasner transition team.**

a. This sentencing review is designed to review the length of sentences for factually guilty offenders and does not assess claims of actual innocence, correct?

Response: According to the Philadelphia District Attorney's Office, the Conviction Integrity Unit (CIU)'s investigations into claims of unjust or excessive sentences does consider evidence supporting a claim of actual innocence as one of several potential grounds for recommending a reduction in sentence. *See* tinyurl.com/CIUreport at 26-28.

23. **You testified to this Committee that your "role in those transition committees were only on the issue of what's called conviction integrity, not the front-end prosecution policies, but on the review of old cases." Did your work advising the Philadelphia District Attorney's Office or the Krasner transition team on the "review of old cases" include any advice or counsel regarding review of convictions or sentences of offenders on any grounds other than actual innocence? If so, please explain in detail.**

Response: Yes. I was not a member of District Attorney-elect Krasner's transition committee, but in November and December 2017, to the best of my records and recollection, I spent approximately five hours consulting with members of Mr. Krasner's transition subcommittee on conviction integrity. In that advisory capacity, I provided input on proposals regarding the scope, operations and mandate of the District Attorney's anticipated Conviction Integrity Unit ("CIU").

Among the questions about which the subcommittee requested my input was whether the CIU's mandate to review prior convictions would be limited to grounds of actual innocence, or whether the CIU would be empowered to investigate and recommend relief on other grounds. It is my recollection that the subcommittee proposed to District Attorney-elect Krasner that the CIU limit its investigations to cases in which the convicted person asserted his or her actual innocence, but that once an investigation was launched, the CIU would be empowered to investigate certain other legal grounds for relief, if the evidence and caselaw so warranted, including (1) that the conviction was obtained in violation of the convicted person's right to timely disclosure of exculpatory evidence, if such violation(s) were material to the outcome in light of other evidence supporting the convicted person's claim of innocence; and (2) that the conviction was obtained in

violation of the convicted person's right to effective assistance of counsel, if such violation(s) were material to the outcome in light of other evidence supporting the convicted person's claim of innocence. In other words, the recommendation was that actual innocence would be a required component of any CIU investigation, but the CIU would be authorized to simultaneously investigate certain other grounds for relief.

Ultimately, all decisions regarding which cases the CIU was empowered to review and on what legal grounds were made by District Attorney Krasner in consultation with his staff, including the Supervisor of the CIU, who was hired after the transition committee completed its work. The CIU's case review mandate, as well as information on its investigations into what the CIU ultimately determined were wrongful convictions and/or sentences, are summarized in a June 2021 report by the Philadelphia DAO. *See* tinyurl.com/CIUreport.

24. **In your December 2019 article, "Prosecutors Can Right Past Wrongs—If Only the System Lets Them," you state that "intense opposition—at the judicial and political levels—by those who would rather perpetrate a failed status quo than explore new solutions to improve public safety, has slowed the pace of reform considerably." As support for this assertion, you decry how a federal judge "blocked" District Attorney Krasner's attempt to re-sentence Robert Wharton, a death row inmate. In 1984, Robert Wharton and an accomplice murdered a Philadelphia couple, strangling the husband to death and drowning the wife in a bathtub. Wharton and his accomplice then turned off the heat in the couple's home so that the victims' six-month old baby, alone in the Philadelphia winter, would freeze to death.**

a. The District Attorney's Office sought to re-sentence Mr. Wharton to a less severe, non-death sentence, but did not seek to vacate his sentence in its entirety or otherwise exonerate Mr. Wharton. Is it therefore fair to say that Mr. Wharton was not factually innocent of the double murder he was convicted of?

Response: As an outside attorney and advocate who did not represent Mr. Wharton, I do not have access to the complete record of the Philadelphia District Attorney's review of Mr. Wharton's case, only a portion of which was made public in its resentencing application to the federal district court. Thus, I have no basis to state whether that review supports or does not support the conclusion that Mr. Wharton was "not factually innocent." However, it is my understanding that Mr. Krasner's Conviction Integrity Unit played no role in the resentencing recommendation made to the federal district court, and that it was the District Attorney Office's Law Division that was assigned to Mr. Wharton's case.

b. In the December 2019 article, you do not allege that the district court was incorrect either in its understanding of the facts of the Wharton case or the legal analysis underpinning the district court's opinion. Is your criticism of the district court's decision therefore based on your personal opposition to the death penalty or other non-legal considerations?

Response: The reference to Mr. Wharton's resentencing litigation in the 2019 article was based on legal authorities and factual matters set forth by the parties in the public filings in the federal district court litigation referenced. The article's assertions were not based on any personal views of the co-authors or "non-legal considerations" unrelated to the merits of Mr. Wharton's legal claims.

c. Given your criticism of the district court's decision, is it fair to say that if you were the district judge in this case that you would have granted the relief that District Attorney Krasner requested?

Response: As a judicial nominee, it would not be appropriate for me to offer a speculative opinion as to what result I might have reached were a specific case previously litigated in another federal district court to have come before me. If confirmed, my approach in each case would be to carefully review the briefs, factual record, and research the applicable law before rendering a decision that applies the law to the facts in accordance with controlling legal precedent.

25. **In this same December 2019 article, you made the following assertion regarding criticism of progressive prosecutors:**

> **The opposition some of these prosecutors have faced speaks to the extent that punishment, racism, and a reflexive defense of the status quo have colored certain quarters of our criminal legal system. It's perhaps unsurprising that reform prosecutors who have faced the most vicious attacks are women of color—including Mosby, Rollins, and Gardner, the first Black chief prosecutor in St. Louis history.**

a. Do you still believe that those who were critical of the progressive policies of Marilyn Mosby, Rachel Rollins, or Kim Gardner were motivated by racial or sex-based animus?

Response: I have never asserted that persons who criticized the policies of these prosecutors were motivated by racial or sex-based animus.

26. **You also served as an advisor to Los Angeles District Attorney George Gascon's transition team. On his first day in office, Gascon introduced a 14page, nine-point "Special Directive" for the office that included, among other things, (1) refusing to seek either the death penalty or life without parole, no matter how heinous the crime; (2) a blanket prohibition on trying juveniles as adults, even in cases of murder or rape; and (3) dramatically reducing the use of sentencing enhancements for particularly egregious facts or conduct, such as use a gun or gang affiliation.**

a. Did you participate in, advise on, or contribute to—to any degree—the formulation or drafting of this Special Directive, or any of its subparts?

i. If so, what aspects? Please be specific.

Response: No. Based upon my review of online records, it appears that District Attorney Gascon released a series of Special Directives on his first day in office, each of which addressed different policies for the incoming administration and its staff. I am unaware of and have not been able to locate a single 14-page Special Directive that covers each of the above issues.

Among the Special Directives issued by DA Gascon on December 7, 2020, is Special Directive 20-13 (entitled "Conviction Integrity Unit") (*available at* https://da.lacounty.gov/sites/default/files/pdf/Special-Directive-20-13.pdf. As an advisor to the co-chairs of DA Gascon's conviction integrity subcommittee, I provided input and background information that was incorporated into the drafting of SD 20-13. However, SD 20-13 does not include any of the three policies listed above in Question 26.

ii. If not, when specifically were you made aware of the Special Directive?

Response: I was made aware of the Special Directive(s) cited in Question 26 after it was released to the public, through news reports, after DA Gascon took office in December 2020.

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

Response: The Appointments Clause affords the President the power, with the advice and consent of the Senate, to make appointments to certain political positions in the federal government. U.S. Constitution, Art. II, §2, cl. 2. *See also Bolling v. Sharpe*, 347 U.S. 497 (1954) (under Due Process Clause of the Fifth Amendment, federal government is subject to antidiscrimination provisions of the Equal Protection Clause of the Fourteenth Amendment). Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation; as a judicial nominee, it would not be appropriate for me to comment on the merits of any particular dispute that may arise before the court, including a potential challenge to future political appointments.

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

Response: If confirmed, I would be bound by the United States Supreme Court's precedent regardless of that Court's size or composition, and it would be inappropriate for me to comment on whether the size of that Court should be changed.

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

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

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

Response: No. All rights enumerated in the Constitution or recognized by the Supreme Court are equally deserving of legal protection.

31. **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 33.

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

Response: Article II of the Constitution states that the President "shall take care that the laws be faithfully executed." U.S. Const., Art. II, §3. With respect to executive agencies, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court held that there is "a general presumption of unreviewability of decisions not to enforce" by executive agencies. *Id.* at 834. I n *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), the Supreme Court held that private citizens generally "lack standing to contest the policies of the prosecuting authority" when that citizen is neither prosecuted nor threatened with prosecution. Particularly in the realm of criminal law, 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).

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

Response: If confirmed as a district judge and presented with a case in which the distinction between an act of "prosecutorial discretion" and that of a substantive rule change under the Administrative Procedure Act were at issue and necessary to decide the case, I would apply all available precedent from the Supreme Court and Second Circuit to resolve the issue. To date, neither the Supreme Court nor the Second Circuit has resolved this distinction, but cases raising this question are pending in other federal courts. In light of that pending or impending litigation, it would be inappropriate for me, as a judicial nominee, to comment on the issue.

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

Response: No. The Federal Death Penalty Act, duly enacted by Congress, states that a defendant found guilty of a death-eligible offense "shall be sentenced to death if, after

consideration of the factors set forth in" the Act, "it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense." 18 U.S.C. § 3591(a). The Constitution does not confer on the President the authority to unilaterally "abolish" legislation duly passed by Congress. Furthermore, the President has no authority to abolish the death penalty at the state level, and a state legislature may enact a death penalty statute that otherwise complies with the Constitution as set forth in the Supreme Court's death penalty jurisprudence. *See Gregg v. Georgia,* 428 U.S. 153 (1976) (holding that state death penalty statutes do not necessarily involve "cruel and unusual" punishments under the Eighth and Fourteenth Amendments).

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

Response: In *Alabama Association of Realtors v. Dep't. of Health and Human Servs.*, 141 S. Ct. 2485, 2487-88 (2021), the Supreme Court vacated the district court's stay of an order concluding the Centers for Disease Control lacked statutory authority to impose an eviction moratorium during the Covid-19 pandemic. The Court applied the governing four factor test announced in *Nken v. Holder*, 556 U.S. 418 (2009) -- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies" -- to find that the plaintiffs had satisfied this test because, *inter alia,* they had demonstrated sufficient evidence of irreparable harm and a likelihood of success on the merits of their lawsuit. *Id.* at 2488-90.

Senator Josh Hawley
Questions for the Record

Nina Morrison
Nominee, U.S. District Court for the Eastern District of New York

1. **When, if ever, do you believe it is appropriate for a judge to impose a below-Guidelines sentence?**

   Response: A federal judge's sentencing decisions are governed by 18 U.S.C. § 3553(a) ("Factors to Be Considered in Imposing a Sentence"). Section 3553(a) directs courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in the statute, and further directs that courts "shall consider" each of the specifically enumerated factors listed therein. One of the factors district courts must consider in each case is "the kinds of sentence and the sentencing range" recommended in the Guidelines, as applicable to the individual defendant and the offense(s) in question. *See* §3553(a)(4)). If confirmed as a federal district court judge, I would consider the Guidelines-recommended sentence and sentencing range in each case and depart from the Guidelines only where authorized and appropriate under the totality of the analysis required by 18 U.S.C. § 3553(a).

2. **Do you believe it is ever appropriate for a judge to make sentencing decisions about an individual engaged in violence associated with a public protest on the basis of her assessment of the merits of that protest?**

   Response: No. A judge's sentencing decisions must be based on the factors set forth in 18 U.S.C. § 3553(a), which does not authorize the court to consider "the merits of" a defendant's public protest that was associated with the defendant's commission of a crime.

3. **Justice Thurgood 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: I am not aware of the full context of the quotation by Justice Marshall. As stated here, I do not agree with it.

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

      Response: The judicial oath requires a judge to faithfully and impartially follow the law, including all precedent from the Supreme Court and the relevant Circuit Court of Appeals. As a judicial nominee, I do not believe it is appropriate to

comment on whether a particular "philosophy" held by another judge, outside of any actions taken by that judge, would constitute a violation of the judge's oath.

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

Response: The *Younger* abstention doctrine "forbids federal courts from enjoining ongoing state proceedings." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (*citing Younger v. Harris*, 401 U.S. 37, 91 (1971)). The Second Circuit rule is that abstention is "mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Id.* at 100–01 (quoting *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003)).

The *Pullman* abstention doctrine instructs that where a case presents an unsettled issue of state law that would be dispositive, and thus would avoid the need for deciding the federal constitutional question presented, a federal court should refrain from deciding the case. *See R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 498–501 (1941). The Second Circuit has instructed that abstention under this doctrine 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*., 380 F.3d at 100 (internal quotation and citation omitted).

The *Burford* abstention doctrine (*see Burford v. Sun Oil Co*., 319 U.S. 315 (1943)) instructs that 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 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 *Colorado River* abstention doctrine "comprises a few 'extraordinary and narrow exception[s]' to a federal court's duty to exercise its jurisdiction" when there is concurrent action in state court. *Woodford v. Cmty. Action Agency of Greene Cty., Inc.,* 239 F.3d 517, 521–22 (2d Cir. 2001) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). The Second Circuit has instructed courts to consider: (1) whether the controversy involves a matter 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. *Id.* at 522 (internal citations omitted).

The *Brillhart/Wilton* abstention doctrine applies when a plaintiff seeks "purely declaratory relief" and there is a parallel, pending state-court action. *Kanciper v. Suffolk Cty. Soc. for the Prevention of Cruelty to Animals, Inc*., 722 F.3d 88, 93 (2d Cir. 2013); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). 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 RiverBlack River Regulating Dist*., 673 F.3d 84, 105 (2d Cir. 2012) (internal quotation marks omitted).

The *Rooker-Feldman* doctrine bars federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005); *see also Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). There are four requirements that must be met for *Rooker-Feldman* to apply in the Second Circuit: (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 New York*, 2 F.4th 82, 101 (2d Cir. 2021) (internal quotation marks omitted).

5. **Have you ever worked on a legal case or representation in which you opposed 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.**

        Response: In my twenty-two years of practicing law, I do not recall ever working on a legal case or representation in which I opposed a party's religious liberty claim.

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

Response: In interpreting the Constitution, courts are "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quotation marks and citation omitted). And where "the Constitution's text does not alone resolve" a question of interpretation, the Supreme Court has "turn[ed] to the historical background of [the text] to understand its meaning." *Crawford v. Washington,* 541 U.S. 36, 43-44 (2004).

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

Response: Statutory text is "the authoritative statement" as to the statute's meaning, "not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). Only if the text is ambiguous or the statutory scheme is incoherent or inconsistent may courts employ other tools of statutory construction, such as the canons of construction. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Under the canons of construction, a court may consider legislative history, but must do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. Furthermore, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, [courts] must choose the [statutory] language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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 instructed that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those [members of Congress] involved in drafting and studying the proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984). *But see NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (warning that "floor statements by individual legislators rank among the least illuminating forms of legislative history").

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

Response: It is not appropriate to consult the laws of foreign nations when interpreting the provisions of the United States Constitution. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility").

8. 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: In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court delineated the test that governs claims that an execution protocol violates the Eighth Amendment. The petitioner must first show "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.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n. 9 (1994)). Second, the petitioner must proffer an alternative procedure that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 51. Third, "[i]f a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* I am unaware of any caselaw in the Second Circuit that governs or further clarifies this standard.

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

Response: Yes, although the precise wording of the standard set forth in *Glossip* is slightly different than as phrased in this Question. The Supreme Court held in *Glossip v. Gross*, 576 U.S. 863, 878–79 (2015), that a petitioner must establish a "known and available alternative method of execution" and that the alternative method presents less risk of "severe pain and suffering."

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

Response: In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-74 (2009), the Supreme Court held that convicted prisoners do not have a substantive due process right to access DNA evidence. However, in *Osborne*, the Court did recognize that convicted prisoners may have a "liberty interest" in accessing DNA evidence as a matter of procedural due process, where (as in *Osborne*) the State has provided a statutory vehicle for convicted prisoners to seek post-conviction relief based on actual innocence.

In *Newton v. City of New York,* 779 F.3d 140, 142 (2d Cir. 2015), the Second Circuit applied *Osborne* to hold that New York law provides a convicted prisoner with a liberty interest in demonstrating his innocence with newly available DNA evidence, and that the

Due Process Clause of the Fourteenth Amendment "entitle[s] such a prisoner to reasonable procedures that permit him to vindicate that liberty interest."

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

Response: No.

12. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a 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 held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal citation omitted). If a law is either not neutral or is not generally applicable, then the law "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). 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." *Id.* at 533. A law is not neutral if it is enforced in a selective manner that discriminates against religious views. *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951). Similarly, a law may not be neutral if statements made by officials at a public meeting demonstrate that the law's enforcement was motivated by hostility to religion. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Further, the Supreme Court has held that a law may not be generally applicable if the law prohibits or fails to provide exemptions for certain religious conduct while permitting secular conduct that implicates the same governmental interests. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The Supreme Court has also held that the Free Exercise Clause prohibits enforcement of certain employment laws in a manner that would interfere with a religious institution's employment of individuals involved in religious training, under what is known as the "ministerial exception." *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

13. 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 12.

14. 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: Federal courts considering a request for injunctive relief must apply the standards and procedures set forth in Federal Rule of Civil Procedure 65. An injunction "is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); accordingly, injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Most recently, the Supreme Court upheld the grant of preliminary injunctive relief and ordered a nationwide stay barring the enforcement of certain aspects of the Occupational Safety and Health Administration's workplace vaccine mandate in a pending legal challenge to the mandate. *See Nat'l Fed. of Indep. Bus. et al., v. Dep't of Labor et al.,* 595 U.S. __ (2022) (per curiam). If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including on the issues of the proper scope of injunctive relief and when district courts may order such relief.

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

Response: The Supreme Court has made clear that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). 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).

Applying the Supreme Court's precedent, the Second Circuit has held that a district court errs if it looks beyond whether an individual's religious belief is sincerely held or to consider whether the individual's interpretation of religious doctrine is correct. *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003).

16. 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: It appears that Justice Holmes included this statement in his opinion to support his argument that the Fourteenth Amendment's drafters did not adopt the particular economic theory endorsed by the majority opinion in *Lochner*. As Justice Holmes noted elsewhere in that opinion, "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: The Supreme Court effectively overruled *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (the "doctrine that prevailed in *Lochner* . . . has long since been discarded"). If confirmed as a district judge, I would be bound to follow all valid United States Supreme Court precedent, including *West Coast Hotel.*

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that a good judge is one who reaches a result that is in accordance with the law, whether that result accords with her or his personal views or not.

18. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: My understanding of the statement in *Trump v. Hawaii* that *Korematsu v. United States*, 323 U.S. 214 (1944) had been "overruled in the court of history," is that it means that, while *Korematsu* had not been formally overruled or clearly abrogated by the Supreme Court, it has been widely viewed as wholly discredited and is a precedent that the Supreme Court no longer considers to be binding or valid.

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

a. If so, what are they?

Response: Please see my response to Question 18. I am not aware of any other Supreme Court opinions that are no longer good law without having been formally overruled or clearly abrogated.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

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

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

Response to all subparts: A decision of the United States Supreme Court is binding on all lower federal courts unless and until the Supreme Court overrules that decision. A decision of the Second Circuit is binding on courts in that circuit until it is overruled by the Supreme Court or an en banc panel of the Second Circuit. If confirmed, I would be bound to apply the holding of *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) regardless of my personal views. Further, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court stated that Kodak's control of "80% to 95% of the service market, with no readily available substitutes, is . . . sufficient to survive summary judgment under the more stringent monopoly standard of § 2" of the Sherman Antitrust Act. *See also id.* (citing prior cases holding that "87% of the market is a monopoly" and that "over two-thirds of the market is a monopoly.") *Id.* (internal citations and quotation marks omitted).

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

Response: The Supreme Court has made clear that

> there is "no federal general common law." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). These areas have included admiralty disputes and certain controversies between States. *See, e.g.*, *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938). In contexts like these, federal common

> law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. . . . In the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'" *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)).

Rodriguez v. Federal Deposit Insurance Corporation, 140 S. Ct. 713, 717 (2020).

22. 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: Where a case in federal court raises a question of state constitutional interpretation, federal courts must defer to the decisions of the highest court in the state whose constitution the federal court is interpreting. *See Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938). Accordingly, I would consider decisions of the highest court in the state whose constitution I am interpreting in determining the scope of the state constitutional right at issue. Further, "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). If confirmed, I would faithfully apply the precedents set forth above.

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

Response: Federal constitutional provisions must be interpreted in accordance with Supreme Court and Second Circuit precedent and consistent with Supreme Court and Second Circuit interpretive precedent. With respect to state constitutional provisions, "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).

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

Response: The United States Constitution is "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The protections in federal constitutional provisions are binding on states, "notwithstanding" anything to the contrary in a state's constitution. Under our federalist system, states may interpret similar or identical provisions of their state constitutions in to provide greater protection for individual liberties than under the federal Constitution, but may not restrict those liberties in a manner that conflicts with or violates federal constitutional rights.

23. 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 for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow, all precedent from the Supreme Court. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to apply, interpret or enforce. The constitutionality of *de jure* racial segregation in public schools, however, is extremely unlikely to arise in pending or prospective litigation. Therefore, like prior judicial nominees, I believe that I can permissibly comment on the correctness of precedent for *Brown v. Board of Education*, and to state that I agree that *Brown* was correctly decided.

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

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

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

Response to all subparts: Federal courts considering a request for injunctive relief must apply the standards and procedures set forth in Federal Rule of Civil Procedure 65. An injunction "is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); accordingly, injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Most recently, the Supreme Court upheld the grant of preliminary injunctive relief and ordered a nationwide stay barring the enforcement of certain aspects of the Occupational Safety and Health Administration's workplace vaccine mandate in a pending legal challenge to the mandate. *See Nat'l Fed. of Indep. Bus. et al., v. Dep't of Labor et al.,* 595 U.S. __ (2022) (per curiam). If confirmed as a district court judge for the Eastern District of New York, and presented with a request for a nationwide injunction, I would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit in considering the application, including on the issues of the proper scope of injunctive relief and when it is appropriate for district courts to order such relief.

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

Response: Federalism is a bedrock principle of our constitutional system, designed to ensure shared power between national and state governments. It is. *See New York v. United States*, 505 U.S. 144, 181 (1992). Like the separation of powers within the federal

government, "a healthy balance of power between the States and the Federal Government . . . reduce[s] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

26. What case or legal representation are you most proud of?

Response: I am proud of each of the 10 cases listed in my Senate Judiciary Questionnaire, as well as others I have had the privilege to work on during my time at the Innocence Project. Among those cases, one comes to mind that not only led to a successful result for the client – a wrongly convicted man who was declared "actually innocent" and freed from prison after serving nearly a quarter-century in prison for a crime he did not commit – but also to a series of other outcomes that served the interests of justice. *See In re Morton*, 326 S.W.3d 634 (Tex. App. 2010) (Waldrop, Jones, Henson, JJ.); *Ex Parte Morton*, No. AP-76,663, 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011) (per curiam).

In that case, my client Michael Morton was exonerated in 2011 and reunited with his now-grown son, who was three years old when Mr. Morton was wrongly sent to prison. Mr. Morton was exonerated due to new DNA evidence I obtained after several years of contested litigation – evidence that not only cleared him of the murder of his beloved wife, but finally identified his wife's true killer, a man named Mark Alan Norwood. Our investigation also led to the DNA identification of Norwood as the man who was responsible for another "cold case" (unsolved) murder of a wife and mother, Debra Baker, who had been brutally murdered two years after Mr. Morton was sent to prison, thus bringing long-overdue justice to Ms. Baker's family as well as the Morton family. With my legal team's cooperation and assistance, the State then successfully prosecuted Norwood for both murders, and he remains incarcerated on a life sentence today.

In addition, Mr. Morton's case inspired key legislation, dubbed "the Michael Morton Act"—unanimously passed by the Texas legislature in 2013, and signed into law by then-Governor Rick Perry—enhancing procedural safeguards in the discovery process to prevent wrongful convictions like Mr. Morton's. *See* Brandi Grissom, "Perry Signs Michael Morton Act," *Texas Tribune*, May 16, 2013, *available at* https://www.texastribune.org/2013/05/16/gov-rick-perry-signs-michael-morton-act/.

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

Response: Please see my answer to Question 4.

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

Response: Whether an injunction is warranted in any particular case depends on a variety of factors, including "irreparable injury and inadequacy of legal remedies." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987). A district court just must

determine whether a party is entitled to monetary damages and/or injunctive relief based on the applicable law and the facts of the specific case presented.

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

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

Response: Please see my response to question 12.

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

Response: Americans' "freedom of worship" is one aspect of the right to free exercise, which also includes a "freedom of conscience." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: As the Second Circuit has explained, "Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'" *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))). The Supreme Court applied this standard in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691–92 (2014), to declare invalid a contraceptive mandate that imposed a substantial burden on the defendant business owners, because it required they choose between complying with the law in violation of their religious beliefs or pay significant fines for non-compliance.

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: In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014), the Supreme Court explained that "it is not for [the court] to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, [the court's] 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction'" (citation omitted)). Sincere religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" and can include beliefs held only by a single person. *Welsh v. United*

States, 398 U.S. 333, 340 (1970). Even atheism can count as a sincerely held belief. *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

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 text of the Religious Freedom Restoration Act (RFRA) specifies that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). In the context of federal regulation of the health insurance market, for example, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), held that a contraceptive mandate imposed a substantial burden on the defendant business owners' free exercise of their sincerely held religious beliefs and thus violated RFRA. However, "RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: I have never served as a judge, and thus have not issued any judicial opinions on these issues.

30. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: The Supreme Court has stated that "an effort to fix some general, numerically precise degree of certainty" to analogous legal standards "may not be helpful." *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (refusing to assign a numerical value to "probable cause"). If confirmed as a district judge, I would instruct jurors as to the meaning and application of the term "reasonable doubt" in accordance with the law.

31. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

c. If you disagree with either of these statements, please explain why and provide examples.

Response to all subparts: Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute regarding legal interpretation that may arise before the court. If confirmed as a district court judge for the Southern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including *Harrington v. Richter*.

32. In your legal career:

a. How many cases have you tried as first chair?

Response: In the last 22 years of practicing law, primarily as a post-conviction attorney, I have not tried any cases as first chair.

b. How many have you tried as second chair?

Response: In the last 22 years of practicing law, primarily as a post-conviction attorney, I have served as second chair in one criminal jury trial that was tried to verdict, and in one civil jury trial that settled mid-trial.

c. How many depositions have you taken?

Response: While an associate at Emery Celli Brinckerhoff Abady Ward and Maazel from 1999-2001, I took and defended numerous depositions. I do not recall the precise number over two decades later. While at the Innocence Project, I have periodically served as co-counsel in civil matters, or litigated in states that permitted depositions in certain post-conviction criminal matters. In those cases, I estimate that I have taken or defended between 8-10 depositions in total.

d. How many depositions have you defended?

Response: Please see my Response to subpart (c).

e. How many cases have you argued before a federal appellate court?

Response: None. However, from 1988-99, I served as a law clerk to the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit.

f. How many cases have you argued before a state appellate court?

Response: I have not tracked the number of cases I have argued before a state appellate court (including trial or circuit courts presiding over appellate matters) in my 20 years as a post-conviction litigator at the Innocence Project, but I would estimate that the total is between 30-40 such cases.

g. How many times have you appeared before a federal agency, and in what capacity?

Response: None.

h. How many dispositive motions have you argued before trial courts?

Response: I have not tracked the number of dispositive motions I have argued in my 20 years at the Innocence Project and my two years in private practice, and the definition of "dispositive" motion may mean different things in the criminal and civil contexts. Broadly speaking, including motions to vacate my clients' convictions and related proceedings, I would estimate that I have appeared on behalf of my clients to argue or present evidence in approximately 30-40 dispositive motions.

i. How many evidentiary motions have you argued before trial courts?

Response: I have not tracked the number of evidentiary motions I have argued in my 20 years at the Innocence Project and my two years in private practice, and the definition of "evidentiary" motion may mean different things in the criminal and civil contexts. Broadly speaking, including motions to obtain post-conviction DNA testing, discovery motions, and motions *in limine* in potential retrial proceedings, I would estimate that I have appeared on behalf of my clients to argue or present evidence in approximately 40-50 evidentiary motions.

33. 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: I have no recollection of ever taking such a position in litigation or publication.

34. 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: To the best of my recollection, I have not deleted or attempted to delete any content from social media since I was first contacted by the White House about being under consideration for this nomination.

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

Response: The Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." (internal quotation marks omitted). *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997). The Supreme Court recognizes such "substantive due process" rights sparingly, and its precedents make clear that unless the foregoing (and demanding) test is met, the judicial branch should allow legislatures and the citizens who elect them to debate and resolve the appropriate balance to strike between legitimate state interests on the one hand and individual liberties on the other. *See id.* at 2267 (noting that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," and declining to recognize a substantive individual right to terminate one's life with the assistance of a physician under the Due Process Clause). The Court's opinion in *Glucksberg* includes a non-exhaustive list of cases in which the Court has recognized certain Due Process rights not specifically enumerated in the Constitution's text:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes 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 one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, supra.

Id. at 2267.

Examples of cases decided after *Glucksberg* in which the Supreme Court has recognized other individual rights not expressly set forth in the Constitution's text include cases recognizing the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: If confirmed as a judge, it would be my duty to fairly and impartially adjudicate individual claims, some of which may include claims of race discrimination in the United States, without regard to my personal beliefs. In certain cases, district judges may be asked to preside over claims that systemic factors – including, but not limited to, patterns or practices of racial bias by state officials – played a role in bringing about a violation of a plaintiff's constitutional rights. *See, e.g.*, *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 694 (1978) (holding that municipal employers may be held liable under 42 U.S.C. §1983 for violations caused by the municipality's "policy or custom"). If such a case were to come before me, my duty would be to impartially consider the evidence established in the record, without regard to any personal beliefs, and apply Supreme Court and Second Circuit precedent to the established facts of a particular case.

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

Response: Yes.

a. How did you handle the situation?

Response: As a lawyer, my obligation is to zealously represent the interests of my clients. The integrity of our legal system depends on lawyers fulfilling this duty within the bounds of the law. I have not found it difficult to do so, even in cases that may have required me to take a position in litigation that did not align with other, personal views I may have had on a given subject.

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

Response: Yes.

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

Response: Federalist No. 78 and No. 80.

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

Response: As a judicial nominee, it is not appropriate for me to express my personal opinion on this question, which implicates legal, ethical, religious, philosophical, and public policy matters. If confirmed, my role will be to decide individual cases by faithfully applying Supreme Court and Second Circuit precedent to the facts established in a case, and I would do so in any matter that comes before me which raises this question.

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

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms."

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

Response: I have never served as a judge, and thus have not issued any opinions, orders, or other decisions adjudicating such claims.

41. 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: Yes. To the best of my recollection, I testified under oath as a fact witness in three civil rights lawsuits seeking compensation for wrongful conviction in which former Innocence Project clients were the civil plaintiffs (two of whom were my former clients, and one of whom was not). In one of these cases, I testified as a witness at a jury trial in the Eastern District of New York; in the other two cases, I testified as a witness at jury trials in the Southern District of New York. I have also testified under oath as a deponent in one civil rights case filed in the Eastern District of New York, which was also a lawsuit seeking compensation for wrongful conviction in which a former client of mine was the plaintiff. I do not have copies of any of this testimony and I have been unable to find such copies online.

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

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

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

c. Systemic racism?

d. Critical race theory?

Response to all subparts: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: No.

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

Response: I have never authored a brief that was filed in court without my name on it. At various times over the last 22 years, I have provided comments or feedback on briefs authored by my colleagues, but I cannot recall any specific brief that I edited that was filed in court without my name on it.

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

45. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

46. 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: All judicial nominees take the oath before they testify at their confirmation hearings which obligates them to provide truthful information in the responses they provide to all questions, so that the United States Senate can fulfill its advice and consent function under the Constitution.

Senator John Kennedy
Questions for Nina Morrison, Nominee to be District Court Judge
on the Eastern District of New York

1. **In your hearing before the Senate Judiciary Committee, you confirmed service on the transition committee for District Attorney-Elect Larry Krasner of Philadelphia and indicated in your questionnaire that you served in a similar capacity on the transition committee for George Gascón of Los Angeles. These prosecutors, along with other progressive prosecutors like Manhattan District Attorney Alvin Bragg, each issued a memo shortly after their inauguration directing subordinates to refrain from prosecuting entire classes of criminal conduct.**

    a. **Please describe the role you played as an advisor on these transition committees, including any topic on which you provided advisory counsel.**

    Response: As indicated in my Senate Judiciary Questionnaire, I served as an informal advisor to the transition committees convened by Philadelphia District Attorney Larry Krasner (who was elected in November 2017, and was sworn into office in January 2018), and Los Angeles County District Attorney George Cascon (who was elected in November 2020 and was sworn into office in December 2020). I was not a member of either Mr. Krasner or Mr. Gascon's transition teams. (Mr. Krasner's list of transition committee members can be found at https://metrophiladelphia.com/da-elect-krasner-announces-transition-team-to-help-bring-promises-to-reality/; Mr. Gascon's list of transition committee members can be found at https://www.georgegascon.org/campaign-news/george-gascon-announces-transition-team/).

    Regarding District Attorney Krasner's transition team, I was initially invited by one of its members to serve on one of its subcommittees. However, because the Innocence Project was at that time engaged in client representation that could have resulted in adversarial litigation against the Philadelphia District Attorney's Office, after consulting with the Innocence Project's executive leadership and in-house counsel, I determined that the prudent course was to decline any formal role on the committee. However, I did agree to make myself available to advise and consult with members of District Attorney Krasner's subcommittee charged with devising policies and practices for his "Conviction Integrity Unit" – a specialized unit within the District Attorney's Office charged with proactively reviewing claims of wrongful conviction (including, but not limited to, claims based on actual innocence and due process violations) in convictions for serious crimes that were obtained prior to the current District Attorney's tenure in office. Prior to District Attorney Krasner's election, I had served in a similar advisory capacity regarding conviction integrity "best practices" and policies for other newly elected prosecutors and their senior staffs in various jurisdictions across the country, including, for example, Criminal District Attorney Sharen Wilson in Tarrant County, Texas; and State Attorney Melissa Nelson in Jacksonville,

Florida (both of whom are Republicans, and had previously served as senior assistant prosecutors in the offices they were elected to lead).

In November/December 2017, I participated in at least one telephone call with members of Mr. Krasner's "conviction review" subcommittee. I also reviewed and provided feedback on a draft memorandum regarding proposed policies and practices for the CIU that was submitted to Mr. Krasner and his transition team in early December 2017. Based on my available records and recollection, it appears that in total I provided approximately 5 hours of consultation to this subcommittee during that time, limited to the issues outlined above.

Regarding District Attorney Gascon's transition committee, in November 2020, I was contacted by Paula Mitchell, a Los Angeles attorney who was serving as the co-chair of Mr. Gascon's "Conviction Review" committee during his transition. Ms. Mitchell requested my input on proposed new policies and practices for Mr. Gascon's "Conviction Integrity Unit" (formerly known as the Conviction Review Unit). I understood that the Unit's anticipated mandate was to independently review claims of wrongful conviction in cases occurring prior to the current District Attorney's tenure, as well as due process violations related to those convictions and/or sentences. I thereafter participated in at least one phone call with Ms. Mitchell; supplied her with model policies from other prosecutors' offices as well as background materials on issues such as case acceptance and review criteria, victim services and outreach, and advancements in forensic science and discovery practices; and provided feedback on a draft memorandum to the District Attorney-elect regarding the new Conviction Integrity Unit. Based on my available records and recollections, it appears that I spent approximately 5-7 hours total on these consultations, limited to the issues outlined above.

Regarding District Attorney Bragg's transition committee, I played no role on that committee nor in formulating any of District Attorney Bragg's policies, either as a member of the committee or as an advisor to the committee.

b. Given the temporal proximity of your service on their transition teams to the issuance of memos by both DA Krasner and Gascón, please indicate whether you participated in the development of either. If so, please describe any contribution you made.

Response: I understand this question to refer to (1) a memorandum publicly issued by Philadelphia District Attorney Krasner in February 2018 regarding various new policies and practices related to charging and sentencing recommendations by line prosecutors in pending and future cases (*see* https://www.inquirer.com/philly/news/crime/philadelphia-district-attorney-larry-krasner-plea-deals-shorter-sentences-cost-of-mass-incarceration-20180315.html); and (2) a series of policy Directives issued to all Deputy District Attorneys in Los Angeles County by District Attorney Gascon in December 2020.

Regarding the Krasner memorandum, I did not participate or play any role in its drafting or development. (It is my understanding that District Attorney Krasner did not issue a 2018 policy memorandum regarding his office's Conviction Integrity Unit. However, more information about the policies and practices developed by the CIU during Mr. Krasner's first term in office, as well as the exonerations of more than 20 wrongly convicted individuals as a result of the work of the CIU as of June 2021, can be found in a June 2021 report issued by the Office. *See* https://tinyurl.com/bderyu3k.)

Regarding the Gascon Directives, as indicated in my Response to subpart (a), I participated in the development of recommendations limited to the mission, policies, and practices of the District Attorney's new Conviction Integrity Unit. Some, but not all, of the recommendations I participated in developing appear to have been adopted and included in Special Directive 20-13 ("Conviction Integrity Unit" (December 7, 2020), *available at* https://da.lacounty.gov/sites/default/files/pdf/Special-Directive-20-13.pdf. I played no role in the development of any of the other Special Directives issued by District Attorney Gascon.

c. Did you ever advise either District Attorney-Elect Krasner or Gascón, or any other elected district attorney, to refrain from prosecuting certain criminal conduct as a matter of course? If so, please describe the conduct and articulate your rationale for this advice.

Response: No.

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

1. How would you describe your judicial philosophy?

Response: The sworn duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed to serve a district judge for the Eastern District of New York, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods or judicial philosophy. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

In terms of an overall approach to judging, the Second Circuit Court of Appeals judge for whom I clerked, the Hon. Pierre N. Leval, frequently emphasized the importance of refraining from deciding any legal or factual issue that is not necessary to the outcome of a case, to honor the principles of judicial modesty and economy. I would strive to follow that approach if confirmed as a district judge.

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

Response: If a federal statutory provision had been previously interpreted by the United States Supreme Court or the Second Circuit, that interpretation would be binding precedent. If there is no binding precedent, a district court judge should first consider the text of the statute. Statutory text is "the authoritative statement" as to the statute's meaning, "not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005).

Where "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal citation omitted). Only if the text is ambiguous or the statutory scheme is incoherent or inconsistent may courts employ other tools of statutory construction, such as the canons of construction. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Under the canons of construction, a court may consider legislative history, but must do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. Furthermore, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, [courts] must choose the [statutory] language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted).

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

Response: Please see my response to Question 2. In the rare case where there is no Supreme Court or Second Circuit precedent on the meaning of a constitutional provision to guide a lower court's interpretation of that provision, and where the sources listed in my answer to Question 2 do not resolve the issue, courts may also consider secondary sources such as contemporary dictionaries, commentaries, and state constitutions to determine the ordinary public meaning of the Constitutional text at the time of ratification. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that, in interpreting the Constitution, courts are "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Id.* at 576 (quotation marks and citation omitted).

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to 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: As discussed in my answer to Question 2, the statutory text is the authoritative and primary source upon which courts should rely when reading statutes; "the inquiry ceases" where the statutory text is clear and unambiguous. *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court discussed at length the principles that courts should follow when confronted with claims that the meaning of a statute's terms may have changed over time. In *Bostock*, the Court explained that courts should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at 1738. However, the Court has also instructed that in the years following a statute's enactment, if the courts are presented with "a new application [of statutory text] emerges that is both unexpected and important," courts must "enforce the plain terms of the law" as set forth in the text, even if the proffered application was not necessarily contemplated by the legislature at the time of enactment. *Id.* at 1750; *see also id.* at 1753 ("[T]he same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them").

6. What are the constitutional requirements for standing?

Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), the Supreme Court explained that "the irreducible constitutional minimum of standing contains three elements." These are: (1) the plaintiff has suffered an "injury in fact," (2) there is a "causal connection" between the injury and the conduct at issue, *i.e.,* the plaintiff's alleged injury must "be fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court," and (3) redressability, *i.e.,* "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" in the lawsuit. *Id*.

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

Response: The Necessary and Proper Clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18. In *McCullough v. Maryland*, 17 U.S. 316, 400 (1819), the Supreme Court held that the power of Congress to incorporate a federal Bank of the United States was "implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect."

In the years since *McCollough,* the nature and scope of Congressional authority to legislate in areas where its authority is implied through other constitutional provisions has been a topic of considerable debate, both in the Supreme Court's own jurisprudence and among constitutional scholars. To date, the Supreme Court has recognized certain Congressional powers that the Court has deemed necessary and proper to carry out the duties and responsibilities conferred elsewhere in the Constitution. *See, e.g., United States v. Fox*, 95 U.S. 670, 672 (1877) (Congressional power to enact federal criminal laws); *United States v. Comstock*, 560 U.S. 126, 129–30, 146 (2010) (power to imprison); *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013) (power to require the registration of military sex offenders).

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

Response: If confirmed as a federal district judge, my task would be to strictly follow the Supreme Court's precedents with respect to the evaluation of federal statutes where the source of the underlying Congressional authority is at issue. Under those precedents, "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012). However, "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Id.* at 570 (2012) (internal

citation omitted). Thus, a court should not automatically strike down the law "because Congress used the wrong labels" or failed to identify the source of its authority. *Id.* at 569-70. Moreover, any exercise of Congressional authority may not violate other provisions of the Constitution. *See, e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down portions of congressional statute regulating internet transmission of messages to minors as a violation of the First Amendment).

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

Response: Please see my response to Question 7.

10. What rights are protected under substantive due process?

Response: The Fifth and Fourteenth Amendments protect "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," and are "implicit in the concept of ordered liberty." (internal quotation marks omitted). *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997). The Supreme Court recognizes such "substantive due process" rights sparingly, and its precedents make clear that unless the foregoing (and demanding) test is met, the judicial branch should allow legislatures and the citizens who elect them to debate and resolve the appropriate balance to strike between legitimate state interests on the one hand and individual liberties on the other. *See id.* at 2267 (noting that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," and declining to recognize a substantive individual right to terminate one's life with the assistance of a physician under the Due Process Clause). The Court's opinion in *Glucksberg* includes a non-exhaustive list of cases in which the Court has recognized certain Due Process rights not specifically enumerated in the Constitution's text:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes 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 one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*.; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, supra.

Id. at 2267.

Examples of cases decided after *Glucksberg* in which the Supreme Court has recognized other individual rights not expressly set forth in the Constitution's text

include the right to interstate travel, *Saenz v. Roe*, 526 U.S. 489 (1999), and the right of same-sex couples to marry, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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: Please see my response to Question 10. If confirmed as a district court judge, I would not confer any special status or favor to claims of individual non-economic rights over those claims asserting economic rights, but would consider all such claims fairly and impartially, and in accordance with controlling Supreme Court precedent.

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

Response: The Supreme Court has interpreted the Commerce Clause to grant Congress the power to regulate "three broad categories of activity": (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). However, the Supreme Court has also delineated express limits to this power. For example, Congress may not use the Commerce Clause to regulate "inaction" -- that is, Congress lacks the power to "compel[] individuals to become active in commerce by purchasing a product." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: The Supreme Court has instructed that a group may be considered a "suspect class" and laws targeting or impacting that group shall be subject to strict scrutiny if the group has "the traditional indicia of suspectedness." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). These "traditional indicia" include whether the group has an "immutable characteristic determined solely by the accident of birth" or if it 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." *Id*. To date, the Supreme Court has recognized that race, religion, national origin, and alienage are suspect classifications. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-32 (1971).

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

Response: The Framers' decision to include checks and balances between the three branches of government in the Constitution's design -- and to expressly provide for the separation of powers among the branches -- is fundamental to both the structure of the Constitution itself, and to realizing the Framers' commitment to preventing abuses of power. The Supreme Court has emphasized 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: I would look to the constitutional text related to each branch's powers, and to Supreme Court and Second Circuit precedent regarding the history and meaning of that text, to determine whether the disputed action overstepped the constitutional boundaries of that branch. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *I.N.S. v. Chadha,* 462 U.S. 919 (1983).

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

Response: None. While judges should treat all litigants with respect and consideration, a judge's personal feelings or sympathies towards (or against) any litigant should play no role in his or her consideration of a case.

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

Response: Both are equally undesirable results that judges should seek to avoid.

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

Response: I have not examined nor studied the frequency with which the Supreme Court has exercised its power of judicial review to strike down federal statutes as unconstitutional during different time periods. Nor have I studied what changes, if any, there have been in the frequency of or underlying rationales asserted by the Supreme Court in striking down statutes during the time periods referenced. Both topics may be fruitful ones for academics and constitutional scholars to study and analyze in greater depth.

If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court, regardless of historical trends or patterns in the Court's jurisprudence.

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

Response: The term "judicial review" is generally understood to embody the long-established rule that the judicial branch is empowered to review the legality of legislative and executive actions. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (declaring the Judiciary Act of 1789 unconstitutional). The Supreme Court has stated that only branch of the federal government that has "[t]he power to interpret the Constitution in a case or controversy" is the judiciary, *see City of Boerne v. Flores*, 521 U.S. 507, 524 (1997)*, superseded by statute on other grounds as stated in Holt v. Hobbs,* 574 U.S. 352, 357 (2015), but did not use the term "judicial supremacy." I am generally unfamiliar with the term "judicial supremacy" and I am unaware of any consensus definition of that term, nor of binding precedent with respect to its potential application in matters that may come before the federal courts.

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: All federal and state legislators, executive officers, and judicial officers are similarly "bound by Oath or Affirmation, to support [the United States] Constitution. U.S. Const., Art. VI. State officials are bound to follow the decisions of the United States Supreme Court interpreting the Constitution. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

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's maxim is important to keep in mind while judging because courts remain "the least dangerous branch" only when judges respect the constitutional limits on their roles in our tripartite system of government – specifically, that a judge's role is to impartially interpret and apply the law, not to make policy.

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 for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit. It would be improper for me to deem any precedent by these courts to be "questionable" in its underpinnings or correctness when determining the scope of its application in any case that may come before me. However, to the extent that the foundation of an appellate court's precedent may be subject to challenge, the Second Circuit may, sitting *en banc*, elect to revise, limit, or overturn its own precedent; and the Supreme Court may do the same under the criteria delineated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992).

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

Response: None. A district judge sentencing an individual defendant may only apply the specific factors set forth in 18 U.S.C. § 3553(a) and make an individualized determination as to the appropriate sentence the defendant should receive. Section 3553(a) does not permit a district judge to consider the defendant's group identi(es) – including race, gender, nationality, sexual orientation or gender identity – in its sentencing analysis.

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: How best to ensure the "fair, just, and impartial treatment of all individuals" in American society– including, but not limited to, the individuals who are identified in the statement quoted above – is an important question for policy makers to debate and consider. However, if confirmed to serve as a judge, it would

not be my role to make policy. Instead, the judicial function is to decide individual cases and controversies by fully and fairly applying the law to the facts as established in the record.

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

Response: Black's Law Dictionary defines "equity" as "fairness; impartiality; evenhanded dealing" and the "body of principles constituting what is fair and right[.]" Black's Law Dictionary offers a different definition of "equality," which it defines as the "quality, state, or condition of being equal; esp., likeness in power or political status." *See* Black's Law Dictionary (11th ed. 2019).

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

Response: The text of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. If confirmed, and a case were to come before me asserting a claim to "equity" in the application of a constitutional provision, statute, or rule (as opposed to the more well-defined principles of equal protection of the laws), I would research the applicable law, including any Supreme Court and Second Circuit precedent, and take "equity" into consideration only to the extent, if any, that it is authorized by those precedents and applicable to the facts of the particular case as established by the record.

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

Response: Please see my response to Question 26, above. The Fourteenth Amendment does not contain the term "equity" in its text, nor does that provision or the Supreme Court's caselaw reference the specific definition of the term proffered in the statement referenced in Question 24.

28. How do you define "systemic racism?"

Response: I do not have a personal definition of the term "systemic racism," and I do not recall ever using that term in litigation on behalf of my clients.

In my work as an advocate, I have become aware of certain research regarding potential correlations between racial bias and wrongful convictions. In 2017, for example, the National Registry of Exonerations released a study entitled "Race and Wrongful Convictions in the United States." The study's authors reviewed over 1,900 exonerations in the NRE's database, focusing primarily on three crime categories: murder, sexual assault, and drug crimes. The data from this study led the authors to conclude that the risk of wrongful convictions in America falls more heavily on Black Americans than on other racial groups, even while controlling for other factors. Furthermore, this research showed that Black exonerees had originally

received longer sentences, on average, than others who had been exonerated for the same type of crime. *See* https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

I am also aware that in *Kimbrough v. United States*, 552 U.S. 85, 98 (2007), the United States Supreme Court acknowledged the United States Sentencing Commission's finding that the 100-to-1 ratio for crack cocaine versus powder cocaine sentencing had created the perception that the criminal justice system promoted racial disparities. Thereafter, Congress passed the Fair Sentencing Act of 2010 (21 U.S.C § 801) in an effort to address and remedy some of the disparities identified by the Sentencing Commission. *See, e.g., id. at* Sec. 2 ("Cocaine Sentencing Disparity Reduction").

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

Response: Black's Law Dictionary defines critical race theory as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Critical Race Theory, Black's Law Dictionary (11th ed. 2019).

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

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

31. In a law review article you wrote entitled "Curing 'Constitutional Amnesia", you defend state departures from federal precedent. If you are confirmed to the federal district court, will you faithfully follow federal precedent even if it conflicts with state court precedent?

Response: Yes. In my 1998 law review article, I discussed various state court applications of a doctrine known colloquially as the "New Federalism," in which state courts have interpreted certain provisions of their state constitutions in a manner that is more protective of individual liberties than the Supreme Court has interpreted corresponding provisions of the United States Constitution. These state court decisions I discussed in the article do not conflict with federal precedent, however. The Supreme Court has long recognized that the federal constitution provides a so-called "floor" of protection for individual liberties, but has made clear that states are free to interpret such provisions of their own constitutions in a manner that is more expansive than the Supreme Court may have interpreted parallel provisions of the federal Constitution. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

Where a state constitutional provision or decision conflicts with the federal constitution – such as when state law infringes on a fundamental right protected by the United States Constitution – federal law controls. For example, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the United States Supreme Court held that a "no-aid" provision of the Montana state constitution excluding religious schools from a state-funded scholarship program that was open to sectarian private schools was unconstitutional, because the disfavored treatment of religious schools under this application of Montana law violated the Free Exercise Clause of the First Amendment to the United States Constitution.

If confirmed as a federal district judge, I would faithfully follow all Supreme Court and Second Circuit precedent regarding the supremacy of federal law when it conflicts with state constitutional or statutory law, including but not limited to circumstances analogous to those presented in *Espinoza.*

Senator Ben Sasse
Questions for the Record for Nina Morrison
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
February 16, 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: In terms of an overall approach to judging, the Court of Appeals judge for whom I clerked, the Hon. Pierre N. Leval, frequently emphasized the importance of refraining from deciding issues not necessary to the outcome of a case, to honor the principles of judicial modesty and economy. I would strive to follow that approach if confirmed as a district judge.

   In general, the sworn duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed to serve a district judge for the Eastern District of New York, my duty would be to faithfully follow the precedents of the Supreme Court and the Second Circuit, including precedent regarding interpretive methods or judicial philosophy. If confirmed, I would swear an oath to discharge that duty fully and faithfully.

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

   Response: I have never served as a judge, and in my work as an attorney, I have not previously used labels such as "originalist" to describe my approach to analyzing legal cases and controversies. I am aware, however, that the Supreme Court has instructed that, in in absence of controlling precedent on a particular issue of constitutional interpretation, a lower court is to be guided by the "normal and ordinary" use of the terms as likely understood by those who enacted the constitutional or statutory provision in question. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed to serve a district judge for the Eastern District of New York, I would faithfully follow all

Supreme Court precedent regarding when courts should consider the original public meaning of a constitutional or statutory provision, including but not limited to *Heller.*

5. Would you describe yourself as a textualist?

Response: I have never served as a judge, and in my work as an attorney, I have not previously used labels such as "textualist" to describe my approach to analyzing legal cases and controversies. I am aware, however, of Supreme Court precedent instructing that courts should "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment," and "are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738, 1754 (2020). If confirmed to serve a district judge for the Eastern District of New York, I would faithfully follow all Supreme Court precedent regarding the methodology courts should follow when interpreting the meaning of constitutional or statutory text, including but not limited to *Bostock.*

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

Response: No. The Constitution is an enduring document that sets forth the fundamental rights enjoyed by all Americans and the core principles that govern our nation. In *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), the Supreme Court observed that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." However, the Constitution itself does not change unless amended pursuant to Article V.

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

Response: My respect and admiration for the many able Justices who have served on the Supreme Court does not derive from their jurisprudence or how they may have voted in any particular case. Rather, as with the many lower court judges (at the state and federal level) before whom I have had the privilege to appear, I admire Supreme Court justices for their open-minded but rigorous approach to the law; fidelity to precedent; careful attention to detail; and judicial temperament, among many other qualities.

At the age of 14, one of my first paid summer jobs was to work as a research assistant at the Library of Congress for a journalist working on a biography of then-Justice William Brennan. Among the things I learned about Justice Brennan through that research and my discussions with the author of his biography was the strong emphasis that Justice Brennan placed on achieving consensus among the Justices of the Supreme Court wherever possible, on a range of issues and cases that might have otherwise divided them. Such consensus can enable courts to write opinions that provide clear guidance and explanations of the law to lower courts and the public.

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: If confirmed as a district court judge for the Eastern District of New York, my duty would be to faithfully follow all Supreme Court and Second Circuit precedent; I would play no role in determining when, and under what circumstances, the appellate courts may elect to revisit and either overturn or reaffirm their own precedents. As a general matter, a federal Court of Appeals may only revisit and overturn its own precedents when sitting *en banc* pursuant to the procedures and standards laid out in Federal Rule of Appellate Procedure 35. And while a federal district judge may, in his or her opinions, call attention to evidence regarding the original public meaning of the Constitution that may provide grounds for the Court of Appeals to revisit an existing precedent through *en banc* consideration, all district judges are bound to faithfully follow existing Circuit precedent unless and until the Court of Appeals takes such action.

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 a federal statutory provision had been previously interpreted by the United States Supreme Court or the Second Circuit, that interpretation would be binding precedent. If there is no binding precedent, a district court judge should first consider the text of the statute. Statutory text is "the authoritative statement" as to the statute's meaning, "not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005).

Where "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal citation omitted). Only if the text is ambiguous or the statutory scheme is incoherent or inconsistent may courts employ other tools of statutory construction, such as the canons of construction. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Under the canons of construction, a court may consider legislative history, but must do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. Furthermore, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the

other, with dueling committee reports, [courts] must choose the [statutory] language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted). I am unaware of any precedent directing or allowing district court judges to insert their own views as to "general principles of justice" when interpreting a statute.

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: No. A district judge sentencing an individual defendant may only apply the specific factors set forth in 18 U.S.C. § 3553(a) and make an individualized determination as to the appropriate sentence the defendant should receive. Section 3553(a) does not permit a district judge to consider the defendant's race or ethnicity in sentencing, nor to consider extrinsic evidence regarding sentences imposed for other members of any particular racial or ethnic groups.

Questions from Senator Thom Tillis
for Nina R. Morrison
Nominee to be United States District Judge for
the Eastern District of New York

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

   Response: Yes. The duty of a judge is to set aside whatever personal views she or he may have, if any, on the issues presented and to impartially apply the law to the facts as established by the evidence in the record.

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

   Response: My understanding is that the term "judicial activism" means different things to different people. If the term "judicial activism" refers to the basing of decisions on a judge's personal political or policy views, rather than the applicable law, then I agree that it is inappropriate. If the term "judicial activism" refers to judges deciding issues that are not squarely presented in the case at issue or otherwise necessary to render a decision in that case, then I also agree that it is inappropriate.

   The judge for whom I clerked, the Hon. Pierre N. Leval, frequently emphasized the importance of refraining from deciding issues not necessary to the outcome of a case, in order to honor the principles of judicial modesty and economy. I would follow that approach if confirmed as a district judge.

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

   Response: Yes, as to both. The duty of a judge is to set aside whatever personal views she or he may have, if any, on the issues presented and to impartially apply the law to the facts as established by the evidence in the record. A federal judge must fulfill his or her judicial oath to "administer justice . . . [and] faithfully and impartially discharge and perform all the duties incumbent upon" the judge "under the Constitution and laws of the United States" in all cases.

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

   Response: No. The role of a judge is not to make policy or to second-guess policy decisions made by the legislature, but to decide individual cases and controversies by applying the law impartially to the facts as established by the evidence in the record in each case.

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

Response: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record, regardless of whether the outcome in a case might otherwise be deemed "undesirable" by the judge or anyone else. In my view, a "desirable" outcome is one that results from the faithful application of the law by the presiding judge.

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

Response: No. The duty of a judge is to set aside whatever personal or political views she or he may have, if any, on the issues presented and to impartially apply the law to the facts as established by the evidence in the record.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008), the Supreme Court held "that the Second Amendment confers an individual right to keep and bear arms." In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Supreme Court concluded that the right recognized in *Heller* is a fundamental right incorporated to the states under the Fourteenth Amendment, holding that "the right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States." Presently, the Supreme Court is considering a Second Amendment challenge to the constitutionality of certain provisions of New York State's concealed-carry law and is expected to issue a decision in that case this term which may provide additional precedent for lower courts to follow in cases involving citizens' Second Amendment rights. *See New York State Rifle and Pistol Ass'n. v. Bruen*, No. 20-843, 141 S. Ct. 2566 (2021) (Oct. Term 2021). If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow, all precedent from the Supreme Court, including *Heller*, *McDonald*, and any forthcoming decision in *Bruen*.

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: As with any lawsuit, I would impartially apply the law to the facts as established by the evidence in the record, including any precedent relevant to Second Amendment challenges to governmental policies or practices. Canons of judicial ethics prohibit judges

from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular legal dispute that may arise before the court.

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: The Supreme Court has held that "officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (internal quotation marks and citations omitted). If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit in the area of qualified immunity, including *Wesby*.

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: Whether current law contains sufficient protection for law enforcement officers in the field is an important question for policymakers to decide, both in Congress and in state legislatures. The role of a district judge, however, is not to make policy but to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed as a district court judge for the Eastern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court and the Second Circuit, including with respect to the doctrine of qualified immunity.

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

Response: The duty of a judge is to impartially apply the law to the facts as established by the evidence in the record. If confirmed as a district court judge for the Southern District of New York, my role would be limited to that judicial function. The Supreme Court's precedents provide guidance and instruction for lower federal courts to follow in determining the application of the qualified immunity doctrine to the facts of a particular case in order to determine the degree of immunity that may extend to a law enforcement officer's actions in that case. In that judicial role, I would be bound by, and would

faithfully and impartially follow, all precedent from the Supreme Court and the Second Circuit, including with respect to qualified immunity.

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: If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow all precedent from the Supreme Court. In my 22 years of practicing law, I have not had occasion to work on cases involving patent eligibility.

If confirmed, I would strive to reconcile potentially conflicting precedents from the Supreme Court in all cases that come before me, including in cases raising issues of patent eligibility. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular precedent that they may be called upon to interpret or enforce.

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

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

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

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by

humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

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

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

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

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

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

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

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

Response to all subparts: If I were to be confirmed, and if I encountered a case presenting any of the hypotheticals listed above, I would impartially apply the law to the facts as established by the evidence in the record. Respectfully, while the hypotheticals above pose interesting and important questions of law in the area of patent eligibility, canons of judicial ethics prohibit judges and judicial nominees from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court.

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

Response: Please see my response to Question 13.

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

a. **What experience do you have with copyright law?**

Response: To the best of my recollection, I have not litigated any matters involving copyright law.

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

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

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

Response: I do not recall having any experience addressing intermediary liability for online service providers that host unlawful content posted 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: In the area of intellectual property, while serving as a law clerk on the Second Circuit, I was assigned occasional intellectual property matters, including one major case in the area of trademark law (specifically, regarding the eligibility of a foreign language term as a protected commercial trademark in the United States). While serving as the Executive Director of the Innocence Project from 2002-2004, I worked with pro bono private counsel to register and enforce the trademark for the term "innocence project" to protect the integrity of the mark. In the area of First Amendment and free speech issues, in 2000, I was the author (with Richard Emery) of a law journal article entitled *Five Cases Follow Traditional Course*, N.Y.L.J. (Oct. 2, 2000), which surveyed and analyzed the previous year's First Amendment jurisprudence in New York courts.

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: If a federal statutory provision had been previously interpreted by the United States Supreme Court or the Ninth Circuit, that interpretation would be binding precedent. If there is no binding precedent, a district court judge should first look at the statutory text. As the United States Supreme Court has repeatedly stated, "the authoritative statement is the statutory text, not the legislative history or any

other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). Further, where "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "the inquiry ceases." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal citation omitted). Under the canons of construction, a court may consider legislative history, but must do so with caution. The United States Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. Furthermore, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it. When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, [courts] must choose the [statutory] language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) (quotation marks and citations omitted). The Second Circuit has similarly instructed that only if the plain meaning of a statute "is ambiguous, then a court may resort to the canons of statutory construction" to help resolve the ambiguity. *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

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

Response: The Supreme Court has held that an expert federal agency's advice or analysis as to the interpretation of legislative text, as contained in an agency opinion letter, policy statement, agency manual, or enforcement guideline, receives *Skidmore* deference, *see Skidmore v. Swift*, 323 U.S. 134 (1944). Under *Skidmore*, the U.S. Copyright Office's advice and analysis is entitled to respect, but only to the extent it is persuasive—but it does not receive more deferential *Chevron*-style deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

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: The duty of a judge is to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established by the evidence in the record. If confirmed as a district court judge for the Eastern District of New York, my role would be limited to that judicial function. In that role, I would be bound by, and would faithfully and impartially follow, all precedent from the Supreme Court and the Second Circuit, including in any analysis of an online service provider's obligation to provide remedial action for copyright infringement. Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation, and it is therefore generally inappropriate for judicial nominees to comment on the merits of any particular dispute that may arise before the court.

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

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

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

    Response to both subparts: If confirmed as a district judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow, all precedent from the Supreme Court and the Second Circuit, including with respect to the interpretation and application of the DMCA, in its current form or as it may be amended. The issue of whether the DMCA remains sufficient in the internet era, and whether new laws might be necessary, present important public policy questions for policy makers. The role of a judge, however, is not to make policy but to set aside whatever personal views she or he may have, if any, and to decide individual cases by applying the law impartially to the facts as established by the evidence in the record in each case. If confirmed, my role would be limited to that judicial function.

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: In *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001), the Second Circuit concluded, "[T]the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands[.]" I would follow the analysis in *Iragorri* and all

other Supreme Court and Second Circuit precedent when presented with any case involving a challenge to the plaintiff's choice of where the litigation was filed.

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

Response: District court judges preside over the matters that are assigned to them, according to the local rules of the district court on which they serve. As a general matter, district court judges should not encourage or discourage a litigant from filing a case in any particular court. Once a matter is filed, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Importantly, however, "[a] federal court has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has jurisdiction to hear [the] case," if the court finds that "trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (internal citations and quotation marks omitted). The court may also dismiss the case on such grounds if it finds that "the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.*

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: No. I do not believe it would be appropriate for a judge to ever engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant.

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

Response: I commit not to engage in such conduct.

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

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

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

Response to all subparts: Mandamus is a "drastic and extraordinary" remedy. *Ex parte Fahey*, 332 U.S. 258, 259–260, (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1967), or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S. at 95.

As a judicial nominee, it would be inappropriate for me to comment on the conduct of other district court judges, including claims that a sitting district court judge may have abused his or her discretion or otherwise violated a clear legal duty by failing to transfer an action to a different judicial district. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

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

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

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

Response to both subparts: If confirmed as a district court judge for the Eastern District of New York, I would be bound by, and would faithfully and impartially follow, the Federal Rules of Civil Procedures and the Local Rules of United States District Courts for the Southern and Eastern Districts of New York. As a pending nominee, it would be inappropriate for me to comment on the merits of those Local Rules or any proposals to amend those rules with respect to patent cases.

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

mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

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

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

Response: Please see my response to Question 19.

Questions for the Record for Nina Morrison
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.