Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Sarah Merriam
Nominee to the Court of Appeals for the Second Circuit
June 1, 2022

1. **Between your time as a district court judge and your time as a federal magistrate judge, you have served on the federal bench for over seven years. During that time, you have presided over hundreds of matters, including five trials that proceeded to final judgment. You have also helped facilitate the settlement of hundreds of cases.**

   Can you tell us about how your seven years on the federal bench have prepared you for the Second Circuit?

   Response: I have been very fortunate to have served as both a Magistrate Judge and a District Judge, which has given me a breadth of experience in both civil and criminal matters. I have reviewed literally thousands of applications for criminal investigatory orders. I have ruled on hundreds of discovery and case management motions. I have taken countless Grand Jury returns. I have presided over trials, and selected juries. I have sat across the table from hundreds of litigants in settlement conferences and heard their stories, and tried to help them reach resolution. Perhaps most significantly, as a Magistrate Judge I had the opportunity to work on cases presided over by every District Judge of my Court. That experience allowed me to learn from my colleagues which practices worked well, and which I would choose to incorporate into my own chambers practices. And now, as a District Judge, I am able to work with all of the Magistrate Judges in my District, and learn from them as well. Trial court judges rely on the guidance of the Circuit Courts of Appeals day in and day out. After seven years, I am keenly aware of the need for the Court of Appeals to provide clear, consistent, practical guidance, even or perhaps especially in areas of the law that might seem mundane. I will bring those years of experience with the practical application of Appeals Court decisions to bear if I am confirmed to join the Court of Appeals myself.

2. **Although you once served on the other side of the courtroom as an Assistant Federal Defender, the Committee has received a letter of support from 24 former federal prosecutors who served in the District of Connecticut. This includes three former U.S. Attorneys appointed by Presidents of both parties. The former prosecutors wrote that while serving as a federal defender, you "demonstrated a respect for the Government's prerogatives and an appreciation for the challenges faced by law enforcement." They described you as "a practical and credible colleague." The former prosecutors noted that you were selected to lead the Federal Defender's efforts to implement the Fair Sentencing Act—a law that I authored to reduce the sentencing disparities between crack and powder cocaine. This required close coordination with the U.S. Attorney's Office. As the former prosecutors described it: "Judge Merriam's credibility with federal prosecutors, her high level of organization, and her practical approach to problem solving resulted in efficient and just dispositions for hundreds of people."**

Can you tell us about your work implementing the Fair Sentencing Act, and how you went about working with the U.S. Attorney's Office to get it done?

Response: In the District of Connecticut, we are fortunate to have a criminal bar that is zealous in its work, but collegial and practical as well. When I served as an assistant federal defender, I was proud of the productive relationships I had with prosecutors, and the mutual respect we had for each other and for our mutual obligations in the federal criminal justice system. When the first changes to the sentencing laws for crack and powder cocaine took effect, the Court community acted collectively to ensure that implementation was efficient. I worked with members of the United States Attorney's Office and the United States Probation Office to identify defendants who, if found eligible for a sentence reduction, might qualify for "immediate release," that is, defendants who had already served more time than would be required under a reduced sentence. Collectively, we assembled a list of potentially eligible defendants and set about the task of attempting to determine whether we could reach consensus on the appropriateness of release for that first group of defendants. We then applied that approach to the much broader universe of all defendants who had been sentenced for offenses involving crack cocaine. I handled many of the cases myself, but also supervised the distribution of hundreds of cases to other lawyers, and tracked those cases on a nearly daily basis to ensure that they were being actively addressed. There were cases on which the parties immediately agreed that a reduction in sentence was appropriate, and what the extent of that reduction should be. There were cases in which the parties agreed that a reduction was appropriate, but disagreed on the extent of it. There were cases in which the government opposed a reduction in sentence, and the defendant sought a reduction. Overall, though, it was a truly collaborative effort. I believe that the effective and cooperative nature of that exercise helped to form deeper bonds of respect and appreciation among all of the participants that have served our District well.

3. **During your hearing, you spoke about the judge that you clerked for on the Second Circuit—Judge Thomas Meskill. As you've noted in previous speeches, Judge Meskill was somewhat controversial when he was first nominated by President Nixon, because he had served as a Republican governor and congressman. Critics worried that he would be a political activist on the bench. But you wrote in a letter to the editor of the *Hartford Courant* that he proved the naysayers wrong and served as a truly independent judge. At your investiture to be a magistrate judge, you said that Judge Meskill "taught me that partisan politics have no place in judicial chambers."**

   Can you tell us a little more about how Judge Meskill's example has guided you during your time as a federal judge?

   Response: Judge Meskill was a mentor and a friend to me. Sadly, he passed away before I took the bench, but I have tried to carry his lessons with me as I have served. Judge Meskill had spent decades in positions of power by the time I met him, but he never wanted "yes-men" around him. He wanted his law clerks to provide their own analysis, and push back on his if there was disagreement, because he genuinely believed that two minds were better than one, even when one was his distinguished mind. To that end, he did not allow the law clerks to talk to him at all about a pending case until after the law clerk had provided him with a

final bench memo, summarizing the clerk's view. He worried that otherwise, the law clerk would simply parrot back to him what the clerk believe the Judge wanted to hear. In spite of that opportunity and invitation to dissent, I do not recall that Judge Meskill and I ever disagreed on any significant issue. I share Judge Meskill's belief that the law is the law, and a judge's reading of the law must be unaffected by the judge's personal history or views. I am very proud to have been Judge Meskill's law clerk, and I am very grateful for his guidance.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Sarah A. L. Merriam
Nominee to be United States Circuit Judge for the Second Circuit

1. **In *Romero v. Prindle Hill Construction, LLC*, you wrote that "[w]age and hour laws protect undocumented workers, just as they protect United States citizens." You also suggested that "precluding evidence of plaintiff's immigration status furthers the purpose and intent of the" Fair Labor Standards Act. In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court held that awarding backpay to an undocumented alien "is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)."[1] The Court explained that generally, "if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status."[2]**

    a. **Please describe your understanding of any Second Circuit precedent concerning the applicability of labor laws to undocumented workers, including any cases interpreting *Hoffman* and its reach.**

    Response: The Second Circuit, acknowledging Hoffman, has found that "an order requiring an employer to pay his undocumented workers the minimum wages prescribed by the [FLSA] for labor actually and already performed[]" is permissible and that the "IRCA does not preclude such FLSA awards." Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 243 (2d Cir. 2006) (collecting cases). As a judge for the past seven years, I have been bound by Supreme Court and Second Circuit precedent. I note, however, that other courts agree with the Second Circuit on this issue. See, e.g., Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 933 (8th Cir. 2013) ("[W]e hold that aliens, authorized to work or not, may recover unpaid and underpaid wages under the FLSA."). The Eleventh Circuit has noted that the Department of Labor has "interpreted the FLSA to cover undocumented aliens" since at least 1942, and "[s]ince that time the Department of Labor has enforced the FLSA on behalf of undocumented workers on numerous occasions. ... As the agency charged with implementing the act ... the Department's interpretation is entitled to considerable deference." Patel v. Quality Inn S., 846 F.2d 700, 703 (11th Cir. 1988). "Unlike the NLRA, there is nothing in the FLSA that would allow us to conclude that undocumented aliens, although protected by the Act, are nevertheless barred from recovering unpaid wages thereunder." Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1307 (11th Cir. 2013).

    b. **How, in your view, are the purposes of the Fair Labor Standards Act furthered by applying the Act to undocumented workers?**

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[1] 535 U.S. 137, 140 (2002).
[2] *Id*. at 148. *See* 8 U.S.C. § 1324a.

Response: As a federal District and Magistrate Judge in the District of Connecticut for the past seven years, I have followed Supreme Court precedent regarding the scope and purpose of the FLSA. The Supreme Court has explained that the FLSA "declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission." Powell v. U.S. Cartridge Co., 339 U.S. 497, 516 (1950). The Second Circuit has explained: "The FLSA is construed liberally to apply to the furthest reaches consistent with congressional direction to accomplish the FLSA's purposes. Enacted in 1938, the FLSA set up a comprehensive legislative scheme in part to prevent the production of goods under labor conditions that were detrimental to the maintenance of the minimum standards of living necessary for health and general well-being. The FLSA was intended to protect workers from substandard conditions and the fair-minded employer from unfair competition. The FLSA and its subsequent amendments prohibited child labor, required overtime pay for certain jobs, and established a minimum wage." Velez v. Sanchez, 693 F.3d 308, 325–26 (2d Cir. 2012) (citations and quotation marks omitted). I am aware that in cases relating to this question, government officials have opined that permitting employers to hire undocumented workers at substandard wages undercuts the wage market for workers – legal and illegal – and rewards employers for hiring undocumented workers. For example, the Secretary of Labor has stated: "[A]pplying the FLSA to unauthorized aliens 'is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation.'" Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 936 (8th Cir. 2013) (quoting amicus brief by Secretary of Labor).

c. **How does your decision in *Romero* comport with the Supreme Court's reasoning in *Hoffman*?**

Response: As a federal District and Magistrate Judge in the District of Connecticut for the past seven years, I have followed Supreme Court regarding the scope and purpose of the FLSA. The Second Circuit decision in Madeira made clear that FLSA wage awards are not precluded by the Hoffman case. Hoffman was focused on the role and authority of the NLRB; it makes no reference to the FLSA. The Supreme Court in Hoffman stated: "This case exemplifies the principle that the Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad, is not unlimited." Hoffman, 535 U.S. at 142–43 (2002) (citations and quotation marks omitted). The focus of the ruling was on the scope of the NLRB's authority, particularly with regard to the use of particular remedies: "[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." Id. at 147. Furthermore, in Hoffman, the Supreme Court held that undocumented workers were entitled to the protection of the laws at issue there; the only error found was the nature of the remedy awarded, in the unique context of the NLRB's regulatory authority. As the Eleventh Circuit has noted, "[n]or does Hoffman cast doubt on our holding that undocumented aliens may recover their unpaid wages under the FLSA." Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1307 (11th Cir. 2013).

2. **In 2016, you decided to release a man who admitted to robbing seven banks back into the community to stay at a sober house. The Assistant U.S. Attorney prosecuting the case remarked that he had never heard of "any bank robber that gets out on bond, let alone one who robbed seven banks." Please explain why you believed it was appropriate to release this man after he violated the conditions of his supervised release.**

   Response: I have identified the case that I believe is referenced here, and reviewed the ECF case file. I understand that a news article reported the prosecutor as making this statement, but I do not recall it specifically, and there are no transcripts available in the ECF file. Respectfully, I would note that I did not make the finding that the defendant should be released at the time of his guilty plea. I handled his initial presentment, and I did order him released before he was found guilty, on strict conditions, including inpatient treatment, and a prohibition on his leaving that inpatient facility except for treatment and court appearances. The finding that the defendant should be released at the time of his guilty plea was made by another judge. I later handled a motion to modify the conditions of his release, which was not opposed by the government or the probation officer, to permit the defendant to move from one residential facility to a different residential facility. The modification was necessary because the defendant had relapsed into drug use and had been expelled from the first facility. Neither the government nor the probation officer requested that the defendant's release be revoked. I granted the motion to modify the existing conditions of release, and imposed strict conditions, including substance abuse and mental health treatment, drug testing, residence in a sober house, location monitoring, and curfew. At each step of the process, I applied the standards in the Bail Reform Act, 18 U.S.C. §3142, et seq.

3. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: In determining whether a right is "fundamental," a court considers whether it "is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is deeply rooted in this Nation's history and tradition." McDonald v. City of Chicago, Ill., 561 U.S. 742, 767 (2010) (citations and quotation marks omitted).

4. **Please explain the difference between the original intent of a law and its original public meaning.**

   Response: The original intent of a law refers to the intent of the people who drafted and adopted the law. The original public meaning of a law refers to the understanding an informed person in the community at the time the law was enacted would have had regarding the meaning and purpose of the law.

   a. **If there is a conflict between a law's original intent and original public meaning, which should a judge rely on to determine how to interpret and apply the law?**

Response: I am not aware of any guidance from the Supreme Court as to whether original intent or original meaning should govern, if the two are in conflict. Ordinarily original public meaning will inform the inquiry into original intent, rather than contradict it. In the event of a conflict, I would have to determine which evidence was more persuasive, and more in harmony with the plain text of the statute itself.

5. **As a judge, what legal framework would you use to evaluate a claim about a violation of the Establishment Clause?**

Response: The Supreme Court has identified three factors that a court must consider in evaluating an Establishment Clause claim: "[A] court may invalidate a statute [under the Establishment Clause] only if it is motivated wholly by an impermissible purpose, if its primary effect is the advancement of religion, or if it requires excessive entanglement between church and state." Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (citations and quotation marks omitted). While the Supreme Court has not expressly overruled its holding in Lemon v. Kurtzman, 403 U. S. 602 (1971), the Lemon "test for resolving Establishment Clause disputes[]" has been described by Justice Gorsuch as belonging to a "bygone era" and as being "an anomaly and a mistake." Shurtleff v. City of Boston, Mass., 142 S. Ct. 1583, 1604, 1606 (2022) (Gorsuch, J., concurring) (citation and quotation marks omitted); see also Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("In many cases, this Court has either expressly declined to apply the [Lemon] test or has simply ignored it.").

6. **Please describe your understanding of the constitutionality of nationwide or universal injunctions based on current Supreme Court and Second Circuit precedent.**

Response: This is an open question in federal law. The Supreme Court has held that, in a class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). More recently, the Court has observed that only where a constitutional violation has been shown to be "systemwide" should the corresponding injunctive relief be given that scope. Lewis v. Casey, 518 U.S. 343, 359 (1996). Justice Thomas has expressed skepticism about whether such injunctions are within the authority of a district court. See Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). He observed, however, that "[a]n injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide." Id. at 2425 n.1. Justice Gorsuch noted recently that the Supreme Court has not yet taken up what he views as "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). If presented with this question, I would apply Supreme Court and Second Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: Yes. See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) (acknowledging "the liberty of parents and guardians to direct the upbringing and education of children under their control."); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) ("Parents, of course, have a liberty interest, properly cognizable under the Fourteenth Amendment, in the upbringing of their children.").

8. **Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?**

   Response: The Supreme Court has recently treated these two doctrines as effectively interchangeable, apparently viewing Auer as merely a reaffirmation of Seminole Rock, which predates it by more than 50 years: "This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice Auer deference, or sometimes Seminole Rock deference, after two cases in which we employed it." Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

9. **When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?**

   Response: I would consider the context of the text, including the structure of the larger text to which it belongs. I would apply any binding precedent addressing the meaning of the text. I would then consider persuasive but non-binding precedent, including decisions of courts around the country, and decisions interpreting similar statutes. I would employ any canons of construction that were relevant and persuasive. Finally, if ambiguity remained, I would consider legislative history if it were persuasive and available. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'").

10. **When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?**

    Response: I am not aware of any Supreme Court or Second Circuit guidance on this issue. However, I would evaluate the canons to determine whether, in this area of the law, one had been found more useful than the other; consider whether one canon was generally more accepted by the Supreme Court than the other; and assess whether one canon produced an outcome more consonant with the statutory text and the structure of the text as a whole.

11. **How do you decide when text is ambiguous?**

    Response: I read the text, in context. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). Mere disagreement among parties, lawyers, or even courts, does

not necessarily render text ambiguous. See, e.g., Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 461 (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.").

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

Response: I cannot provide a yes or no response to these questions. I believe such a response would violate my obligations as a judge to honor all currently binding Supreme Court precedent equally.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. That includes Brown v. Board of Education, which I do believe was correctly decided.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. That includes Loving v. Virginia, which I do believe was correctly decided.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: As a judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent.

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

Response: I contacted the offices of Senator Blumenthal and Senator Murphy in late January 2022, expressing my interest in being considered for a position with the Second Circuit Court of Appeals. I completed a questionnaire for review by an Advisory Committee appointed by the Senators, which I submitted through staff members of Senator Blumenthal and Senator Murphy's offices. I participated in a remote interview with the Advisory Committee in March 2022. I was then contacted by Senator Blumenthal's office to arrange an interview with Senator Blumenthal and Senator Murphy by Zoom, which also occurred in March 2022.

I was contacted by the White House Counsel's Office on April 9, 2022. I was then in contact with officials from the Office of Legal Policy at the Department of Justice. On April 27, 2022, the President announced his intent to nominate me.

14. **During your selection process, did you talk with anyone from or anyone directly associated with the Raben Group or the Committee for a Fair Judiciary? If so, what was the nature of those discussions?**

Response: No

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

Response: No.

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

Response: No.

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

Response: No.

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

    Response: No.

19. **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, and/or Jen Dansereau?**

       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, and/or Jen Dansereau?**

       Response: No.

20. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: No.

21. **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.

22. **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.

23. **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.

24. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.**

a. Has anyone associated with The Raben Group or the Committee for a Fair Judiciary 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 Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?

Response: No.

c. Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?

Response: No.

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

Response: I received the questions by email on June 1, 2022, and immediately began preparing my responses. I conducted research on Westlaw, in the Court's ECF system, and through other online sources regarding particular terms and cases raised by some of the questions. I shared my responses with employees of the Department of Justice, Office of Legal Policy, Judicial Nominations staff, who offered feedback on some of my responses.

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

Questions for the Record for Sarah A.L. Merriam, Nominee for the Second Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Discrimination on the basis of race in violation of the Constitution or the laws of the United States is illegal.

2. **In *Romero v. Prindle Hill Constr., LLC*, where you granted a motion to preclude evidence of the plaintiff's immigration status, you suggested that, "precluding evidence of plaintiff's immigration status furthers the purpose and intent of the FLSA."**

   a. **How did you determine what the purpose of the FLSA was in reaching your decision?**

   Response: I relied on Supreme Court and Second Circuit decisions articulating the purpose of the FLSA generally. Additionally, my decision was informed by persuasive precedents from other courts that had confronted the specific issue in that case because Supreme Court and Second Circuit precedent did not address the issue directly. As the Second Circuit has summarized: "[B]oth the Supreme Court and our Court have long recognized as the FLSA's underlying purpose: 'to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (internal quotation marks omitted)." Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015). See also Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 147 (2012) ("Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'"); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987) ("While improving working conditions was undoubtedly one of Congress' concerns, it was certainly not the only aim of the FLSA. In addition to the goal identified by petitioner, the Act's declaration of policy, contained in § 2(a), reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions."); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) ("The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.").

   b. **What sources are appropriate for judges to consider when divining the purpose of a statute?**

   Response: First, if the text of a statute is clear, any inquiry into its purpose ends there.

Second, I am bound by Supreme Court and Second Circuit precedent construing a particular statute. If it in fact becomes necessary to consider the purpose of a statute, and the text itself, the existing precedent, and other tools of construction do not resolve the question, the Supreme Court and the Second Circuit have approved the use of legislative history, though generally as a last resort. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'"). "If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143 (2018). The Supreme Court has recently confirmed that though it may be useful at times, "legislative history is not the law." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) (citations and quotation marks omitted). As such, the purpose as expressed in the text of a statute must control. I would attempt to discern the purpose of a statute, as necessary, consistent with Supreme Court and Second Circuit precedent.

c. **How have you considered legislative history in your judicial experience to date?**

Response: I can recall considering legislative history only once in more than seven years on the bench, in interpreting a Connecticut state statute. Connecticut law expressly instructs that legislative history may be used in statutory interpretation. See State v. Orr, 969 A.2d 750, 757–58 (Conn. 2009). I based my analysis primarily on the plain text of the statute, with reference to the structure and context. I concluded that the "limited history" available was "not particularly persuasive, but it supports the Court's interpretation" of the statute at issue. Mahon v. Chicago Title Ins. Co., No. 3:09CV00690(AWT)(SALM), 2017 WL 3331738, at *6 (D. Conn. Aug. 4, 2017).

d. **When deriving the intent of a statute, do you assume all legislators were motivated by the same reasoning? If not, whose intent do you look at? Do you look for what the intent of most of the majority was at the time?**

Response: It is impossible to divine the intent of every member of a legislative body. The Supreme Court has provided some guidance as to what forms of legislative history may be persuasive, that is, what expressions of intent may be considered reliable.

e. **Would the intent of a plurality of the majority of legislators be something that a judge should endeavor to give force to?**

Response: A judge should give force to the statutory text, which is the truest expression of the intent of the legislature.

f. **If the purpose of a statute conflicts with the express text, which carries more weight?**

Response: The text of a statute always controls.

3. **Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?**

Response: I am not aware of any potential unenumerated rights that might be identified by the Supreme Court in the future.

4. **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: My judicial philosophy is quite simple: The rule of law governs. I have no agenda other than applying the law to the facts before me. I have served as a judge in the trial court for more than seven years. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties. There is no individual Justice whose philosophy I can identify as most analogous to my own. When I read a Supreme Court case in my research, I am focused on the holding of the case, rather than the author, and I think of each Supreme Court ruling as embodying the collective wisdom of the majority of the Court, rather than the views of one Justice.

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

Response: Black's Law Dictionary defines "originalism" as: "The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect. — Also termed doctrine of original public meaning; original-meaning doctrine; original public meaning. 2. The doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding. • Sense 1 is an objective test. Sense 2 embodies a subjective test." Originalism, Black's Law Dictionary (11th ed. 2019). I have never described myself as an "originalist." While I am aware that academics and commentators use that term, I have not used it. I believe that, where supported by Supreme Court precedent, interpretation of a constitutional provision should take into account "the intent of those who prepared it or made it legally binding" and the "meaning that it would have conveyed to a fully informed observer at the time when" it was adopted. Id. If I am confirmed as a Judge of the Court of Appeals I will continue to follow the guidance of the Supreme Court and the Second Circuit in interpreting the Constitution.

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

Response: Black's Law Dictionary defines "living constitutionalism" as: "The doctrine

that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values. • While many authorities use the terms living constitutionalism and nonoriginalism interchangeably, others view living constitutionalism as a form of nonoriginalism that values interpretive conformity with changed circumstances and norms more greatly than do other forms of nonoriginalism." Living Constitutionalism, Black's Law Dictionary (11th ed. 2019). I have never described myself as a "living constitutionalist." While I am aware that academics and commentators use that term, I have not used it. The Constitution has served this country for more than 230 years, and I expect it will continue to do so for many centuries more. If I am confirmed as a Judge of the Court of Appeals, I would continue to interpret the Constitution in accordance with the established precedent of the Supreme Court and the Second Circuit.

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

Response: In my seven years as a federal District and Magistrate Judge, I have not confronted a question of constitutional first impression. If such a question were to come before me, the text of the Constitution controls, and no further inquiry would be necessary if the text is clear as to the question presented. If the text of the provision were ambiguous, I would look to other sources of interpretation such as the original public meaning and binding precedent regarding the interpretation of similar provisions.

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

Response: The Supreme Court has recently reaffirmed that a statute's "ordinary meaning at the time of enactment usually governs," rather than any current understanding of that meaning. Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1750 (2020). Likewise, in interpreting constitutional provisions, the Supreme Court has confirmed that courts should be guided by "the principle that the Constitution was written to be understood by the voters[,]" and interpret constitutional provisions in accordance with the understanding that "ordinary citizens in the founding generation[]" would have had. D.C. v. Heller, 554 U.S. 570, 576-77 (2008) (citation and quotation marks omitted). In the Eighth Amendment context, the Supreme Court has found that "objective evidence of contemporary values ... is entitled to great weight[.]" Kennedy v. Louisiana, 554 U.S. 407, 434, as modified (Oct. 1, 2008), opinion modified on denial of reh'g, 554 U.S. 945 (2008). Even that is not without controversy, however. See Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (disagreeing with majority's use of "public opinion poll results" in consideration of Eighth Amendment issues); Trop v. Dulles, 356 U.S. 86, 101 (1958) (discussing "evolving standards of decency"). If presented with the issue, I would consider such current public understanding only if and when such consideration is consistent with Supreme Court and Second Circuit precedent.

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

Response: Only in those limited circumstances when the Supreme Court so declares. If I am confirmed as a Judge of the Court of Appeals, my role would be to apply the Constitution as it has been interpreted by the Supreme Court, and by the Second Circuit. I would continue to faithfully apply that precedent, and honor the limitations it imposes.

10. **You mentioned that you have over 400 opinions on Westlaw. Which of those opinions best demonstrates your fidelity to the law and judicial philosophy?**

Response: This is a difficult question, given the great diversity of cases that have come before me over the past seven years. I believe my decision in Moy v. State Farm Fire & Cas. Co., No. 3:18CV01754(SALM), 2022 WL 198468 (D. Conn. Jan. 21, 2022), reconsideration denied, No. 3:18CV01754(SALM), 2022 WL 669480 (D. Conn. Mar. 7, 2022), illustrates my basic approach in civil cases.

11. **In *United States v. Dragone*, you granted a motion that released a dangerous defendant back into the community to stay at a sober house. The defendant had pled guilty to one robbery and admitted to robbing six more banks, violated the terms of his initial release from federal custody the summer prior, and had 10 prior state convictions. You were quoted saying that you were "willing to give [him] another chance" but that at some point "those chances run out."**

Response: I understand that a news article reported in August 2016 that I made this statement, but I do not recall it specifically, and there are no transcripts available in the ECF file. Respectfully, I would note that I did not make the finding that the defendant should be released at the time of his guilty plea. I handled his initial presentment, and I did order him released before he was found guilty, on strict conditions, including inpatient treatment, and a prohibition on his leaving that inpatient facility except for treatment and court appearances. The finding that the defendant should be released at the time of his guilty plea was made by another judge. I later handled a motion to modify the conditions of his release, which was not opposed by the government or the probation officer, to permit the defendant to move from one residential facility to a different residential facility. The modification was necessary because the defendant had relapsed into drug use and had been expelled from the first facility. Neither the government nor the probation officer requested that the defendant's release be revoked. I granted the motion to modify the existing conditions of release, and imposed strict conditions, including substance abuse and mental health treatment, drug testing, residence in a sober house, location monitoring, and curfew. At each step of the process, I applied the standards in the Bail Reform Act, 18 U.S.C. §3142, et seq.

a. **What did you mean by "those chances would run out"?**

Response: As noted, I do not recall making that statement. If I did make that statement, I

suspect I would have meant that a defendant's conduct must be considered in evaluating the factors set out in 18 U.S.C. §3142 and §3143, governing the decision as to whether a defendant should be detained or released, as well as 18 U.S.C. §3148(b), governing the question of whether a defendant's release should be revoked. If a defendant engages in conduct that shifts the balance against release, the Court may elect, upon motion or on its own initiative, to revoke release. If I used that language, it would have been in an effort to warn the defendant of the serious consequences of any future violation of release, including a relapse into drug use.

b. **In that case, what would have been enough for your chances for him to "run out"?**

Response: Violation of the conditions I imposed. Upon granting the unopposed motion to modify conditions of release in August 2016, I imposed strict conditions including substance abuse and mental health treatment, drug testing, residence in a sober house, location monitoring, and curfew. In late September 2016, the defendant failed to report for required drug testing, and missed treatment sessions. When I was informed of these violations, I immediately issued a warrant for the defendant's arrest, and upon his presentment, I revoked his release and ordered him detained. In November 2016, the defendant filed a motion seeking release to an inpatient facility, which I denied. The defendant remained detained until he was sentenced by the presiding judge.

12. **What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?**

Response: The "rebuttable presumption" of 18 U.S.C. §3142(e)(3) provides for a presumption in favor of detention for defendants charged with drug offenses carrying a maximum sentence of ten years or more, certain offenses involving terrorist activities, certain offenses involving minor victims, crimes involving slavery or human trafficking, and certain enumerated offenses, including most commonly, in my experience, violation of 18 U.S.C. §924(c).

a. **What are the policy rationales underlying such a presumption?**

Response: I am not aware of any decisions examining the policy rationale for the rebuttable presumption, or of any authoritative statement of that rationale.

13. **At your investiture in 2015, Senator Murphy noted that there was a period in your life that you were "being paid for showing an absolute lack of judicial temperament." In the same year, you described yourself as "totally flappable." Would you consider Senator Murphy's statements incorrect? Or, alternatively, would you say that your temperament has changed since the time that those comments were made?**

Response: I believe Senator Murphy was referring to the fact that during the time when I

was in regular contact with him, in the 1990s and again in 2006, I was working as an advocate, including on political campaigns. As an advocate, it was my job to present one side of an issue, and to do so, sometimes, rather vociferously. For more than seven years now, I have been a sitting judge. As a judge, my role is entirely different. I have no "side" as a judge. I am neutral, unbiased, and independent. I have taken that shift from advocacy to neutrality very seriously, and internalized it. My comment about being "flappable" was in the context of relating the time, before I was sworn in as a Magistrate Judge, when I first realized just how challenging judging would be. As I heard my predecessor described, after decades on the bench, as "unflappable," the incredible responsibility of the task I was soon to take on struck me. Becoming a judge is – and should be – awe-inspiring, humbling, and a little bit scary. Over the past seven years I have constantly strived to live up to the standards set by those who came before me, and I have developed a calm and confident judicial demeanor, but I have never forgotten that moment, the need to always be conscious of the incredible trust that has been placed in me, and the need to earn that trust every day.

14. **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: Both constitutional and statutory provisions limit the burdens a government may impose on private institutions. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). The protection extends to small business, see, e.g., Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018), and institutions, see, e.g., Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1871 (2021). Strict scrutiny applies to any law that is not genuinely neutral and generally applicable. See, generally, Lukumi, 508 U.S. 520. Likewise, 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" unless the government "demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1. This effectively codifies the strict scrutiny standard that applies to Free Exercise claims involving laws that are not genuinely neutral and generally applicable. The Supreme Court has found that the "free-exercise rights of corporations" and other private entities are protected, because doing so "protects the religious liberty of the humans who own and control those companies." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014).

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

Response: Any governmental policy that discriminates on the basis of religion – whether that discrimination be facial, or through a facially neutral policy motivated by religious

animus, or by treating comparable secular activity more favorably than religious activity – is subject to strict scrutiny, and must be narrowly tailored to serve a compelling state interest.

16. **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: The Court found that the plaintiffs had "shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020). In particular, the Court noted that the challenged regulations "violate[d] the minimum requirement of neutrality to religion[]" and "single[d] out houses of worship for especially harsh treatment." Id. (citations and quotation marks omitted). The Court found that the regulations could not withstand strict scrutiny, leading to a conclusion that the plaintiffs had established a likelihood of success on the merits as required to issue a preliminary injunction. The Court also observed that any loss of First Amendment rights constitutes irreparable harm.

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

Response: In Tandon v. Newsom, 141 S. Ct. 1294 (2021), the Court found that COVID restrictions imposed by the State of California treated certain religious gatherings less favorably than some secular activities, and that the restrictions therefore were not content-neutral, triggering strict scrutiny review. The Court found that the restrictions violated the petitioners' free exercise rights, and issued an emergency injunction against the restrictions pending appeal.

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

Response: Yes.

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

Response: The Supreme Court found that the Civil Rights Commission had not given the business owner, Phillips, "[t]he neutral and respectful consideration" to which he was entitled. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018). Instead, the Court found that it was apparent that the Commission was hostile to

the "sincere religious beliefs that motivated his objection." Id. "The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." Id. at 1732.

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

Response: The Supreme Court has explained that an individual's beliefs need not perfectly align with any particular faith or organized religion in order to be protected: "[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." Frazee v. Illinois Dep't of Emp. Sec., 489 U.S. 829, 834 (1989). The touchstone of the inquiry is whether the individual's religious beliefs are "sincerely held."

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

Response: Again, the touchstone of the inquiry is the sincerity of the individual's beliefs, not the number of variations in such beliefs that may be possible. "While it is a delicate task to evaluate religious sincerity without questioning religious verity, our free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions." Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996).

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

Response: The Supreme Court has made clear that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981). As noted, it has also confirmed that an individual need not hew to any particular doctrine to enjoy the protection of the Free Exercise Clause. See Frazee v. Illinois Dep't of Emp. Sec., 489 U.S. 829, 834 (1989).

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

Response: I do not know the official position of the Catholic Church, and I am not qualified to comment on it.

21. **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: The Supreme Court extended the so called "ministerial exception" to teachers in a religious school who were not formally considered "ministers." The Court found that an employee's formal title is not the deciding factor; rather, the Court looked to whether the employee has "an important responsibility in elucidating or teaching the tenets of the faith." Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020). The Court concluded that the teachers were subject to the ministerial exception because "they both performed vital religious duties." Id. at 2066. Accordingly, their ADEA claims could not proceed.

22. **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: The Supreme Court found that the City of Philadelphia's refusal to contract with CSS based on its religious affiliation violated CSS's rights under the Free Exercise and Free Speech Clauses of the First Amendment. In particular, the Court focused on the fact that the relevant policy allowed for discretionary exceptions, and the City simply refused to grant such an exception to CSS based on its religious beliefs. The Court applied strict scrutiny, and found that the City's interests "cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." Fulton v. City of Philadelphia, Penn., 141 S. Ct. 1868, 1882 (2021) (citation and quotation marks omitted).

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

Response: Justice Gorsuch agreed with the decision of the Court that remand was warranted in light of the decision in Fulton v. City of Philadelphia, Penn., 141 S. Ct. 1868 (2021). He wrote separately to emphasize the specificity with which the government was required to justify its actions, stating that the government "must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." Mast v. Fillmore Cnty., Minnesota, 141 S. Ct. 2430, 2433 (2021). If a government agency can possibly achieve its compelling state interest without burdening religious freedom, he observed, "it must do so." Id. (quoting Fulton, 141 S. Ct. at 1881).

24. **You mentioned that there is a federal statute that provides that if a person engages in certain activities directed to the attempt to influence a judicial decision or**

threatening a judge, it is a violation of the law. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: The language of the statute is clear. As a sitting judge, it would be inappropriate for me to opine on how I might apply the statute in a particular case, especially when the issue is or may soon be pending in a federal court.

25. **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: The question of what sort of trainings or policies may be undertaken by an employer is one that can and does come before me as a sitting judge, and it would therefore be inappropriate for me to offer hypothetical or advisory rulings on such issues. I can say, however, that the Constitution and law of the United States protect against invidious discrimination on the basis of race and sex, and I will continue to apply the established precedent of the Supreme Court and the Second Circuit in assessing any such claims that come before me.

26. **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: I have not experienced any such trainings in my seven years as a judge to date, and am not aware of any such trainings in the Court to which I have been nominated.

27. **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: I will ensure that my hiring practices comply with the law in all respects.

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

Response: As a sitting judge, I cannot comment on the appropriateness of political appointment decisions. I would apply the established precedent of the Supreme Court and the Second Circuit when assessing any claims relating to this issue that may come before me.

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

Response: I cannot comment on "the criminal justice system" writ large. I have spent my entire legal career in the District of Connecticut. Throughout my years as a criminal defense lawyer, I never felt that a client was treated less favorably because of his or her race. As a sitting judge myself for the past seven years in the District of Connecticut, I treat each individual who comes before me fairly, and without regard to their race.

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

Response: That is a policy matter to be decided by Congress and the President.

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

Response: Yes. See District of Columbia v. Heller, 554 U.S. 570 (2008) (describing the right to possess and carry firearms as an individual right).

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I generally think of prosecutorial discretion as relating to specific decisions to prosecute or decline prosecution, and to the setting of prosecution priorities. The Supreme Court has said: "Prosecutorial discretion involves carefully weighing the

benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." Bond v. United States, 572 U.S. 844, 865 (2014). A "rule change" implies that a rulemaking process has been undertaken, and that a bright line has been drawn as to an entire class of issues.

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

Response: The death penalty is authorized by statute in certain federal criminal cases. See 18 U.S.C. §3591. The statute may be repealed by Congress, but may not be unilaterally repealed by the President.

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

Response: The Court found that the CDC had exceeded its authority in issuing an "eviction moratorium" and therefore vacated the stay pending appeal granted by the District Court, allowing judgment to enter in favor of plaintiffs. The Court concluded: "It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. It is up to Congress, not the CDC, to decide whether the public interest merits further action here." Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (citation and quotation marks omitted).

Senator Josh Hawley
Questions for the Record

Sarah Merriam
Nominee, Second Circuit

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

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

    Response: I am not familiar with that statement by Justice Marshall. However, that is not my philosophy. I follow the law as it is written in the Constitution, statutes, rules, and precedent.

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

    Response: I do not believe it would be appropriate for me, as a sitting judge, to publicly opine as to whether a Supreme Court Justice had violated his judicial oath.

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

    Response: The most common abstention doctrines are addressed below.

    Rooker-Feldman Abstention: "The Rooker–Feldman doctrine provides that, in most circumstances, the lower federal courts do not have subject matter jurisdiction to review final judgments of state courts. See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482–83 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414-16 (1923). The Supreme Court has clarified that the doctrine is confined to 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." Grim v. Baker, 553 F. App'x 84, 85 (2d Cir. 2014) (citation and quotation marks omitted).

    Younger Abstention: "In Sprint, the Supreme Court instructed us that a district court should abstain under Younger 'only in three exceptional circumstances involving (1) ongoing state criminal prosecutions, (2) certain civil enforcement proceedings, and (3) civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.' Falco, 805 F.3d at 427 (quoting Sprint, 571

U.S. at 78) (quotation marks omitted). These three exceptions 'define Younger's scope.' Sprint, 571 U.S. at 78. To be sure, before invoking Younger a federal court may 'appropriately consider[ ]' three additional factors laid out in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982), that further counsel in favor of abstention: Whether 'there is (1) an ongoing state judicial proceeding [that] (2) implicates important state interests and (3) provides an adequate opportunity to raise federal challenges.' Sprint, 571 U.S. at 81 (cleaned up); see Falco, 805 F.3d at 427. But these conditions '[are] not dispositive; they [are], instead, additional factors appropriately considered by the federal court before invoking Younger.' Sprint, 571 U.S. at 81." Cavanaugh v. Geballe, 28 F.4th 428, 432 (2d Cir. 2022).

Pullman Abstention: "A case that involves unsettled state law issues preliminary to consideration of a federal constitutional question ... falls within the heartland of Pullman abstention." Osterweil v. Bartlett, 706 F.3d 139, 145 (2d Cir.), certified question accepted, 985 N.E.2d 428 (N.Y. 2013), and certified question answered, 999 N.E.2d 516 (N.Y. 2013).

Colorado River Abstention: "Under the Colorado River exception the court may abstain in order to conserve federal judicial resources only in exceptional circumstances, where the resolution of existing concurrent state-court litigation could result in comprehensive disposition of litigation." Woodford v. Cmty. Action Agency of Greene Cnty., Inc., 239 F.3d 517, 522 (2d Cir. 2001) (citations and quotation marks 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: N/A.

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

Response: The Supreme Court has found that original public meaning is relevant in its interpretation of certain Constitutional provisions. Notably, in District of Columbia v. Heller, 554 U.S. 570 (2008), the Court considered the original public meaning of the Second Amendment right to bear arms, and in Crawford v. Washington, 541 U.S. 36 (2004), of the Confrontation Clause of the Sixth Amendment. If confirmed, I will

continue to follow Supreme Court and Second Circuit precedent regarding the appropriate tools for Constitutional interpretation.

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

Response: I can recall considering legislative history only once in more than seven years on the bench. The Supreme Court and the Second Circuit have, in some circumstances, looked to legislative history in interpreting laws, if the plain language of the statute is unclear, and persuasive legislative history is available. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'"). "If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143 (2018). The Supreme Court has recently confirmed that though it may be useful at times, "legislative history is not the law." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) (citations and quotation marks omitted). I would use legislative history in interpreting a law only if and when such use is consistent with Supreme Court and Second Circuit precedent.

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: Within the broad category of "legislative history," different sources are accorded different weight. See, e.g., Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (describing excerpts from committee testimony as "among the least illuminating forms of legislative history" (citation and quotation marks omitted)); Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv., 462 U.S. 810, 833 (1983) (observing that "the report of the entire conference committee ... would be due great weight."); Disabled in Action of Metro. New York v. Hammons, 202 F.3d 110, 124 (2d Cir. 2000) (explaining that "the most authoritative and reliable materials of legislative history" include "the conference committee report, committee reports, sponsor/floor manager statement and floor and hearing colloquy.").

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

Response: The Supreme Court has occasionally looked to foreign law in interpreting the Constitution, primarily, but not exclusively, in the context of the Eighth Amendment. See, e.g., Enmund v. Florida, 458 U.S. 782, 796-97, n.22 (1982) (observing that "felony murder" had been eliminated or restricted in England, India, Canada, and other countries); Coker v. Georgia, 433 U.S. 584, 596, n.10 (1977) (looking to the practice of other nations as to whether the death penalty should be imposed for rape); see also Washington v. Glucksberg, 521 U.S. 702, 711 (1997)

(considering the practices of European countries in evaluating whether "assisted suicide" is protected by the Constitution). The Supreme Court has found that foreign law was "not persuasive authority" in a case concerning "the interpretation to be accorded rules governing procedure in the federal courts and with constitutional doctrine underlying these rules." Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 212 n.2 (1958).

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: "[P]risoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers. To prevail on such a claim, there must be a substantial risk of serious harm, an objectively intolerable risk of harm[.]" Glossip v. Gross, 576 U.S. 863, 877 (2015) (citations and quotation marks omitted). In addition, a prisoner must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk[.]" Id. at 878.

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

   Response: The petitioner must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain. Id. at 878.

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: No. "State collateral proceedings are not constitutionally required[.]" Murray v. Giarratano, 492 U.S. 1, 10 (1989). Given that the proceedings themselves are not constitutionally mandated, it would stand to reason that DNA testing as part of those proceedings is not constitutionally mandated. See also Dist. Attorney's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 72 (2009) (declining to find substantive due process right to DNA evidence in post-conviction proceedings).

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 emphasized 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." Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021). Likewise, "the inclusion of a formal system of entirely discretionary exceptions" in a government policy renders the policy "not generally applicable[,]" thus triggering strict scrutiny review. Fulton v. City of Philadelphia, Penn., 141 S. Ct. 1868, 1878 (2021). A governmental policy that discriminates on the basis of religion – whether that discrimination be facial, or through a facially neutral policy motivated by religious animus, or by treating comparable secular activity more favorably than religious activity – is subject to strict scrutiny, and must be narrowly tailored to serve a compelling state interest. See, e.g., Tandon, 141 S. Ct. 1294; Fulton, 141 S. Ct. 1868; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). A truly "neutral and generally applicable policy is subject to only rational-basis review[.]" Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 631 (2d Cir. 2020).

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: A governmental policy that discriminates against a religious group or belief is subject to strict scrutiny, and must be narrowly tailored to serve a compelling state interest. See, e.g., Tandon v. Newsom, 141 S. Ct. 1294 (2021); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

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

Response: The Supreme Court has explained that an individual's beliefs need not perfectly align with any particular faith or organized religion in order to be "sincerely held." "[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." Frazee v. Illinois Dep't of Emp. Sec., 489 U.S. 829, 834 (1989). The Supreme Court has also made clear that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981). "While it is a delicate task to evaluate religious sincerity without questioning religious verity, our free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions." Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996). In determining whether a religious belief is "sincerely held[,]" the court does not "evaluate the objective reasonableness of the prisoner's belief;" only the sincerity of the belief and whether that belief is religious in nature. Washington v. Gonyea, 538 F. App'x 23, 26 (2d Cir. 2013) (citations and 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: The Supreme Court found that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." D.C. v. Heller, 554 U.S. 570, 592 (2008).

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: I believe Justice Holmes was referring to the fact that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Lochner, 198 U.S. at 75–76 (Holmes, J., dissenting).

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

Response: While Lochner has not been expressly overruled, its continued validity has been called into question by the Supreme Court. See, e.g., Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 861 (1992) (observing that later Supreme Court decisions "signaled the demise of Lochner"); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded."). Nonetheless, as a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any Supreme Court precedent.

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

Response: I am aware that sometimes the viability of a Supreme Court decision is called into question by the Supreme Court itself in later decisions, without an express overruling. Lochner is a good example of that situation. But it remains the Supreme Court's province alone to overrule its prior decisions.

a. If so, what are they?

Response: I am not aware of any.

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

Response: I absolutely commit to faithfully apply all Supreme Court precedent that has not been overruled.

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

a. Do you agree with Judge Learned Hand?

Response: The decision quoted appears to be good law in the Second Circuit, and as such I would be bound to follow it, to the extent it represents a finding of the Court, rather than dicta, which at least the thirty-three percent limitation appears to do.

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

Response: N/A.

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: Under the ALCOA decision cited above, the minimum must be greater than 33%. While "a party may have monopoly power in a particular market, even though its market share is less than 50%[,]" Hayden Pub. Co. v. Cox Broad. Corp., 730 F.2d 64, 69 n.7 (2d Cir. 1984), "a market share below 50% is rarely evidence of monopoly power[.]" Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 (2d Cir. 1981). It thus appears that under Second Circuit law, the minimum market share required is likely to be near to or greater than 50%, though a market share between 33% and 50% would not preclude a finding of monopoly.

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

Response: "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's legislative Powers in Congress and reserves most other regulatory authority to the States. As this Court has put it, there is no federal general common law. Instead, 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) (citations and quotation marks omitted). "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. ... When Congress has not spoken to a particular issue, however, and when there exists a significant conflict between some federal policy or interest and the use of state law, the Court has found it necessary, in a few and restricted instances, to develop federal common law." City of

Milwaukee v. Illinois & Michigan, 451 U.S. 304, 312-13 (1981) (citations and quotation marks omitted). Federal common law is most prevalent in areas such as admiralty and bankruptcy law.

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

Response: The highest court of the State is the ultimate authority on the State law, including interpretation of the State's constitution. Cf. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000). Therefore, I would consult state court precedent in analyzing the State constitution. If state law permitted consideration of the analogous federal constitutional language, I would consider that as well.

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

Response: I would defer to the State courts on that question. If the State courts have pronounced that the State provision was intended to mirror the federal provision, and the State courts have relied upon federal case law interpreting the identical language, that would be a signal that it might be appropriate to interpret the two provisions in the same way. "Where a state law question has not been clearly decided by the state courts, we must make our best estimate of what the state court would rule to be its law." In re Leasing Consultants Inc., 592 F.2d 103, 109 (2d Cir. 1979).

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

Response: The federal Constitution provides certain rights and protections, and those are binding on the states. A state, however, may choose to provide more expansive protections, as long as those protections do not infringe the federal Constitution.

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

Response: As a District Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a Judge of the Court of Appeals, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. That includes Brown v. Board of Education, which I do believe was correctly decided.

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

Response: This is an open question in federal law. The Supreme Court has held that, in a class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). More recently, the Court has observed that only where a constitutional violation has been shown to be "systemwide" should the corresponding injunctive relief be given that scope. Lewis v. Casey, 518 U.S. 343, 359 (1996). Justice Thomas has expressed skepticism about whether such injunctions are within the authority of a district court. See Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). He observed, however, that "[a]n injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide." Id. at 2425 n.1. Justice Gorsuch noted recently that the Supreme Court has not yet taken up what he views as "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). If presented with this question, I would apply Supreme Court and Second Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: See response to Question 20, above.

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

Response: See response to Question 20, above.

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: See response to Question 20, above.

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

Response: "Federalism secures the freedom of the individual." Bond v. United States, 564 U.S. 211, 221 (2011). "[F]reedom is enhanced by the creation of two governments, not one." Alden v. Maine, 527 U.S. 706, 758 (1999). "When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central

Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States." Id.

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

Response: There are a number of "abstention doctrines" that provide guidance on when a federal court should abstain from addressing a question in deference to the state courts. These include Rooker-Feldman abstention, under which a federal court abstains from hearing a claim that amounts to a challenge to a final judgment of the state court; Younger abstention, under which a federal court abstains from interfering in ongoing state court matters; Pullman abstention, under which a federal court abstains from hearing a challenge to an ambiguous state law where the state court could decide the issue without implicating federal Constitutional issues; and Colorado River abstention, under which a federal court abstains from exercising jurisdiction over a case where a parallel state court proceeding is underway.

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

Response: I do not believe the Court should consider whether a particular form of relief is "advantageous" or not. The question of what form of relief should be awarded depends upon the relief sought, the relief available under the applicable statutes and rules, any immunity of the parties to certain forms of relief, and the relief supported by the factual and legal findings of the Court.

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

Response: In Glucksberg, the Supreme Court described the rights it had identified as protected by "substantive due process" as follows: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, ibid.; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Casey, supra. 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 278-79." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

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

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

Response: "The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status." Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020). "The Free Exercise Clause protects against even indirect coercion[.]" Id. at 2256. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment prohibits all governmental regulation of religious beliefs as such. ... In addition to belief, the Free Exercise Clause also protects the performance of (or abstention from) physical acts that constitute the free exercise of religion: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014) (citations and quotation marks omitted).

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

Response: "Free exercise" includes more than simply freedom to worship in a formal manner. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. ... But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990).

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: "[A] substantial burden exists where the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996).

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: It is generally not appropriate. The Supreme Court has made clear that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981).

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: RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the rule burdening the free exercise can survive strict scrutiny review. 42 U.S.C. §2000bb-1(a), (b). "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. §2000bb-1(c). The Second Circuit has expressly found RFRA can be raised as a defense to an employment discrimination claim under the ADEA. See Hankins v. Lyght, 441 F.3d 96, 102 (2d Cir. 2006).

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

Response: I have never issued a ruling adjudicating the merits of such a claim. However, I have issued orders in cases raising such claims. The cases I am able to identify are: Johnson v. New York State Div. of Hum. Rts., No. 3:22CV00233(SALM), 2022 WL 487101 (D. Conn. Feb. 17, 2022); Nau v. Papoosha, No. 3:21CV00019(SALM), 2021 WL 5447197 (D. Conn. Nov. 22, 2021); Martin v. Joe's, No. 3:20CV00732(CSH)(SALM), 2021 WL 6499473 (D. Conn. Apr. 9, 2021); Seniw v. Sacred Heart Univ., No. 3:18CV00980(JCH)(SALM), 2018 WL 4697308, at *1 (D. Conn. June 19, 2018); Goode v. Bruno, et al., 3:10CV01734(SALM), Doc. #228 (D. Conn. June 13, 2018) (order granting motion for approval of settlement); Gupte v. Lerz, No. 3:17CV00283(JCH)(SALM), 2017 WL 11318738 (D. Conn. Apr. 14, 2017), report and recommendation adopted (May 2, 2017); Gupte v. Lerz, No. 3:17CV00283(JCH)(SALM), 2017 WL 11318704 (D. Conn. Mar. 2, 2017); Boyd v. Semple, et al., 3:11CV00824(SALM), Doc. #135 (D. Conn. Feb. 21, 2017) (order granting motion for final approval of settlement).

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: I am not familiar with this statement by Justice Scalia, but I understand it to mean that a judge's decisions are not necessarily achieving results that he or she "likes." Rather, a judge must reach decisions based only on the law and the facts presented, even if in a given case the result is not one that might appeal to the judge's personal feelings. I also understand this to be a commentary on the fact that judging is, and should be, hard, when it is done carefully and well.

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

Response: I cannot recall ever taking such a position in litigation, and I am confident I have not taken any such a position in a publication.

a. If yes, please provide appropriate citations.

Response: Not applicable.

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

Response: No.

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

Response: I can only speak to my own experience. I have spent most of my life, and my entire legal career, in Connecticut. Throughout my years as a criminal defense lawyer, I never felt that a client was treated less favorably because of his or her race. As a sitting judge myself for the past seven years in the District of Connecticut, I treat each individual who comes before me fairly, and without regard to their race.

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

Response: When I was an advocate, in private practice and as an Assistant Federal Defender, I advocated for my clients' interests, within the bounds of my legal and ethical obligations. I never took a position that I believed was unwarranted under the law, but I had an obligation to set aside my personal views when advocating on behalf of my

clients' interests. In some cases, that meant making a well-founded legal argument that did not represent my personal opinion, without giving any indication of what my personal views might be.

32. How did you handle the situation?

Response: I focused on the law. When I was presented with a difficult argument or a difficult client, I focused on the relevant statutes, case law, and rules, and on the importance of my role as counsel in the functioning of our adversary system.

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: I cannot single out one that has most influenced me, but as a sitting judge, I do find Federalist Papers No. 80 and No. 81 particularly intriguing. It is possible to trace many of the principles that underlie my daily work, such as the bases of subject matter jurisdiction and the creation of the Circuit and District Courts, to Hamilton's writing in these papers.

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

Response: The question of when human life begins is the topic of heated political debate and is currently being litigated in federal courts across the country. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a Judge of the Court of Appeals, I will continue to apply Supreme Court and Second Circuit precedent to any matters involving this issue.

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

Response: I testified at a prior Senate Judiciary Committee hearing in 2021, which is available at https://www.judiciary.senate.gov/meetings/07/07/2021/nominations.

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: No.

b. Amazon?

Response: No.

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?

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

Response: As an associate in private practice from 2003 to 2005, I may have reviewed briefs drafted by the senior partners, or assisted in drafting portions of briefs, where my name did not appear on the brief. However, I cannot recall any

specific such briefs, and I am confident that my name was on any briefs on which I had a substantial role.

40. Have you ever confessed error to a court?

Response: I do not believe so. I can recall at least one instance of identifying a typographical error after filing a motion, and submitting a corrected motion, but I do not believe I have ever confessed error on a substantive claim.

a. If so, please describe the circumstances.

Response: N/A.

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

Response: I understand my duty in testifying before the Senate Judiciary Committee to be reflected in the oath I took to tell the truth at that proceeding. I was truthful with the Committee in my testimony, and have been truthful in these written responses.

Questions for the Record

Senator John Kennedy

Sarah Merriam

1. Please describe your judicial philosophy. Be as specific as possible.

Response: My judicial philosophy is quite simple: The rule of law governs. I have no agenda other than applying the law to the facts before me. I have served as a judge in the trial court for more than seven years. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties. If I am confirmed as a Judge of the Court of Appeals, I will continue to focus my efforts on applying the law, as reflected in the text of the relevant statutes and rules and existing precedent, to the facts of each case.

2. Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?

Response: No. If the text of a law is clear, the inquiry ends there.

3. Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?

Response: The Supreme Court has held that certain presidential statements may be persuasive evidence of the intent of a statute. For example: "The opening portion of the Proclamation is an unambiguous, contemporaneous statement, by the Nation's Chief Executive, of a perceived disestablishment of Gregory County. It reflects, we believe, the clear import of the congressional action in the 1904 Act." Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 602–03 (1977); see also S. Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 354 (1998).

4. What First Amendment restrictions can the owner of a shopping center place on private property?

Response: Generally, a claim for violation of the First Amendment will not lie against a private actor, including a shopping center, with very limited exceptions. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." Hudgens v. N. L. R. B., 424 U.S. 507, 513 (1976). "[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only." Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567 (1972). However, state law or state Constitutional provisions may limit the scope of an owner's ability to restrict speech on the property. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

5. How does the Major Questions Doctrine relate to *Chevron*?

Response: The "major questions doctrine" refers to the idea that courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021). If an agency exercises such "vast" powers, and that exercise is clearly beyond the scope of the authority granted to it by statute, the agency's action would not be entitled to Chevron deference. Chevron deference only applies where the statute is ambiguous in the grant of authority to the agency; a presumption that Congress will speak clearly when granting certain "vast" powers suggests that a failure to provide clear guidance in the relevant statute would amount to an unambiguous denial of those powers.

6. What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?

Response: I believe the use of the term "the people" throughout the Bill of Rights reflects the fact that many of the first ten Amendments to the Constitution are largely concerned with protecting the rights of individuals, as opposed to issues of governmental structure and the powers of the three branches, which were addressed in the body of the Constitution itself. The Supreme Court has interpreted the Amendments in the Bill of Rights independently, and has not, as far as I am aware, declared that the meaning of the term "the people" is to be defined the same as it is used in each Amendment.

7. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953) (quotation marks and citation omitted) (emphasis added). The Supreme Court has held: "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." Mathews v. Diaz, 426 U.S. 67, 77 (1976). The Second Circuit has held that the Fourth and Fifth Amendments protect non-citizens who are not lawfully present in the United States, and thus subject to removal. See Zuniga-Perez v. Sessions, 897 F.3d 114, 122 (2d Cir. 2018). However, I am not aware of any decision of the Supreme Court or the Second Circuit specifically addressing whether a right of "privacy" extends to individuals who are not lawfully present in the United States.

8. When does equal protection of the law in the United States attach to a human life?

Response: The question of when human life begins, and what rights attach to an unborn child or fetus, and when, are the topic of heated political debate and are currently being litigated in federal courts across the country. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a Judge of the Court of Appeals, I will continue to apply Supreme Court and Second Circuit precedent to any matters involving equal protection rights.

9. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: The Supreme Court has held that Voter ID laws can be constitutional, if the requirements are rational and not unrelated to voter qualifications. See Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008). Such laws are not, therefore, per se "illegitimate" or "racist."

Senator Mike Lee
Questions for the Record
Sarah Merriam, Nominee to be United States Circuit Judge for the Second Circuit

1. How would you describe your judicial philosophy?

Response: My judicial philosophy is quite simple: The rule of law governs. I have no agenda other than applying the law to the facts before me. I have served as a judge in the trial court for more than seven years. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties.

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

Response: I begin with the text of any statute. Next, I would consult Supreme Court and Second Circuit precedent interpreting that statute. If no binding precedent were available, I would turn to precedent interpreting related or analogous statutes, or to persuasive precedent from other Circuits. Ordinarily I expect that would end my inquiry. In the unusual case where the text and the applicable case law were insufficient to resolve the issue, I would look to any other persuasive and reliable sources approved by the Supreme Court and the Second Circuit for interpretation of that or similar statutes, such as legislative history.

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

Response: I would begin with the text of the constitutional provision. Next, I would consult Supreme Court and Second Circuit precedent interpreting that provision. If no binding precedent were available, I would turn to precedent interpreting related or analogous provisions, or persuasive precedent from other Circuits. Ordinarily I expect that would end my inquiry. In the unusual case where the text and the applicable case law were insufficient to resolve the issue, I would look to any other persuasive and reliable sources approved by the Supreme Court and the Second Circuit for interpretation of that or similar provisions.

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

Response: The text controls. Where the Supreme Court or the Second Circuit has indicated that original meaning may be relevant to the interpretation of a particular provision, that is also a relevant consideration.

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

Response: I begin with the text of any statute. I read the statute as a whole, with an eye to its structure, and I give primary weight 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: I would strictly follow the guidance of the Supreme Court on this question. The Supreme Court has indicated in some contexts that "our understanding of" particular constitutional provisions "has evolved over time." Gonzales v. Raich, 545 U.S. 1, 15–16 (2005). In other contexts, the Supreme Court has turned to the original meaning of a provision. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1966 (2019) (considering original meaning of Double Jeopardy Clause); Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020) (considering original meaning of Appointments Clause).

6. What are the constitutional requirements for standing?

Response: The "irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citation and quotation marks omitted).

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

Response: As early as the seminal case of M'Culloch v. Maryland, the Supreme Court has held that certain powers are implicitly granted to Congress, specifically, those necessary to carry out its duties under the Constitution: "Even without the aid of the general clause in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted." M'Culloch v. Maryland, 17 U.S. 316, 323–24 (1819). One hundred years later, the Supreme Court held that the question of whether a particular unenumerated power may be attributed to Congress "must depend upon how far such limited power is ancillary or incidental to the power granted to Congress[.]" Marshall v. Gordon, 243 U.S. 521, 537 (1917).

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

Response: I would begin by evaluating the scope of Congress's power in the relevant area, as delineated in the text of the Constitution. I would then consult Supreme Court and Second Circuit precedent interpreting similar enactments. To the extent the government argued that Congress acted pursuant to some established but

unenumerated power, I would evaluate whether the Supreme Court had in fact recognized such a power.

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

Response: The Ninth Amendment protects against the infringement of unenumerated rights, suggesting that those rights must be protected. The Supreme Court has found particular unenumerated rights are protected by the Constitution, including the right to interstate travel, the right to vote, and various "privacy" rights, including those described below in response to Question 10.

10. What rights are protected under substantive due process?

Response: In 1997, the Supreme Court described the rights it had identified as protected by "substantive due process" as follows: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, ibid.; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Casey, supra. 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." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

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

Response: The rights protected by "substantive due process" are delineated by the Supreme Court. If I am confirmed as a Judge of the Court of Appeals, I will continue to apply the precedent of the Supreme Court and the Second Circuit in determining what types of rights are, or are not, protected under that doctrine.

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

Response: Congress's power under the Commerce Clause is limited to three types of congressional action: "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." Gonzales v. Raich, 545 U.S. 1, 16–17 (2005). The

Commerce Clause does not permit Congress "to regulate individuals as such, as opposed to their activities[.]" Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 557 (2012). It can also be limited by other Constitutional provisions. See, e.g., United States v. Martignon, 492 F.3d 140, 149 (2d Cir. 2007) (Copyright Clause); Ry. Lab. Executives' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982) (Bankruptcy Clause).

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

Response: The Supreme Court has held that application of strict scrutiny review is triggered by classifications based on race, national origin, or alienage. Graham v. Richardson, 403 U.S. 365, 372 (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 was designed with the tripartite system of checks and balances to ensure that no one branch oversteps its authority, as a check on the risk of tyranny. Our founders were fearful of centralized government, so they created a system in which one branch writes the laws, one branch enforces the laws, and one branch interprets the laws, with each having authority over the other in various ways (e.g., appointment, advice and consent, judicial review, impeachment, veto). It was a creative solution, and a remarkable system, as evidenced by the fact that few systems have survived and thrived for 230 years, as ours has.

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 begin with the text of the Constitution setting out the scope and the limits of that branch's authority, as well as the scope of the authority of the other branches in the disputed area. I would rely upon binding Supreme Court and Second Circuit precedent to evaluate the scope of the authority granted to the branch, and whether its actions were Constitutional.

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

Response: Over the past seven years while I have been sitting as a judge, I have tried to always bear in mind that the parties before me are human. Federal litigation, whether civil or criminal, is often the result of serious harms and can have devastating consequences for all concerned, whether that be individuals, businesses, or governmental entities. I strive to ensure that all parties are heard, that they feel that the Court has given careful consideration to their arguments, and that they are treated with respect. When the Court issues a ruling, it is nearly always the case that at least one party's position is not upheld; my hope is that when the parties understand the process and feel that it was fair, they will be more accepting of the ruling, even if it is unfavorable to them. This promotes the legitimacy of the courts in the eyes of the

public, as well as finality in litigation. Empathy does not, and should not, however, play any role in a judge's actual decision-making process.

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

Response: Either error could cause serious harm, to the parties directly affected and to the integrity of the system itself.

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 do not know the reasons for this shift. Question 17 presages the upsides and downsides of this trend: The downsides to aggressive judicial review include the risk that constitutional statutes will be struck down, and a perception by the public or the other branches that the judicial branch is overstepping its bounds. The downsides to judicial passivity include the risk that unconstitutional statutes will be permitted to stand, and a perception by the public or the other branches that the judicial branch is abdicating its proper role in the system of checks and balances.

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

Response: Judicial review refers to the power of the court to review and invalidate, if appropriate, the actions of the executive and legislative branches. Judicial supremacy refers to the idea that the Supreme Court's interpretation of the Constitution is binding on the executive and legislative branches, as well as the states.

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: As a judge, it is my duty to render decisions that are just, and that accurately apply the laws and the Constitution of this country. A court's duty is always to do justice, in fidelity to the Constitution. I cannot comment on the decisions that elected officials make when confronted with a decision by the highest court of the land that they believe to be unconstitutional.

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 role of a judge is to decide only the case or controversy presented, and to do so by applying the law as it is set out in the Constitution, statutes and precedent, to the facts established. The limitations of that role must be acknowledged and respected, in order for the system of checks and balances to work properly, and for the public to have full faith in the judiciary.

22. 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: A district court judge's obligation is to apply existing precedent. Any expansion of the scope of precedent must consider carefully whether there is support in the law for such expansion.

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. Only those factors set forth in 18 U.S.C. §3553(a) should be considered in sentencing a defendant. As the Sentencing Guidelines state, race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual §5H1.10 (policy statement) (2018).

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 do not disagree with the definition set forth above, but I would clarify that in my definition, equity is not limited to ensuring justice and fairness to the populations enumerated in that definition, or any other specific group. It entails

justice and fairness for all, without limitation. This is consistent with my oath of office, which requires me to do justice "without respect to persons."

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

Response: The difference, under the dictionary definitions, is that the former describes treatment, while the latter describes status. Equity is defined as "justice according to natural law or right[,] specifically: freedom from bias or favoritism[.]" Merriam-Webster.com online dictionary, accessed June 2, 2022. Equality is defined as "the quality or state of being equal." Id.

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

Response: The 14th Amendment guarantees "equal protection of the laws."

27. How do you define "systemic racism?"

Response: I have no personal definition of the term. I believe when that term is used by others, they are referring to the idea that an entire system, and its institutions, are imbued with racism, whether subtle or overt. An online dictionary defines it as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race[.]" Systemic Racism, Cambridge Dictionary online dictionary.

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

Response: I have no personal experience with or training in critical race theory; I do not have a personal definition of the term. Black's Law Dictionary defines critical race theory as: "A reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." Critical Race Theory, Black's Law Dictionary (11th ed. 2019).

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

Response: My understanding is that "critical race theory" is an academic and intellectual movement or school of thought, whereas "systemic racism" is a description of a circumstance that may be present in a given system.

Senator Ben Sasse
Questions for the Record for Sarah A.L. Merriam
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 25, 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: My judicial philosophy is quite simple: The rule of law governs. I have no agenda other than applying the law to the facts before me. I have served as a judge in the trial court for more than seven years. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties. If I am confirmed as a Judge of the Court of Appeals, I will continue to focus my efforts on applying the law, as reflected in the text of the relevant statutes and rules and existing precedent, to the facts of each case.

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

   Response: I have never described myself as an "originalist." While I am aware that academics and commentators use that term, I have not used it. I believe that, where supported by Supreme Court precedent, interpretation of a constitutional provision should take into account "the intent of those who prepared it or made it legally binding" and the "meaning that it would have conveyed to a fully informed observer at the time when" it was adopted. Originalism, Black's Law Dictionary (11th ed. 2019). If I am confirmed as a Judge of the Court of Appeals I will continue to follow the guidance of the Supreme Court and the Second Circuit in interpreting the Constitution.

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

   Response: I have never described myself as a "textualist." I do firmly believe that any interpretation of the Constitution, a statute, or a rule, must begin with the plain meaning of the text. That has been my approach as a judge for the past seven years, and would continue to be so if I am confirmed as a Judge of the Court of Appeals. I follow, and would continue to follow, the guidance of the Supreme Court and the Second Circuit in interpreting the text of the Constitution, a statute, or a rule.

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

Response: The Constitution has served this country for more than 230 years, and I expect it will continue to do so for many centuries more. I do not subscribe to any particular judicial philosophy such as "living constitutionalism." If I am confirmed as a Judge of the Court of Appeals, I would continue to interpret the Constitution in accordance with the established precedent of the Supreme Court and the Second Circuit.

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

Response: There is no individual Justice whose jurisprudence I have studied carefully enough to identify as the one I most particularly admire. When I read a Supreme Court case in my research, I am focused on the holding of the case, rather than the author, and I think of each Supreme Court ruling as embodying the collective wisdom of the majority of the Court, rather than the views of one Justice.

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: The doctrine of stare decisis generally requires that a Circuit Court have compelling reasons to overturn its own precedent. See, e.g., Wilson v. Cook Cty., 937 F.3d 1028, 1035 (7th Cir. 2019), cert. denied sub nom. Wilson v. Cook Cty., Illinois, 141 S. Ct. 110 (2020). A Circuit Court may reverse its own prior precedent if that precedent has been overruled or undermined by the Supreme Court, by an en banc ruling, or by statute. See In re Sokolowski, 205 F.3d 532, 534–35 (2d Cir. 2000) ("As we have explained, this court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc." (citations and quotation marks omitted)). Thus, an appellate court would be required to reaffirm its own precedent unless that precedent had been brought into question by statute or subsequent rulings of the Supreme Court or of that appellate court acting en banc.

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: See Response to Question 7, above.

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: None, unless the text of the statute itself is ambiguous. The Supreme Court and the Second Circuit have, in some circumstances, looked to legislative history in interpreting laws, if the plain language of the statute is unclear, and persuasive legislative history is available. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'"). "If the text is

clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143 (2018). The Supreme Court has recently confirmed that though it may be useful at times, "legislative history is not the law." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) (citations and quotation marks omitted). I would use legislative history in interpreting a law only if and when such use is consistent with Supreme Court and Second Circuit precedent. To the extent "general principles of justice" are embodied in canons of construction such as the Rule of Lenity, they may also inform the interpretation of an ambiguous text, but the court must always be careful not to read general ideals into specific statutes.

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. Only those factors set forth in 18 U.S.C. §3553(a) should be considered in sentencing a defendant. As the Sentencing Guidelines state, race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual §5H1.10 (policy statement) (2018).

Questions from Senator Thom Tillis
for Sarah A. L. Merriam
Nominee to be US Circuit Judge for the
Second Circuit

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: Black's Law Dictionary defines "judicial activism" as: "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I think of judicial activism as describing a practice whereby a judge would have an outcome in mind, based on personal views, rather than determining the outcome based solely on the existing law and facts presented. I do not consider that appropriate. A judge must make decisions based on a faithful application of the law to the facts, rather than an effort to achieve a particular result.

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

   Response: I believe impartiality is not only an expectation for a judge, but in fact a necessity. The oath of office I took when I became a judge requires me to "administer justice without respect to persons[.]" 28 U.S.C. §453. I would uphold that same oath – and the same duty of impartiality – if I am confirmed as a Judge of the Court of Appeals.

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

   Response: No.

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

   Response: A judge must faithfully interpret and apply the law, regardless of the outcome. A judge has no interest in what the outcome is, only in applying the law to the facts presented.

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

   Response: No.

7. **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: A court must grant qualified immunity to law enforcement personnel and departments "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. ... This demanding standard protects all but the plainly incompetent or those who knowingly violate the law." D.C. v. Wesby, 138 S. Ct. 577, 589-90 (2018) (citations and quotation marks omitted). To be "clearly established," the law generally must have been dictated by controlling authority, and the law must apply with specificity to the particular circumstances presented. See, e.g., Mullenix v. Luna, 577 U.S. 7, 12 (2015). I have applied this standard as a sitting judge, and if I am confirmed as a Judge of the Court of Appeals, I will continue to apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

8. **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: Qualified immunity is the law, but the precise contours of its protection are currently and constantly being litigated, and the question is likely to come before me either in my current role, or, if I am confirmed, as a Judge of the Court of Appeals. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a Judge of the Court of Appeals, I will continue to apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

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

Response: Qualified immunity is the law, but the precise contours of its protection are currently and constantly being litigated, and the question is likely to come before me either in my current role, or, if I am confirmed, as a Judge of the Court of Appeals. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a Judge of the Court of Appeals, I will continue to apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

10. **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: I handled at least one criminal matter as a lawyer involving alleged violations of copyright law; that case was resolved without a trial. I conducted settlement discussions in several copyright cases as a Magistrate Judge. I have been assigned two copyright matters as a District Judge, both of which were resolved by settlement without the need for significant motions practice or trial.

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

Response: When I was a law clerk, the District Judge I clerked for sat by designation on a Second Circuit Panel that heard an early challenge involving an injunction issued under the Digital Millennium Copyright Act. Other than that experience more than 20 years ago, I do not believe I have had occasion to address the DMCA.

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

Response: I do not believe I have had occasion to address this issue. The District of Connecticut has had a number of cases involving alleged pirating of copyrighted material over the "dark web", with which I have had some involvement, but to my knowledge, the complaints in those cases have named only the individuals alleged to have stolen the copyrighted material, rather than any online service providers, as defendants.

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: Most of the First Amendment issues that have come before me as a District Judge are in the context of civil rights complaints brought by prisoners, most often involving religious expression or alleged retaliation for seeking redress of grievances. I do not recall addressing a case in which free speech issues were raised in the context of intellectual property law.

11. 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: First, if the text of a statute is clear, there should be no need to resort to the use of legislative history to interpret that text, and the fact that courts disagree on the meaning of text does not necessarily mean that *I* would find that text ambiguous. Second, I am bound by Supreme Court and Second Circuit precedent construing a particular statute. If the text itself, the existing precedent, and other tools of construction do not resolve the question, the Supreme Court and the Second Circuit have approved the use of legislative history in interpreting laws, though generally as a last resort. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'"). "If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143 (2018). The Supreme Court has recently confirmed that though it may be useful at times, "legislative history is not the law." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) (citations and quotation marks omitted). As such, the intent as expressed in the text of a statute must control. The Second Circuit has considered the legislative history of the DMCA specifically in several rulings, in an effort to determine the intent of Congress. See, e.g., Fischer v. Forrest, 968 F.3d 216, 222 (2d Cir. 2020), cert. denied, 142 S. Ct. 460, 211 L. Ed. 2d 279 (2021); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 37 (2d Cir. 2012); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001). I would use legislative history in interpreting the DMCA only if and when such use is consistent with Supreme Court and Second Circuit precedent.

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

Response: The Second Circuit has held that the advice and analysis of the Copyright Office is not controlling; rather, it is entitled to deference only where it is persuasive. "The Copyright Office's interpretations of the Copyright Act are entitled to some deference insofar as we deem them to be persuasive." EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 97 (2d Cir. 2016). The Supreme Court has observed that the position of the Copyright Office is often set forth in the "Compendium of U.S. Copyright Office Practices" which is "a non-binding administrative manual that at most merits deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944). That means we must follow it only to the extent it has the 'power to persuade.'" Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1510 (2020). "Although an opinion expressed by the Copyright Office in such a report does not receive Chevron deference of the sort accorded to rulemaking by authorized agencies, we do recognize the Copyright Office's intimate familiarity with the copyright statute and would

certainly give appropriate deference to its reasonably persuasive interpretations of the Copyright Act." Capitol Recs., LLC v. Vimeo, LLC, 826 F.3d 78, 93 (2d Cir. 2016).

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: I have not confronted this issue, and have not had an opportunity to analyze this aspect of the DMCA. The threshold for establishing notice is a question to be determined by policy makers. If I am confirmed as a Judge of the Court of Appeals, I will apply the plain text of the DMCA statute, as well as Supreme Court and Second Circuit precedent.

12. 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: Judges are bound by the text of the law, but may read the provisions of the DMCA to apply to technologies that did not exist at the time it was enacted. Just as the Fourth Amendment's protections apply to email accounts and cellular telephones, which could not even have been imagined at the time of the Amendment's adoption, a court applying the DMCA should be able to apply its provisions to evolving technologies, as long as the text itself supports such an application.

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: Where precedent announces general principles, it is useful and applicable even in a changing technological landscape. A court must be cautious not to expand any law beyond the boundaries set by the language of the law itself, but precedent applying a law to older or even defunct technologies can inform a court's analysis of that law as applied to new technologies. As the Supreme Court noted in applying the centuries-old Fourth Amendment to cell-phone tracking requests, a court must keep an "attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools." Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018). There, the Court relied upon long-established precedent regarding the protections of the Fourth Amendment generally to consider how the Fourth Amendment should apply to a uniquely modern concern.

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

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

Response: I have served only in a geographically small District, where we do not have (or need) separate divisions. Cases in my District are assigned randomly across all District Judges, except in very limited circumstances. I believe that it is critical to ensure both fairness and the appearance of fairness to litigants in every judicial district.

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

Response: In my time as a district judge, I have never encouraged such conduct.

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: I am not familiar with this practice, and I do not feel comfortable commenting on the practices of other courts. As a federal District and Magistrate Judge, I have not engaged in behavior designed to attract any particular type of case or litigant.

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

Response: My understanding is that Chief Justice Roberts has identified concerns with "judicial assignment and venue for patent cases in federal trial court." Year-End Report on the Federal Judiciary, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf. The Chief Justice has requested the Committee on Court Administration and Case Management to review the issue, and to report back to the Judicial Conference. See id. I take very seriously any situation that gives rise to a perception of unfairness in our judicial system, or undermines public confidence in the federal courts.

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 noted, the Chief Justice has initiated an inquiry into the case assignment practices for patent matters in the United States District Courts.

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? Should such a rule apply only where a single judge sits in a division?

Response: I have served only in a geographically small District, where we do not have (or need) separate divisions. By Local Rule, cases in my District are assigned randomly across all District Judges, except in very limited circumstances.

15. 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: I believe that any assessment of the fitness or conduct of a judge must be made on an individualized basis, by the appropriate judicial authority. In the Second Circuit, it is my understanding that complaints alleging judicial misconduct are reviewed by the Chief Judge and the Judicial Council.

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

Response: Again, an individualized assessment would need to be made by the appropriate judicial authority. But it is hard to imagine that ten or twenty mandamus orders in a short period of time would not raise concerns about the impact on public confidence in the court.