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

1. **You moderated an Equal Justice Works event in 2021, where you interviewed Professor Evan Mandery. Professor Mandery commented: "So there is no doubt on either side that LDF's interest in the death penalty—in ending the death penalty—you know, by virtue of its mission—was highly informed by concerns of racism." Although you did not verbally comment, you nodded repeatedly during this comment. While discussing *Gregg v. Georgia* with Professor Mandery—a death penalty decision by the Supreme Court—you said that the Supreme Court did not recognize disparate impact claims in death penalty cases because "it really is just the fear of too much justice, pretty much opening the floodgates, because if there is disparate impact in the death penalty then there is obviously disparate impact in every touch with the criminal justice system." You added: "So I think this is a very sobering kind of note about this Court, about this opinion, and what this says about the system, pretty much the recognition that it is having a disproportionate impact but not willing to find any way to address it." I have two related questions for you.**

    a. **As deputy litigation director with LDF, do you share LDF's interest in ending the death penalty?**

    Response: Congress has established a federal death penalty, *see*18 U.S.C. § 3591, and the Supreme Court has held that the death penalty is constitutional under the Eighth Amendment, *see Gregg v. Georgia*, 428 U.S. 153 (1976). If confirmed as a district court judge, I commit to faithfully and impartially applying Supreme Court and Second Circuit precedent, including precedent concerning the death penalty.

    b. **Do you currently believe that there is racially disparate impact "in every touch with the criminal justice system"? And if you have changed your mind, what caused you to change?**

    Response: In the above referenced remarks, I was referring to the Supreme Court's recognition of the "persistent danger that racial attitudes may affect criminal proceedings." *McCleskey v. Kemp*, 481 U.S. 279, 329 (1987). The Court also stated that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id*. at 312; *see also id.* at 315-318. And because of the risk that race may enter the criminal justice process, the Court stated that it had "engaged in unceasing efforts to eradicate racial prejudice from our criminal justice system." *Id*. at 333 (internal quotations and citations omitted). If confirmed

as a district court judge, I would faithfully and impartially follow binding Supreme Court and Second Circuit precedent.

2. **You spoke during a 2021 event hosted by the New York University School of Law and Brennan Center for Justice, which focused on the treatment and selection of law clerks. In discussing your work, you said, "I knew that at LDF I could address the systemic racial discrimination that contributed to the lives of my clients and their communities." You also said, "I want to stop individuals, institutions, government actors who engage in racial discrimination whether they have racism in their heart or not. I am not here to absolve them of their racism nor am I here to label them as one. I seek systemic reform that will lead to racial equality." What role do you believe that, as a federal judge, you would have in addressing systemic racial discrimination?**

   Response: The above referenced statement, which was from remarks at Washington & Lee Law School in 2020, described my work as an attorney representing clients in civil rights matters and would have no bearing on my duty as a judge. My reference to "systemic reform" referred to cases that LDF had brought on behalf of clients, a classic example being *Brown v. Board of Education*, 347 U.S. 483 (1954). In general, however, the question of whether systemic racial discrimination exists, and what if anything should be done to address it, is in the purview of policy makers, not the judicial branch. If confirmed as a district court judge and a case of race-based discrimination or racial bias comes before me, I would fairly and impartially apply the precedent of the Supreme Court and Second Circuit to the facts established in the record of the case.

3. **According to documents you produced to the Judiciary Committee, in July 2020, you expressed "serious concerns" about the federal government's response to summer 2020 protests, including the federal response to protests in Portland, Oregon. You said that, "[i]f what is happening in Portland expands to Chicago, Philadelphia, other cities, we would think that is an unconstitutional overreach by the federal government." You also worked on NAACP FOIA requests—which sought to push back against federal actions in Portland—that were sent to the U.S. Justice Department, U.S. Marshals Service, DHS, and U.S. Customs and Border Protection after federal agents responded to protests in Portland.**

   In his dissent for a Ninth Circuit case concerning reporter access, Judge O'Scannlain described the situation at the federal courthouse in Portland:

   > **Rioters smashed the glass entryway doors of the Mark O. Hatfield Federal Courthouse and attempted to set fire to the building. They threw balloons containing an accelerant into the lobby and fired powerful commercial fireworks toward the accelerant, which ignited a fire in the lobby. Vandalism, destruction of property, and assault on**

> **federal law enforcement officers securing the building continued throughout the Fourth of July holiday weekend, and federal agents made multiple arrests.[1]**

Despite the attempts to burn down the federal courthouse with federal law enforcement officers inside just two weeks before, on July 17, 2020, you said this in documents that you provided to the Judiciary Committee: "Peaceful protesters in Portland continue to encounter militaristic, organized force from multiple federal agencies." You continued:

> **In recent days, we have seen reports and disturbing footage of these federal agents detaining and/or arresting individuals without explanation. The deployment of these law enforcement personnel remains completely unprovoked and unnecessary. These FOIA requests will help us determine whether this Administration has exceeded its authority to send these personnel into the streets of Portland and whether these actions violated the rights of concerned citizens.**

The same day you said that the deployment of federal law enforcement personnel was "completely unprovoked and unnecessary," one of those protestors attempted to smash a law enforcement officer's head in with a hammer.[2]

With the benefit of hindsight, would you revise any of your statements about these protests being peaceful or about the need for federal law enforcement to provide protection in Portland?

Response: The NAACP Legal Defense and Educational Fund (LDF) sent Freedom of Information Act (FOIA) requests to federal law enforcement agencies to obtain information concerning the parameters of the deployment of such law enforcement. Consistent with FOIA's directive that certain records of federal government agencies are accessible to the public, LDF sought such records concerning the deployment, including the deputation of federal personnel, and Interagency Agreements and/or Memorandum of Understanding.

I am not familiar of the specific facts quoted in the question above and was not involved in litigating the *Index Newspapers* case. However, it appears that in that case the district court preliminarily enjoined the U.S. Department of Homeland Security and the U.S. Marshals Service from engaging in particular law enforcement activity while responding

[1] *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 839–40 (9th Cir. 2020).
[2] *See, e.g.*, *Portland protest: Man caught on video attacking a U.S. Marshal with a hammer | ABC7*, ABC7 (July 17, 2020), https://www.youtube.com/watch?v=t7vlKbR3Gcs.

to protests in Portland. The district court entered the injunction after making findings regarding the use of excessive force against journalists and authorized legal observers by some law enforcement agents of the federal defendants, and the Ninth Circuit declined to issue a stay of that injunction. *See*, *e.g.*, *Index Newspapers*, 977 F.3d at 828–29 (citing "exceptionally strong support for the district court's finding that some of the Federal Defendants were motivated to target journalists in retaliation for plaintiffs' exercise of their First Amendment rights" (internal quotation marks omitted)).

As a pending judicial nominee, it would be inappropriate for me to comment on the factual assessment of a judge. If confirmed as a district court judge, I would faithfully and impartially follow binding Supreme Court and Second Circuit precedent, including in matters related to the First Amendment.

4. **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: To my knowledge, "super precedent" is not a term used or defined by the Supreme Court or Second Circuit. It is not a term that I have used in my practice. If confirmed, I will faithfully adhere to all Supreme Court and Second Circuit precedent.

5. **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, I would faithfully and impartially follow all Supreme Court precedent, including each of the cases listed above. As a pending judicial nominee, I am constrained from commenting on any issue that may be the subject of litigation before me. The constitutionality of *de jure* racial segregation in public schools or anti-miscegenation laws, however, are unlikely to be the subject of future controversy. Therefore, like prior

judicial nominees, I believe it is appropriate for me to state my opinion that both *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

6. **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 and do not use that phrase in my practice. As the Supreme Court stated, the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). If confirmed as a district court judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent.

7. **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 established in the record.

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

   Response: I do not know the context of that statement, but as written here, I disagree. Courts should interpret constitutional provisions by using interpretative methodologies as instructed by the United States Supreme Court. It is not appropriate for judges to substitute their own "value judgments" or personal views for controlling precedent.

9. **Is climate change real?**

   Response: Climate change is an issue that has been the subject of extensive discussion by policy makers and may be an issue in litigation. If confirmed as a district court judge, I would base any decision involving climate change—or any other issue—on a careful examination of the parties' arguments, the governing law, and the evidentiary record.

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

    Response: The Supreme Court has 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." *Troxel v. Granville*, 530 U.S. 57 (2000) (citing cases).

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

Response: To the extent this question concerns the role of expert testimony in federal cases regarding such matters, the Second Circuit has instructed that 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). District courts play a gate-keeping function to ensure that "all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993); *see also* Federal Rule of Evidence 702.

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

Response: The Supreme Court observed that "advances in neonatal care have advanced viability to a point somewhat earlier" than when *Roe v. Wade* was decided. *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992). The Court also noted that viability occurred at approximately 28 weeks at the time of *Roe v. Wade*, occurred at approximately 23 to 24 weeks at the time of *Casey*, and may occur "at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future." *Id*.

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

Response: When life begins could be considered by some as a scientific question, as well as religious, philosophical, and moral questions. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (stating "[a]t 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."). If confirmed as a district court judge, I would faithfully and impartially follow binding Supreme Court and Second Circuit precedent regarding this issue.

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

Response: My general understanding is that there are medical procedures that purport to change one's biological sex; and that some individuals choose to identify as a sex other than the one indicated on the person's birth certificate. *See, e.g.*, New York Civil Rights Law § 67(2). To the extent this question relates to the role of expert scientific testimony in federal court, please see my response to Question 11.

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

Response: Generally, any threat, which I understand to include an intent to cause harm, intimidate, or other hostile action, against federal officers, including Supreme Court justices is wrong. And depending on specific facts, may also constitute a crime under 18 U.S.C. § 115.

16. **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). If confirmed as a district court judge and a case involving the President's removal power came before me, I would faithfully apply Supreme Court and Second Circuit precedent to the specific facts of the case.

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

Response: The funding amounts that federal, state, and local governments provide to police departments and other law enforcement agencies are important policy questions within the purview of policy makers, not the judicial branch. If confirmed as a district court judge, I would have no role in making policy.

18. **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 provide to police departments and support services is an important policy question within the purview of policy makers, not the judicial branch. If confirmed as a district court judge, I would have no role in making policy.

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

Response: The question of how to best manage the prison population and public safety during a pandemic is within the purview of policy makers, not the judicial branch. I understand generally that applications for release of incarcerated persons 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). If I am confirmed as a district court judge and a case presenting this issue comes before me, I would faithfully apply binding Supreme Court and Second Circuit precedent to the facts presented in the case, and would also look to the sentencing factors set forth in 18 U.S.C. §§ 3582(c)(1)(A) and 3553(a).

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

Response: If confirmed as a district court judge, I would faithfully apply binding Supreme Court and Second Circuit, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), and any forthcoming decision in *New York State Rifle & Pistol Association Inc. v. Bruen*, 141 S. Ct. 2566 (2021).

21. **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 this issue. If confirmed as a district court judge, I would fairly and impartially apply the applicable law to the facts established in the record.

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

Response: While I'm aware of the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and its progeny, I am unaware of any Supreme Court or Second Circuit precedent that squarely addresses this issue. If confirmed as a district court judge, I would fairly and impartially apply the applicable law to the facts established in the record.

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

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

    Response: The court hearing a matter under this statute, or any other statute, decides whether the claim is successful under the law. And while courts "have no business addressing" whether a religious belief is reasonable, the question of whether a law substantially burdens the free exercise of religion, is a determination for the court. *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014).

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

    Response: The 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(a) – (b)).

In *Hobby Lobby*, the United States Supreme Court found that because a federal "contraceptive mandate" would impose significant costs on an employer "if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). 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 fairly and impartially follow Supreme Court and Second Circuit precedent, including *Hobby Lobby*.

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

Response: I am not aware of Judge Reinhardt's statement or its context. If confirmed as a district court judge, I would fairly and impartially follow all Supreme Court and Second Circuit precedent, and would strive to render decisions consistent with that precedent.

25. **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, and may be provided counsel 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.

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

Response: My understanding is the Blaine Amendments were a failed effort to "amend[] the Constitution to bar any aid to sectarian institutions." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). In *Espinoza v. Montana*, 140 S. Ct. 2246 (2020), the Supreme Court ruled "[t]he application of the no-aid provision [in the Montana Constitution] discriminated against religious schools and the families whose children attend or hope to attend them in violation of the Free Exercise Clause of the Federal

Constitution." *Id*. at 2249. In the decision, the Supreme Court stated, "the Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree'" and "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id*. at 2259 (citations omitted).

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

Response: Yes. The First Amendment provides the right to "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) (citation omitted).

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

Response: The Supreme Court has held that the government may punish "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[,]" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), consistent with the First Amendment. In *Cohen v. California*, 403 U.S. 15, 20 (1971), the Court stated that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."

29. **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).

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

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

Response: No.

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

Response: No.

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

Response: I have spoken with Christopher Kang, who has provided me with general background information concerning the judicial nomination process, based on his experience in the White House Counsel's Office.

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

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

Response: No.

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

Response: No.

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

Response. Please see my response to Question 30(c) regarding my prior contact with Christopher Kang of Demand Justice.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

35. **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 6, 2021, I submitted an application to Senator Charles Schumer to be considered for a position on the United States District Court for the Eastern District of New York. On March 26, 2021, I interviewed with Senator Schumer's judicial screening committee. On April 16, 2021, I interviewed with Senator Kirsten Gillibrand's staff. On September 7, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials at the Office of Legal Policy at the United States Department of Justice. On January 19, 2022, the President announced his intent to nominate me to the United States District Court for the Eastern District of New York.

36. **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 30(c) regarding my prior contact with Christopher Kang. We discussed generally how the nominations process works.

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

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

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

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

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

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

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

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

41. **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 7, 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.

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

Response: On May 4, 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 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 Natasha Clarise Merle
Nominee for the Eastern District of New York

1. **In an August 2017 episode of the podcast called "The Breach," you said "It's inconsistent to denounce white supremacy but not repudiate voter ID laws, to not repudiate the Muslim ban, to not repudiate the wall. These are all things that support and are grounded in white supremacy." Do you believe that policy proposals such as voter ID requirements and a southern border wall are based on white supremacy?**

   Response: The Supreme Court held in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) that voter identification requirements can be constitutionally permissible. Border security policies present important questions in the purview of policy makers, not the judicial branch. If confirmed as a district court judge, I would have no role in making policy. I would fairly and impartially apply Supreme Court and Second Circuit precedent to the facts of the case before me.

2. **Do you believe that the Supreme Court was motivated by white supremacy in *Trump v. Hawaii*, in which the Court upheld the restriction on travel from certain countries that you derisively call "the Muslim ban"?**

   Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court upheld the validity of travel restrictions from certain countries as within the President's power. *See id.* at 2408, 2415. Specifically, the Court concluded that the language of the Immigration and Nationality Act, 8 U. S. C. §1182(f)—which gives the President broad authority to suspend the entry of non-citizens into the country if such entry "would be detrimental to the interests of the United States"—was "clear" and the presidential Proclamation announcing the restrictions "d[id] not exceed any textual limit on the President's authority." 138 S. Ct. at 2410. In assessing the First Amendment claim that the restrictions were motivated by religious discrimination, the Supreme Court applied a "highly constrained" standard of review, due to the Executive Branch's primary role in making policy on matters of national security and immigration. *Id.* at 2419–20. Under this deferential standard of review, the Court considered only the objective question of whether the policy "can reasonably be understood to result from a justification independent of unconstitutional grounds"; it did not determine the actual subjective motives for the policy's adoption. *Id.* at 2420. If confirmed as a district judge, I would fairly and impartially follow binding Supreme Court and Second Circuit precedent, including *Trump v. Hawaii*.

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

Questions for the Record for Natasha Merle, 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. **Is racial discrimination wrong?**

   Response: Yes. Congress has passed antidiscrimination laws that prohibit racial discrimination. Further, the Fourteenth Amendments provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court

has held that race-based classifications are subject to strict scrutiny and are thus only permissible when narrowly tailored to achieve a compelling government interest.

2. **Is critical race theory taught in K-12 schools?**

   a. **If it is not, should it be, in your opinion?**

   Response to Questions 2 and 2(a): To the extent the term "critical race theory" is referring to an academic doctrine that examines the relationship between race and the law, it is my understanding that it is a subject that originated in and is taught in some law schools. I am not aware of it being taught in K-12 schools. Critical race theory is not a subject I studied in law school, nor have I used it in my practice as a litigator.

3. **Have you personally or professionally or in an academic setting, advocated for race reparations?**

Response: No.

4. **Are any state interests in promoting voter integrity measures legitimate?**

Response: The Supreme Court has held that states can have a legitimate interest in voter integrity. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021) (holding a state "indisputably has a compelling interest in preserving the integrity of its election process"); *see also Crawford v. Marion Cty Election Bd.*, 553 U.S. 181, 197 (2008) (holding that state's "interest in protecting public confidence in elections, while closely related to its interest in preventing voter fraud, has independent significance, because such confidence encourages citizen participation in the democratic process."). If confirmed as a district judge, I would fairly and impartially follow all precedent of the Supreme Court and Second Circuit, including *Brnovich* and *Crawford*.

5. **Do you believe that border security policies that advocate for building a border wall are grounded in white supremacy?**

Response: Border security policies present important questions in the purview of policy makers, not the judicial branch. If confirmed as a district court judge, I would have no role in making policy. I would fairly and impartially apply Supreme Court and Second Circuit precedent to the facts of the case before me.

6. **Do you believe that voter ID laws are grounded in white supremacy?**

Response: The Supreme Court held in *Crawford v. Marion County Election Board.*, 553 U.S. 181 (2008) that voter identification requirements can be constitutionally permissible.

If confirmed as a district judge I would fairly and impartially apply all precedents of the Supreme Court and the Second Circuit, including *Crawford*.

7. **In 2017, you gave a clear answer to questions 5 - 7. In an interview with The Breach, you connected voter ID laws and the border wall to white supremacy. You said, "It's inconsistent to denounce white supremacy but not repudiate voter ID laws, to not repudiate the Muslim ban, to not repudiate the 'wall.' These are all things that support and are grounded in white supremacy." Do you no longer believe in your statement from 2017?**

Response: Please see my response to Questions 5 and 6. In my role as a litigator in those remarks, I was focused on certain voter ID laws that may be subject to challenge because of a racially discriminatory effect or purpose, and cases where such discrimination was held to violate the Fourteenth Amendment or the Voting Rights Act. *See. e.g.*, *North Carolina NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2017). As a judicial nominee, it would be inappropriate for me to comment further because I do not want to leave the mistaken impression that I have prejudged a relevant issue. If confirmed as a district court judge, I will follow all binding Supreme Court and Second Circuit precedent.

8. **In 2020, you worked on NAACP FOIA requests sent to the DOJ, U.S. Marshals Service, DHS, and CBP regarding the response by federal law enforcement officers to the riots that happened in Portland, Oregon over the summer of 2020. The requests that you filed described the Portland protests as "peaceful." The requests that you filed took issue with CBP's description of the rioters as "violent anarchists" and a "violent mob."**

Here is what you said in your FOIA request, "The decision to deploy federal law enforcement personnel, and the manner in which federal law enforcement personnel were deployed, escalated concerns about whether protestors could safely voice their demand for social justice and institutional reform. Rhetoric from federal officials, including referring to protestors as "violent anarchists" and a "violent mob," exacerbated concern around whether the influx of federal law enforcement officers would impede First Amendment rights.

That is a direct quote the July 17, 2020 FOIA Requests that you submitted to the U.S. Marshals Service, the Department of Homeland Security, and the U.S. Customs and Border Protection, correct?

Response: Respectfully, the quote above is missing the internal citations to the quotes from a news report included therein. The NAACP Legal Defense and Educational Fund

sent the referenced FOIA requests to federal law enforcement agencies to obtain information concerning the parameters of the deployment of federal law enforcement.

9. **Please confirm that your name is the only name that appears on the signature block for these three FOIA requests.**

Response: I sent the requests under my name on behalf of the NAACP Legal Defense and Educational Fund.

10. **Ninth Circuit Judge O'Scannlain described the situation at the federal courthouse in Portland. *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 839–40 (9th Cir. 2020). He said that, "Rioters smashed the glass entryway doors of the Mark O. Hatfield Federal Courthouse and attempted to set fire to the building. They threw balloons containing an accelerant into the lobby and fired powerful commercial fireworks toward the accelerant, which ignited a fire in the lobby. Vandalism, destruction of property, and assault on federal law enforcement officers securing the building continued throughout the Fourth of July holiday weekend, and federal agents made multiple arrests." Do you disagree with Judge O'Scannlain's factual assessment of the 2020 riots in Portland?**

Response: NAACP LDF's role was limited to sending FOIA requests to federal law enforcement to obtain information concerning the parameters of the deployment of federal law enforcement. Consistent with FOIA's directive that certain records of federal government agencies are accessible to the public, LDF sought such records concerning the deployment, including the deputation of federal personnel, and Interagency Agreements and/or Memorandum of Understanding.

I am not familiar of the specific facts quoted in the question above and was not involved in litigating the *Index Newspapers* case. However, it appears that in that case the district court preliminarily enjoined the U.S. Department of Homeland Security and the U.S. Marshals Service from engaging in particular law enforcement activity while responding to protests in Portland. The district court entered the injunction after making findings regarding the use of excessive force against journalists and authorized legal observers by some law enforcement agents of the federal defendants, and the Ninth Circuit declined to issue a stay of that injunction. *See*, *e.g.*, *Index Newspapers*, 977 F.3d at 828–29 (citing "exceptionally strong support for the district court's finding that some of the Federal Defendants were motivated to target journalists in retaliation for plaintiffs' exercise of their First Amendment rights" (internal quotation marks omitted)).

As a judicial nominee, it would be inappropriate for me to comment on the factual assessment of a judge. If confirmed as a district court judge, I would fairly and impartially

follow all Supreme Court and Second Circuit precedent, including that concerning First Amendment rights.

11. **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: It is a judge's sworn duty to set aside whatever personal views she or he may have and to impartially apply the law to the facts as established by the evidence in the record, and treat all parties with fairness and respect. If confirmed as a district court judge, I would take an oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States. Beyond this fundamental duty of all judges, I am not aware and therefore not able to comment on which Justices' philosophy is closest to my approach.

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

Response: I have not used labels such as "originalist" to describe my approach to analyzing the evidence and relevant law in my role as an attorney. The Supreme Court has instructed that, in the 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 court judge, I would faithfully follow binding Supreme Court precedent regarding when courts should look to the original public meaning of the relevant text, including *Heller.*

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

Response: Please see responses to Questions 11 and 12. I generally understand the phrase "living constitution" to mean that the Constitution's meaning changes and evolves through time. I have never used this phrase. The Constitution is an enduring document that sets forth fundamental rights and the core principles that govern our nation.

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

Response: If confirmed as a district court judge, I would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to methods of constitutional interpretation. This includes *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), in which the Supreme Court explained that 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."

15. **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: Supreme Court precedent directs that if "the statutory text is plain and unambiguous," the text must be enforced "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). 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). If confirmed as a district court judge, my role would be to follow Supreme Court and Second Circuit precedent on the interpretative methods used when deciding questions of constitutional and statutory interpretation.

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

Response: No. The Constitution does not change unless amended pursuant to the procedures set forth in Article V.

17. **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: Yes. The limits of government action in the context of constitutional and statutory protections of the free exercise of religion is fact specific. For example, under the First Amendment, the "ministerial exception" provides that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Also, under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq. ("RFRA"), the federal "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "is in furtherance of a compelling governmental interest," and "is

the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b).

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

Response: No. The Constitution prohibits such discrimination, as the Supreme Court has confirmed in several significant cases. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

19. **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 made a strong showing "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.* 66–67.

20. **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. The Court explained 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 further held that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." The Court also held that litigants remained entitled to emergency injunctive relief when they "'remain under a constant threat' that

government officials will use their power to reinstate the challenged restrictions." *Id*. at 1297 (internal citations omitted).

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's (CCRC) decision and issuance of a cease-and-desist order, in a proceeding arising from a cakeshop's refusal to sell a wedding cake to a same-sex couple, did not comply with the Free Exercise Clause's requirement of religious neutrality. The Court held that "[t]he neutral and respectful consideration to which [the plaintiff] was entitled was compromised," given the CCRC's "treatment of his case," which had "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729.

23. **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 23, and subparts (a) and (b): In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held 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). In *Welsh v. United States*, 398 U.S. 333, 339-40 (1970), the Supreme Court held that sincere religious beliefs "stem from [a person's] moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions," and furthermore, that such beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."

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

Response: Please see my response to Questions 23, 23(a) and 23(b). As a judicial nominee, it is not appropriate for me to comment on what is or is not the official position of the Catholic Church or any religion.

24. **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.

25. **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 stated the provision "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. 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," and that the provision at issue "violates the First Amendment." *Id.*

26. **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 as a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Supreme Court remanded 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 concurrence identified errors the state court had made in its application of RLUIPA, including in how the state court had failed 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).

27. **Would 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 trainings provided by the Second Circuit or the Eastern District of New York, or what role, if any, I would have in such programming, if confirmed. All training and programming by the federal courts must adhere to all applicable legal requirements.

28. **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: Please see my response to Question 27.

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

Response: Response: If confirmed as a district judge, I would faithfully and impartially follow Supreme Court and Second Circuit precedent, including with respect to claims of racial bias and racial discrimination. The broad issue presented in the question is within the purview of policy makers, not the judicial branch. However, I am aware of studies regarding disparities in the criminal justice system, as well as courts' recognition of such

disparities, *see e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (stating that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."); *see also Kimbrough v. United States*, 552 U.S. 85 (2007). I am also aware that judges preside over matters that include claims that systemic factors, such as governmental policies or practices alleged to reflect racial bias, were responsible for 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").

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

Response: Your question seems to be referring to political appointments in the province of the Executive Branch; all such appointments must be lawful under the Constitution. As a pending judicial nominee it would not be appropriate for me to comment on the executive's appointment process.

31. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

32. **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 to follow all precedent of the U.S. Supreme Court regardless of that Court's size or composition. It would be inappropriate for me to comment on whether the size of that Court should be changed.

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

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."

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

Response: I am not aware of any Supreme Court or Second Circuit precedent that holds that the Second Amendment receives less protection than any other enumerated right in the Constitution.

35. **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 34.

36. **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 makes clear that the President's role is to enforce the law, specifically providing that the President "shall take care that the laws be faithfully executed." U.S. Const., Art. II, §3. As a pending judicial nominee, it would not be appropriate for me comment on the lawfulness of any conduct that may potentially come before me. If confirmed as a district court judge, I would be duty bound to follow the law of the Supreme Court and Second Circuit faithfully and impartially.

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

Response: The Supreme Court has described a "substantive rule" as one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). As matters concerning what distinguishes an act of "prosecutorial discretion" from that of a substantive administrative rule change are currently pending in courts, it would be inappropriate for me, as a judicial nominee, to comment on such issues.

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

Response: 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 President lacks the authority to unilaterally "abolish" legislation duly passed by Congress.

39. **Does the federal court system have the authority to abolish the death penalty?**

Response: The Supreme Court has held that the death penalty is constitutional under the Eighth Amendment. *See Gregg v. Georgia*, 96 S. Ct. 2909 (1976). Abolishing the death penalty would present a public policy question within the purview of policy makers, not judges. If confirmed as a district judge, I would faithfully and impartially apply Supreme Court and Second Circuit precedent concerning death eligible cases.

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

Response: In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court granted an application to vacate a stay of a district court order enjoining a nationwide eviction moratorium for residential rental properties imposed by Director of Centers for Disease Control and Prevention (CDC) in response to COVID-19 pandemic. The Court found that plaintiffs had failed to meet the test delineated in *Nken v. Holder*, 556 U.S. 418 (2009). The effect of the Court's ruling was to permit the district court's injunction to go into effect, thus blocking the CDC's nationwide eviction moratorium.

Senator Josh Hawley
Questions for the Record

Natasha Merle
Nominee, U.S. District Court for the Eastern District of New York

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

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

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

    Response to all subparts: I am not familiar with the context of the quote. If confirmed as a district court judge, I would fairly and impartially follow binding Supreme Court and the Second Circuit precedent. I would not impose my personal views in any case.

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

    Response: *Younger* abstention "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 has held 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)).

    Pullman abstention doctrine holds that federal courts "ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). In the Second Circuit, *Pullman* abstention is appropriate "when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co*., 380 F.3d at 100 (internal quotation and citation omitted).

The *Burford* abstention doctrine instructs that, if timely and adequate state-court review is available, a federal court sitting in equity must not 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 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), which was in turn discussing *Burford v. Sun Oil Co*., 319 U.S. 315 (1943) and its progeny).

Colorado River abstention "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.

Brillhart/Wilton abstention applies when a federal lawsuit seeks "purely declaratory relief" and there is a parallel action pending in state court. *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 relevant factors: "(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 Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The Second Circuit has identified four requirements for *Rooker-Feldman* to apply: "(1) the federal-court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by a state-court judgment; (3) the plaintiff must invite district court review and rejection of that judgment; and (4) the state-court judgment must have been rendered before the district court proceedings commenced." *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021) (internal quotation marks and brackets omitted).

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

   Response: No.

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

      Response: Please see my response to Question 3.

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

   Response: If confirmed as a district court judge, I would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to methods of constitutional interpretation. This includes *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), in which the Supreme Court explained that 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."

5. **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). Courts employ other tools of statutory construction only when text does not unambiguously resolve an interpretive question. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). Thus, consistent with Supreme Court and Second Circuit precedent, I would only consider legislative history when there is no applicable, binding precedent and when the text of the statute at issue is ambiguous. *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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

Response: If confirmed as a district court judge, I would faithfully and impartially follow binding Supreme Court and Second Circuit precedent, including with respect to the use of legislative history for ascertaining legislative intent. Examples of such precedents include: *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"); and *Garcia v. United States*, 469 U.S. 70, 76 (1984) (holding "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'").

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

Response: It is generally not appropriate to consult foreign law when interpreting provisions of the U.S. Constitution. There are examples of the Supreme Court referencing foreign law in constitutional cases in certain limited instances. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (referencing English common law in determining scope of Second Amendment). If confirmed as a district court judge, I would do so only when directed by the Supreme Court and Second Circuit.

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

Response: The Supreme Court articulated the test for claims that an execution protocol violates the Eighth Amendment: The petitioner must demonstrate a "substantial risk of serious harm,' an objectively intolerable risk of harm" Second, the petitioner must identify an alternative procedure that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." Third, the state refuses to adopt that alternative "without a legitimate penological justification." *Baze v. Rees*, 553 U.S. 35, 50-52 (2008) (internal citations omitted); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019). I am unaware of any precedent in the Second Circuit that specifically addresses this standard.

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

Response: Yes. The Supreme Court reaffirmed in *Bucklew v. Precythe*, relying on *Glossip v. Gross*, that "[t]he Eighth Amendment does not come into play unless the risk of pain associated with the State's method is 'substantial when compared to a known and available alternative.'" *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), *Id.* at 1125 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015)).

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

Response: In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–74 (2009), the Supreme Court held that convicted prisoners do not have a due process right to access DNA evidence. This standard has been applied by the Second Circuit. *See Newton v. City of New York*, 779 F.3d 140, 147 (2d Cir. 2015).

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

Response: No.

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

Response: The Supreme Court has held that under the First Amendment's Free Exercise Clause, otherwise-valid, facially neutral state laws of general applicability do not ordinarily trigger strict scrutiny. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–82 (1990). However, "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (citing *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)). Further, a "law is not generally applicable if it invites the government to consider particular reasons for a person's conduct by providing a mechanism for

individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. (internal quotations omitted). *See also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

With respect to the federal government, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.* ("RFRA"), provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b).

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

Response: Please see my response to question 10.

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

Response: Sincere religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" and may include beliefs held only by a single person. *Welsh v. United States*, 398 U.S. 333, 340 (1970). "It 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). The Second Circuit has "refused to evaluate the objective reasonableness of" religious beliefs and held that "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003) (internal quotation marks omitted).

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

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

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

622, and that the firearm regulations at issue in that case violated the Second Amendment, *id.* at 636.

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

Response: No.

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

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

Response: While I am not sure what Justice Holmes meant by that statement, based on the context within his dissenting opinion, it appears that Justice Holmes was advancing the position that the Fourteenth Amendment's drafters did not intend to adopt an economic theory.

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

Response: 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").

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

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

Response: One example that may be responsive is *Korematsu v. United States*, 323 U.S. 214 (1944), which was described as having been "overruled in the court of history." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

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

Response: I commit to faithfully applying binding Supreme Court precedents as decided.

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

a. Do you agree with Judge Learned Hand?

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

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

Response to all subparts: The Second Circuit has stated "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." *Broadway Delivery Corp. v. United Parcel Serv. Of America, Inc*., 651 F.2d 122, 129 (2d Cir. 1983) The Second Circuit, relying on Supreme Court precedent, has cautioned, however, that market share percentages alone are not conclusive of determining monopoly power. *Id*. (citing *United States v. Columbia Steel Co*., 334 U.S. 495 (1948). If confirmed as a district court judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent, including concerning the issue presented here.

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

Response: Federal common law refers to law derived from courts in decisions as opposed to by statute. The Supreme Court stated that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Rather, "only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

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

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

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

Response to all subparts: With respect to state constitutional provisions, if confirmed as a district court judge, I would defer to 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).

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. States provisions may provide greater protections than the Constitution, but the Constitution's protections are, at a minimum, binding on the states.

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

Response: The canons of judicial ethics constrain judicial nominees from commenting on the merits of any particular precedent that they may be called upon to apply. 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 that *Brown* was correctly decided.

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

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

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

Response to all subparts: Federal Rule of Civil Procedure 65 governs requests for injunctive relief. 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). The Second Circuit has noted that it has "no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree[s] that such injunctions may be an appropriate remedy in certain circumstances." *New York v. United States Dep't of Homeland Sec*., 969 F.3d 42, 88 (2d Cir. 2020), cert. granted sub nom., 141 S. Ct. 1370 (2021), and cert. dismissed sub nom., 141 S. Ct. 1292 (2021). The authority to issue a nationwide injunction, however, is not unlimited, and should only be issued when circumstances necessitate it. *Id*. If

confirmed as a district court judge, I would be to follow Supreme Court and Second Circuit precedent regarding the issuance of an injunction.

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

Response: Please see my response to Question 20.

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

Response: Federalism is foundational to the design of the Constitution, which ensures a particular allocation and sharing of power between the federal and state governments. *See New York v. United States*, 505 U.S. 144, 181 (1992). "[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).

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

Response: Please see my response to Question 2.

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

Response: Federal Rule of Civil Procedure 65 governs requests for injunctive relief. A district court must determine whether a party is entitled to monetary damages and/or injunctive relief based on the applicable law and the facts of each case. If confirmed as a district court judge, I would faithfully and impartially follow binding Supreme Court and Second Circuit, including with respect to injunctive relief and damages.

25. 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). *Glucksberg* set forth a non-exhaustive list of cases that have recognized certain Due Process rights not specifically enumerated in the Constitution's text. *See id.* at 2267.

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

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

Response: Please see my responses to Questions 10 and 11.

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

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

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

Response: The Second Circuit has stated: "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). If confirmed, I would faithfully and impartially apply Supreme Court and Second Circuit precedent.

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

Response: Please see my response to Question 12.

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

Response: The 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). "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: No.

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

a. What do you understand this statement to mean?

Response: My understanding of this statement is that judges should faithfully and impartially follow precedent and not base their decisions on personal views, values, or opinions.

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

a. If yes, please provide appropriate citations.

Response: During my fourteen years of practice, I have worked on a broad range of matters. To the best of my recollection, the following cases are responsive to this question:

Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193-LSC, 284 F. Supp. 3d 1253 (N.D. Ala. 2018) (Coogler, J.), *aff'd*, 992 F.3d 1299 (11th Cir. 2021) (Branch, Carnes, Gayles, JJ.).

People First v. Merrill, 467 F. Supp. 3d 1179 (N.D. Ala. 2020) (Kallon, J.), *stay pending appeal denied*, 815 F. App'x 505 (11th Cir. 2020) (Rosenbaum, Jill Pryor, Grant, JJ.), *stay granted*, 141 S. Ct. 190 (2020); 491 F. Supp. 3d 1076 (N.D. Ala. 2020) (Kallon, J.), *stay pending appeal granted in part*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. 2020) (Jordan, Jill Pryor, Lagoa, JJ.), *stay granted*, 141 S. Ct. 25 (2020).

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

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

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

Response: If confirmed as a district judge, I would faithfully and impartially follow Supreme Court and Second Circuit precedent, including with respect to claims of racial bias and racial discrimination. The broad issue presented in the question is within the purview of policy makers, not the judicial branch. However, I am aware of studies regarding disparities in the criminal justice system, as well as courts' recognition of such disparities, *see e.g*., *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (stating that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."); *see also Kimbrough v. United States*, 552 U.S. 85 (2007). I am also aware that judges preside over matters that include claims that systemic factors, such as governmental policies or practices alleged to reflect racial bias, were responsible for 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").

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

Response: Yes.

32. How did you handle the situation?

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

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

Response: Yes.

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

Response: Federalist No. 78.

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

Response: This question implicates weighty issues of ethics, religion, and public policy. As a judicial nominee, it would be inappropriate for me to express an opinion on this question. If confirmed as a district judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent.

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

Response: To the best of my recollection, I have not testified under oath other than at my hearing before the Senate Judiciary Committee.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: Yes.

b. Amazon?

Response: Yes.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

Response: To the best of my recollection, I have never authored a brief that was filed in court without my name on it. At various times in my professional career, I have provided comments or feedback on briefs authored by my colleagues, including colleagues I supervise in my current role as Deputy Director of Litigation for the NAACP Legal Defense and Educational Fund, Inc.

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

Response: Not applicable.

40. Have you ever confessed error to a court?

Response: To the best of my recollection, I have not ever confessed error to a court.

a. If so, please describe the circumstances.

Response: Not applicable.

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

Response: Consistent with the oath nominees take when testifying, nominees have a responsibility to answer all questions from the Senate Judiciary Committee truthfully and honestly.

Questions for the Record for Natasha Clarise Merle
From Senator Mazie K. Hirono

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

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Natasha Merle, Nominee to the United States District Court for the Eastern District of New York

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

Response: It is a judge's sworn duty 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, and treat all parties with fairness and respect. If confirmed as a district court judge, I would take an oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States.

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

Response: If a federal statute had been previously interpreted by the United States Supreme Court or the Second Circuit, that interpretation of the provision is binding precedent and I would faithfully and impartially apply it. If there is no binding precedent, I would then look at the text of the statute and if "the words of [the] statute are unambiguous, then . . . judicial inquiry is complete." *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 462 (2002) (internal quotations omitted). If the meaning of the provision is ambiguous, I would then employ "interpretive tools, including canons, statutory structure and legislative history." *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014).

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

Response: If confirmed as a district court judge, I would faithfully and impartially follow all precedent from the Supreme Court and Second Circuit, including with respect to methods of constitutional interpretation. This includes *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), in which the Supreme Court explained that 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."

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

Response: Please see my response to Question 3.

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

   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: Please see my responses to Questions 2 and 3. If confirmed as a district court judge, the text of a provision is the authoritative and primary source upon which I would rely when interpreting it. The "plain meaning" of a statute refers to the "ordinary public meaning of its terms at the time of its enactment." *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020). The Supreme Court has instructed that, absent controlling precedent on a matter of constitutional interpretation, a court should be guided by the "normal and ordinary" use of relevant terms, as they were likely understood by those who enacted the provision at issue. *See e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

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

   Response: There are three elements necessary to establish constitutional standing:

   > *First*, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical . . . *Second*, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court. *Third*, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

   Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (emphasis added, cleaned up).

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.

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." *McCullough v. Maryland*, 17 U.S. 316, 400 (1819).

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

Response: If confirmed as a district judge, I would follow Supreme Court and Second Circuit precedent concerning Congress's powers, including *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) (holding that if "no enumerated power authorizes Congress to pass a certain law, that law may not be enacted.").

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

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect those fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Court included a non-exhaustive list of these rights:

> 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* . . . We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278–279.

Id. at 720.

10. **What rights are protected under substantive due process?**

Response: Please see my response to Question 9.

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

Response: Please see my response to Question 9. Further, the Supreme Court effectively overruled *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (finding "the doctrine that prevailed in *Lochner* . . . has long since been discarded."). If confirmed as a district court judge, any personal views on the rights referenced in the question would be irrelevant. I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent regarding these rights.

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

Response: Under the Commerce Clause, Congress has the authority to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Congress, however, 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 described various factors that may qualify a particular group as a "suspect class," including that they have "been subjected to discrimination;" that they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and that they are "a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The 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 Constitution's inclusion of checks and balances and separation of powers is fundamental to the structure of the Constitution. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court explained 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.’” *Id*. at 693 (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 Supreme Court and Second Circuit precedent analyzing the relevant constitutional provision 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: A judge should treat all litigants with respect, but a judge’s personal feelings and views are irrelevant in discharging his or her duties. I would faithfully and impartially apply Supreme Court and Second Circuit precedent to the relevant facts of the case before me.

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

Response: Both are similarly 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 studied nor examined this issue and therefore do not have a basis upon which to form an opinion. If confirmed as a district court judge, I would faithfully and impartially follow all precedent from the Supreme Court.

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

Response: Judicial review refers to the long-established rule that courts have authority to hear and decide cases concerning the legality of actions of the legislative and executive branches of government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). My general understanding of judicial supremacy is that it refers to the

idea that the Supreme Court is the ultimate interpreter of the meaning of constitutional provisions.

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

Response: Elected officials are bound by oath to support the Constitution and follow the decisions of the Supreme Court interpreting the Constitution.

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

Response: The idea that courts "have neither force nor will, but only judgment" is an important reminder of a judge's limited role. Judges do not make policy, their duty is limited to deciding the case or controversy before them, by applying the law fairly and impartially to the facts as established in the record.

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

Response: If confirmed as a district court judge, I would be bound by Supreme Court and Second Circuit precedent. If there is no controlling precedent that speaks directly to the issue, I would look to the interpretive tools as described in the response to Question 2. My personal views as to the correctness of precedent would be irrelevant. 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. In 18 U.S.C. § 3553(a), Congress delineated the factors a federal district court judge must consider when making an individualized assessment as to the appropriate sentence a defendant should receive.

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

Response: I am not familiar with this quote or its context. Moreover, as a judicial nominee, it would not be appropriate for me to comment on statements made by any President. I understand equity to mean fairness or impartiality in the way people are treated.

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[.]" "Equality" is defined 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. **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 24. The Fourteenth Amendment does not contain the term "equity" in its text, it refers to the "equal protection of the laws."

27. **How do you define "systemic racism?"**

Response: My general understanding of that phrase is to mean patterns, practices or policies that disproportionately impact people based on race, as opposed to individual instances of discrimination.

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

Response: My general understanding of critical race theory is that it is an academic doctrine that examines the intersection between race and the law that originated in and is taught in some law schools.

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

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

30. **You recently signed an amicus brief submitted to the Kansas Supreme Court in the case *Kansas v. Carr*. In this brief you argued against "death qualification," the removal of prospective jurors who admit that they could not follow the law in the case they are being asked to consider because they are opposed to the death penalty. Wouldn't seating jurors who have openly stated an unwillingness to follow the law interfere with the role of the jury and the administration of justice?**

Response: The U.S. Supreme Court has held that a prospective juror in a capital case may be excluded for cause if the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

Respectfully, the amicus brief in *Kansas v. Carr*, on which I worked as an attorney at the NAACP Legal Defense and Educational Fund and filed in its behalf, raised a different question. The inquiry concerned whether a specific and unique provision of the Kansas Constitution allows a death qualification process that risks exclusion of a significant number of Black jurors or was the process an infringement on jury rights under Section 5 of the Kansas Constitution's Bill of Rights. The Supreme Court has observed that Kansas law authorizes jurors in the sentencing phase of a capital case to consider "any mitigating circumstance," including the juror's own view of whether "the exercise of mercy" is appropriate. *Kansas v. Marsh*, 548 U.S. 163, 176 (2006). If confirmed as a district judge for the Eastern District of New York, I would not have any role in applying Kansas law and would be bound to apply the Supreme Court's and Second Circuit's precedent, including *Wainwright*.

31. **Two years ago, rioters in Portland Oregon attempted to set fire to the Mark O. Hatfield Federal Courthouse. They also repeatedly ambushed federal law enforcement officers as they tried to leave the building and attacked U.S. Marshals with a hammer. You repeatedly defended the individuals involved in these violent and destructive attacks, and you filed FOIA requests at the Justice Department on their behalf. How can we expect you to respect and uphold your**

duties as a federal judge when you are so willing to dismiss the willful and wanton destruction of federal property and assaults on federal employees?

Response: Respectfully, I did not defend any of the individuals identified in your question, nor did I file Freedom of Information Act (FOIA) requests on their behalf. In my capacity as an attorney at the NAACP Legal Defense and Educational Fund (LDF), I sent FOIA requests, on behalf of LDF, to federal law enforcement to obtain information concerning the parameters of the federal law enforcements' deployment. Consistent with FOIA's directive that certain records of federal government agencies are accessible to the public, LDF sought such records concerning the deployment, including the deputation of federal personnel, and Interagency Agreements and/or Memorandum of Understanding. If confirmed as a district court judge, I would impartially apply Supreme Court and Second Circuit precedent to the facts of the case before me as established in the record.

Senator Ben Sasse
Questions for the Record for Natasha C. Merle
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
April 27, 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. **How would you describe your judicial philosophy?**

   Response: It is a judge's sworn duty to set aside whatever personal views she or he may have, if any, and to impartially apply the law to the facts as established in the record and treat all parties with fairness and respect. If confirmed as a district court judge, I would abide by my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the Constitution and laws of the United States.

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

   Response: In my role as an attorney, I have not used methodological labels such as "originalist", "textualist"—or any other such labels—to describe my work.

   The Supreme Court has instructed that, absent controlling precedent on a matter of constitutional interpretation, a court should be guided by the "normal and ordinary" use of relevant terms as it was likely understood by those who enacted the provision at issue. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed as a district court judge, I would faithfully follow binding Supreme Court precedent regarding when courts should look to the original public meaning of the relevant text, including *Heller*.

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

   Response: Please see my response to Question 3. The text of a statute is the most probative evidence of its meaning and courts should approach unsettled questions of statutory interpretation by looking first to the text of a statute. *See*, *e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (quotations and alterations omitted). If confirmed to serve as a district judge, I would faithfully and impartially follow all Supreme Court and Second Circuit precedent

regarding the methodologies courts should adopt when interpreting the meaning of any relevant text.

5. 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 "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). The Constitution can only be changed if amended pursuant to Article V.

6. 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 for Justices and judges does not derive from their jurisprudence or their positions in particular cases. Rather, I respect Justices and judges for their evenhandedness, open-mindedness, analytical rigor, and adherence to precedent—among other qualities. This includes, for example, two federal district court judges for whom I clerked and greatly respect.

7. 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: Please see my response to Question 3. Further, if confirmed as a district court judge, I would play no role in determining when, and under what circumstances, appellate courts may elect to revisit and either overturn or reaffirm their own precedents. Rather, I would faithfully and impartially follow all Supreme Court and Second Circuit precedent.

As a general matter, an appellate court, acting *en banc*, can overrule precedent in certain circumstances. *See* Federal Rule of Appellate Procedure 35.

8. 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 7.

9. 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: Please see my response to Question 4. 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).

Courts employ other tools of statutory construction only when text does not unambiguously resolve an interpretive question. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). A court may consider legislative history, but only in certain circumstances and with caution, as a last resort. The Supreme Court has stated that "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil*, 545 U.S. at 568. The Supreme Court has also explained that "[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).

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

Response: No. The factors that a federal judge may appropriately consider when sentencing an individual defendant are prescribed by Congress in section 3553(a) of Title 18 of the United States Code.

Questions from Senator Thom Tillis
for Natasha Merle
Nominee to be US District Judge for the
Eastern District of New York

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

   Response: Yes.

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

   Response: My general understanding is that the term "judicial activism" can refer to a court basing its decisions on a judge's personal views, rather than the applicable law and the facts established by the record. I consider that to be inappropriate.

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

   Response: Impartiality is central to a judge's duty and the rule of law. A judge must set aside any personal views he or she may have and impartially apply the law to the facts as established in the record of each case.

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

   Response: No. It is not a judge's role to make policy. A judge's role is to decide individual cases or controversies by impartially applying the law to the facts as established in the record.

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

   Response: Yes. The duty of a judge is to set aside any personal views he or she may have and impartially apply the law to the facts as established in the case. That duty remains regardless of whether the judge would regard the outcome "undesirable" in his or her personal view.

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

   Response: No.

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

Response: If confirmed as a district court judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent when deciding any case involving the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), and any forthcoming decision in *New York State Rifle & Pistol Association Inc. v. Bruen*, 141 S. Ct. 2566 (2021).

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

Response: If confirmed to serve as a district court judge and a case presenting this question came before me, I would fairly and impartially apply all Supreme Court and Second Circuit precedent to the facts as established in the record, including the cases cited in my response to Question 7.

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, I would faithfully and impartially follow binding Supreme Court and Second Circuit precedent related to the doctrine 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 an existing law or policy provides sufficient protection is an issue in the purview of law makers, not the judicial branch. If confirmed as a district court judge, my role would be to faithfully and impartially apply the qualified immunity doctrine as set forth in binding Supreme Court and Second Circuit precedent.

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

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

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

Response: In my years of experience as a public defender, and in private practice and civil rights, I do not recall working on a case involving patent law; I may have worked on a patent case as a judicial law clerk. While as a judicial nominee, it would be inappropriate for me to express a personal opinion on the state of eligibility jurisprudence, I commit to faithfully and impartially following all binding Supreme Court and Second Circuit precedent concerning the issue.

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

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

Response: Because I do not want to give the mistaken impression that I have prejudged an issue that may come before me if I were confirmed to be a district court judge, I am not able to analyze the issues presented in this hypothetical. If I were confirmed and a matter related to patent eligibility came before me, I would apply the relevant Supreme Court and Second Circuit precedent to the facts of the case.

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

Response: Please see my response to Question 13(a).

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that

contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a).

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** ***BioTech Co*** **invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the**

manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

Response: Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a).

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

Response: Please see my response to Question 13(a).

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(a).

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

a. What experience do you have with copyright law?

Response: In my years of experience as a public defender, and in private practice and civil rights, I do not recall working substantially on a case involving copyright law.

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

Response: I do not recall any particular experiences that I have had 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: I have litigated cases raising First Amendment and free speech issues. I worked on at least one case involving trademark infringement as an attorney at Fried, Frank, Shriver & Jacobson LLP, and may have worked on a patent case while serving as a law clerk in the Eastern District of New York.

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: 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).

Courts employ other tools of statutory construction only when text does not unambiguously resolve an interpretive question. *See Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). A court may consider legislative history, but only in certain circumstances and with caution, as a last resort. The Supreme Court has explained that "[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).

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: My understanding is that an expert federal agency's advice or analysis, such as that referenced in this question, generally does not warrant *Chevron*-style deference. Such interpretations are "entitled to respect," but only to the extent that those interpretations have the "power to persuade." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (internal citation omitted).

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

Response: As a judicial nominee, it would be inappropriate for me to comment on a matter that could potentially come before me. If confirmed as a district court judge, I would faithfully and impartially apply binding Supreme Court and Second Circuit precedent to the facts of the case.

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

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

Response: If confirmed as a district judge, I would faithfully and impartially follow all Supreme Court and Second Circuit precedent, including with respect to the interpretation and application of the DMCA and other federal statutes. The questions referenced above are issues in the purview of policy makers, not the judicial branch. If confirmed as a district court judge, my role would be limited to that judicial function.

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

Response: Please see my response to Question 17(a).

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

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

Response: The Second Circuit has stated:

> [T]he 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[.]

Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001). If confirmed, I would faithfully and impartially apply this precedent to the facts of the case before me.

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

Response: Generally speaking, it is not the role of a judge to encourage any litigant to file or discourage any litigant from filing a case in any particular court. If confirmed as a district court judge, I would faithfully and impartially follow all Supreme Court and Second Circuit precedent concerning issues of venue and would adhere to the local rules and procedures regarding the assignment of cases.

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

Response: Please see my response to Question 18(b).

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

Response: Please see my responses to Questions 18(a) and (b).

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

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

Response: Under 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947). As a judicial nominee, it would not be appropriate for me to comment further on how the Federal Circuit should address these hypotheticals. If confirmed as a district court judge, I would faithfully and impartially follow binding Supreme Court and Second Circuit precedent.

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

Response: Please see my response to Question 19(a).

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?

Response: As a judicial nominee, it would be inappropriate for me to comment on the appropriateness of the inquiry described in this question. If confirmed as a district court judge, I would faithfully and impartially follow Supreme Court and Second Circuit precedent, as well as the Federal Rules of Civil Procedure and the Local Rules of United States District Courts for the Southern and Eastern Districts of New York regarding venue.

b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a

local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?

Response: Please see my response to Question 20(a).

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

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

Response: As a judicial nominee, it would be inappropriate for me to comment on the conduct of other judges.

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

Response: Please see my response to Question 19.