Senator Chuck Grassley, Ranking Member
Questions for the Record
Magistrate Judge Ramon Ernesto Reyes, Jr.
Judicial Nominee to the U.S. District Court for the Eastern District of New York

1. **In *Johnson v. Bellnier*, a state jury had convicted Johnson of depraved indifference murder but acquitted him of intentional murder. In his petition for habeas relief, Johnson admitted to the intentional killing of his victim. He argued that his conviction for depraved indifference murder had to be vacated as legally insufficient under New York law because his intent to kill the victim meant no jury could have convicted him of depraved indifference murder. Because Johnson admitted that he had procedurally defaulted on his legal insufficiency argument, he argued that his case fell within the "miscarriage of justice" equitable exception—which is reserved for when a violation of a constitutional right results in an "actually innocent" person being convicted. You granted his habeas petition, finding that it was a miscarriage of justice that he was convicted of depraved indifference murder after admitting he committed intentional murder. The Second Circuit reversed, explaining that "[a] reasonable jury could have concluded that Johnson's actions illustrated depraved indifference not only to Chandler, but also to any other people on the street that could have been struck by his bullets. Similar to another recent decision, *Garbutt v. Conway*, which also contemplated the possibility of an intentional murder, 'a reasonable jury could equally have found that [Johnson] had struck out ... without specifically intending to cause death, but with an awareness that his conduct could have deadly consequences.'" *Johnson v. Bellnier*, 508 F. App'x 23, 26 (2d Cir. 2013) (quoting 668 F.3d 79, 82 (2d Cir.2012)). Please explain why you believed a miscarriage of justice occurred and why you believed no "reasonable jury" could've concluded that the depraved indifference standard had been met.**

   Response: Respectfully, I detailed my reasoning in my report and recommendation, *Johnson v. Bellnier*, No. 09–CV–00381 (KAM)(RER), 2010 WL 7100915 (E.D.N.Y. Nov. 8, 2010), which the district court adopted, 2011 WL 3235708 (E.D.N.Y. July 27, 2011). I respect the decision of the United States Court of Appeals for the Second Circuit and will apply it going forward if a similar issue arises in a subsequent case, as I would so apply all binding Supreme Court and Second Circuit precedent.

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

   Response: In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the Supreme Court held that certain unenumerated rights are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. Such unenumerated rights are objectively "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were

sacrificed." *Id*. at 720–21. As a sitting United States Magistrate Judge and a judicial nominee it would be inappropriate for me to comment on the specific circumstances under which federal judges can add to the list of fundamental rights the Constitution protects. If confirmed, I will strictly adhere to Supreme Court and Second Circuit precedent as to which rights the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution recognize and protect.

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

   Response: I disagree.

4. **Please define the term "living constitution."**

   Response: The term "living constitution" refers to the doctrine "that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I do not use a particular label to characterize my judicial philosophy. If confirmed, I will apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

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

   Response: I am not familiar with this statement by Justice Ketanji Brown Jackson or the context in which it was made. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

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

   Response: The Supreme Court has noted that the Due Process Clause of the Fourteenth Amendment protects a parent's right "to direct the education and upbringing of one's children." *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

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

   Response: The allocation of resources by local governments is a matter best left to policymakers. As a sitting United States Magistrate Judge and a judicial nominee, it would inappropriate for me to opine or comment on this issue.

8. **Are law enforcement partnerships key to preventing acts of terror?**

   Response: The allocation of resources among and between law enforcement entities is a matter best left to policymakers. As a sitting United States Magistrate Judge and a judicial nominee, it would inappropriate for me to opine or comment on this issue.

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

   Response: Federal judges must apply the provisions of the Bail Reform Act, 18 U.S.C. §§ 3141, *et seq.* Ensuring the safety of the community is one of the Bail Reform Act factors that federal judges consider in making every bail determination. As a United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to opine or comment on this issue.

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

    Response: The right "to petition the government for a redress of grievances" is protected by the First Amendment to the United States Constitution.

11. **What role should empathy play in sentencing defendants?**

    Response: Sentencing is confined by the factors set forth in 18 U.S.C. § 3553(a). Empathy is not one of the factors listed in 18 U.S.C. § 3553(a).

12. **Do you agree with the following statement: "Not everyone deserves a lawyer, there is no civil requirement for legal defense"?**

    Response: I am unfamiliar with this quote. Nevertheless, there is no constitutional right to counsel in civil cases.

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

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

       Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me. That being said, it is generally understood that *Brown v. Board of Education* was

"correctly decided" as it has become so firmly rooted in American jurisprudence and the issue is not likely to come before the Court again.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me. That being said, it is generally understood that *Loving v. Virginia* was "correctly decided" as it has become so firmly rooted in American jurisprudence and the issue is not likely to come before the Court again.

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

Response: The Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022). As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: The Supreme Court overturned *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health*, 142 S. Ct. 2228 (2022). As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

i. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

j. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

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

Response: Depending upon the specific facts, threatening Supreme Court Justices or other judges or public officials could violate a number of state and federal statutes, including 18 U.S.C. § 115.

15. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: 18 U.S.C. § 1507 makes it unlawful to picket, parade, or demonstrate "in or near" a court building or the residence of a judge, juror, witness, or court officer, "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty."

16. **Under Supreme Court precedent, is 18 USC § 1507, or a state statute modeled on § 1507, constitutional on its face?**

Response: I am unaware of any Supreme Court or Second Circuit precedent addressing the constitutionality of 18 U.S.C. § 1507 or any analogous state statute. As a sitting United States Magistrate Judge and a judicial nominee, it is inappropriate for me to opine on the constitutionality of 18 U.S.C. § 1507 or any analogous state statute.

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

Response: In *Cohen v. California*, 403 U.S. 150 (1971), the Supreme Court held that states can prohibit the use of "fighting words," defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.* at 20.

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

Response: In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court held that where a speaker intends "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," the speaker's statement does not constitute protected free speech under the true threats doctrine. *Id.* at 359.

19. **Please identify a Supreme Court decision from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: My judicial philosophy derives from my adherence to the rule of law, my oath to decide cases fairly and impartially, and my commitment to treat all parties equally and with respect. From that philosophy evolves the obligations to treat each case with an open mind and without any preconceived personal beliefs, or policy or political preferences; to carefully listen to and consider the parties' factual presentations and legal arguments; to neutrally and impartially apply the law to the facts, faithfully applying all binding Supreme Court and Second Circuit precedent; and to issue thorough and detailed decisions that are restrained to the specific issues presented. Although I have not studied all opinions issued by the Supreme Court over the past 50 years, I am not aware of any opinion that exemplifies this philosophy more than any other.

20. **Please identify a Second Circuit judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: My judicial philosophy derives from my adherence to the rule of law, my oath to decide cases fairly and impartially, and my commitment to treat all parties equally and with respect. From that philosophy evolves the obligations to treat each case with an open mind and without any preconceived personal beliefs, or policy or political preferences; to

carefully listen to and consider the parties' factual presentations and legal arguments; to neutrally and impartially apply the law to the facts, faithfully applying all binding Supreme Court and Second Circuit precedent; and to issue thorough and detailed decisions that are restrained to the specific issues presented. Although I have not studied all opinions issued by the Second Circuit over the past 50 years, I am not aware of any opinion that exemplifies my judicial philosophy more than any other.

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

    Response: I treat each case with an open mind and without any preconceived personal beliefs, or policy or political preferences. I carefully listen to and consider the parties' factual presentations and legal arguments. I neutrally and impartially apply the law to the facts, faithfully applying all binding Supreme Court and Second Circuit precedent. Finally, I issue thorough and detailed decisions that are restrained to the specific issues presented. Following this process ensures that I correctly understand how the law should be applied, without permitting my personal preferences to shape how I view the case.

22. **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: In April 2021 I communicated with Robert Raben, in his role as Chair of the Hispanic National Bar Association's Judicial Endorsement Committee, seeking the HNBA's endorsement to Senators Schumer and Gillibrand for appointment as a United States District Judge for the Eastern District of New York. I subsequently interviewed with the HNBA Judicial Endorsement Committee and received the HNBA's endorsement. I have not had any contact with anyone else associated with the two groups listed above.

23. **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.

24. **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.

25. **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.

26. **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.

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

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

        Response: No.

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

        Response: No.

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

        Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**

Response: I have never had contact with anyone associated with these entities.

c. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

d. **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, or any other such Arabella dark-money fund that is still shrouded.**

Response: No.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

32. **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: In April 2021 I communicated with Robert Raben, in his role as Chair of the Hispanic National Bar Association's Judicial Endorsement Committee, to seek the HNBA's endorsement to Senators Schumer and Gillibrand for appointment as a United States District Judge for the Eastern District of New York. I subsequently interviewed with the HNBA Judicial Endorsement Committee and received the HNBA's endorsement. I have not had any contact with any of the other individuals listed above.

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

    Response: In March 2021, I submitted an application for a position on the U.S. District Court for the Eastern District of New York to Senator Charles Schumer's Judicial Screening Committee. On March 30, 2021, I interviewed with Senator Schumer's Screening Committee. On May 27, 2022, I interviewed with Senator Schumer. On June 2, 2022, I heard from Senator Schumer that he would be submitting my name to the White House for consideration regarding a federal district court vacancy in the Eastern District of New York. On June 9, 2022, I was contacted by the White House Counsel's Office

concerning my potential nomination. On June 10, 2022, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice. On September 6, 2022, my nomination was submitted to the Senate.

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

Response: I received the questions from the Department of Justice's Office of Legal Policy on December 7, 2022. I reviewed the questions, conducted research when necessary, and provided a set of draft answers to OLP. I received minor feedback from OLP, and thereafter finalized my answers for submission to the Judiciary Committee.

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

Questions for the Record for Ramon Reyes, nominated to be United States District Judge for the Eastern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Racial discrimination is generally unlawful under the Constitution and laws of the United States. Various federal statutes prohibit racial discrimination in employment, public accommodations, and other contexts. Race is a suspect classification that is subject to strict scrutiny, and racial classifications are only permissible when narrowly tailored to achieve a compelling governmental interest. If confirmed, I would apply binding Supreme Court and Second Circuit precedent to determine whether alleged instances of racial discrimination violate the law.

2. **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: In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the Supreme Court held that certain unenumerated rights are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. Such unenumerated rights are objectively "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. at 720–21. As a sitting United States Magistrate Judge and a judicial nominee it would be inappropriate for me to comment on whether I believe there are other specific unenumerated rights, not yet articulated by the Supreme Court, that do exist. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will strictly adhere to Supreme Court and Second Circuit precedent as to which rights the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution recognize and protect.

3. **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 derives from my adherence to the rule of law, my oath to decide cases fairly and impartially, and my commitment to treat all parties equally and with respect. From that philosophy evolves the obligations to treat each case with an open mind and without any preconceived personal beliefs, or policy or political preferences; to carefully listen to and consider the parties' factual presentations and legal arguments; to neutrally and impartially apply the law to the facts, faithfully applying all binding Supreme Court and Second Circuit precedent; and to issue thorough and detailed decisions that are restrained to the specific issues presented. I have not studied the judicial philosophies of all Supreme Court Justices since the Warren Court, and am not aware of any Justice that exemplifies this philosophy more than any other.

4. **Please briefly describe the interpretative method known as originalism. Would you**

characterize yourself as an 'originalist'?

Response: "Originalism" is "the doctrine that words of a legal instrument are to be given the meanings they had when they were adopted . . . 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." Black's Law Dictionary (11th ed. 2019). I do not use a particular label to characterize my judicial philosophy. If confirmed, I will apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

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

Response: "Living constitutionalism" is "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I do not use a particular label to characterize my judicial philosophy. If confirmed, I will apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

6. **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: Constitutional interpretation begins with an examination of the text of the provision and any binding precedent of the Supreme Court or Circuit interpreting it. In the rare instance where the provision is ambiguous after considering the text and the applicable precedent, I would look to any Supreme Court guidance as to the method by which the text should be interpreted, the role of the provision in the constitutional structure, and any evidence of the original public meaning of the provision.

7. **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: Generally, the public's current understanding of the Constitution or a statute is not relevant when determining their meaning. When interpreting a constitutional or statutory provision, judges should be guided by the plain language of the text and applicable Supreme Court and Circuit precedent. However, the Supreme Court has applied currently prevailing standards in certain constitutional contexts. *E.g.*, *Miller v. California*, 413 U.S. 15 (1973) (First Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (Eighth Amendment). If confirmed, I would consider the public's current understanding only if such an approach is consistent with Supreme Court and Second Circuit precedent.

8. **Do you believe the meaning of the Constitution changes over time absent changes**

through the Article V amendment process?

Response: The meaning of the Constitution does not change over time. Changes to the text of the Constitution must be made pursuant to the Article V amendment process. The Supreme Court has set forth the manner in which the Constitution shall be interpreted. If confirmed, I will apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

Response: *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

Response: *New York Rifle & Pistol Association v. Bruen,* 142 S. Ct. 2111 (2022), is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me.

11. **Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?**

Response: *Brown v. Board of Education*, 347 U.S. 483 (1954), is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme

Court and Second Circuit precedent to the cases that would come before me. That being said, it is generally understood that *Brown v. Board of Education* was "correctly decided" as it has become so firmly rooted in American jurisprudence and the issue is not likely to come before the Court again.

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

Response: The Bail Reform Act of 1984, 18 U.S.C. §§ 3141, *et seq.*, creates a rebuttable presumption in favor of detention if the judge finds probable cause to believe a defendant committed certain enumerated offenses, including, but not limited to: certain drug offenses carrying a maximum term of imprisonment of ten years or more; unlawful firearm offenses; specific crimes of violence, including acts of terrorism; and, certain offenses involving minor victims. 18 U.S.C. § 3142(e)(3). In addition, a rebuttable presumption in favor of detention arises if the judge finds that the defendant meets certain criteria regarding prior convictions of specific offenses including, but not limited to: specific crimes of violence or drug offenses carrying maximum terms of imprisonment for ten years or more; offenses carrying maximum sentence of life imprisonment or death; certain offenses involving a minor victim; and offenses involving the possession or use of a firearm, destructive device or any other dangerous weapon. 18 U.S.C. § 3142(e)(2) and (f)(1).

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

Response: The Bail Reform Act reflects the conclusions of Congress that a person charged with one of the enumerated offenses in § 3142(e)(2) or (3), or who commits a felony while on pretrial release presents a serious risk of flight or a danger to the community such that no conditions or combination of conditions of pretrial release can reasonably assure that person's appearance at trial or the safety of the community.

13. **Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?**

Response: Yes. The First Amendment to the Constitution provides that federal laws or government actions that prohibit the free exercise of religion are impermissible. The Fourteenth Amendment extends this prohibition to the states. Supreme Court precedent requires that the government show that any law that burdens the free exercise of religion is neutral and generally applicable; if it is not, the government is then required to show that it is narrowly tailored to meet a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). If the law treats any comparable secular activity more favorably than the religious exercise, or if the government acts in a manner that is hostile to religious beliefs, then strict scrutiny would apply. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

In addition, under the Religious Freedom Restoration Act (RFRA), "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a)–(b); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: Such governmental action would be permissible only if it survived strict scrutiny. "[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

15. **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: At issue in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), were New York State regulations regarding the attendance of religious services during the COVID-19 pandemic. The Supreme Court held that the religious entity-applicants were entitled to a preliminary injunction pending appellate review because they were likely to succeed on the merits of their First Amendment claims, they were likely to suffer irreparable harm, and there was no evidence that granting the injunction would be harmful to the public. The Court determined that the challenged restrictions did not withstand strict scrutiny because they were not narrowly tailored to meet compelling government interest as less restrictive means were available to address the health risks at issue.

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

Response: At issue in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), were California's restrictions on private gatherings during the COVID-19 pandemic. The Supreme Court held that the petitioners, who wished to gather for at-home religious exercise, were entitled to a preliminary injunction pending appeal. Applying strict scrutiny, the Court found that California's regulations, which contained myriad exceptions and accommodations for secular activities comparable to religious activities, were neither

neutral nor generally applicable because they treated secular gatherings more favorably than religious gatherings and therefore violated the Free Exercise Clause. *Id.* at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Supreme Court held that the Colorado Civil Rights Commission's conduct in issuing a cease and desist letter to a cake shop owner who had declined for religious reasons to make a wedding cake for a same-sex couple violated the Free Exercise Clause of the First Amendment. The Court concluded that in issuing the cease and desist letter the Commission demonstrated "clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection", *id*. at 1729, and in so doing violated the State's duty under the First Amendment not to use hostility toward religion or a religious viewpoint as a basis for laws or regulations. The Court did not reach the constitutionality of the baker's refusal to serve the couple.

19. **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: Yes, if the beliefs are sincerely held. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 725 (2014); *Frazee v. Ill. Dep't of Emp. Security*, 489 U.S. 829, 834 (1989). The Supreme Court has indicated that whether the First Amendment protects a religious belief does not "turn upon a judicial perception of the particular belief or practice in question" and that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). However, the Supreme Court also observed that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ."). *Id.* at 715.

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

Response: Please see response to Question 19.

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

Response: Please see response to Question 19.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to opine or comment on the official position of the Catholic church.

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

Response: In *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the "ministerial exception" protects religious institutions from certain discrimination claims, and that such institutions may decide matters of church government, faith, and doctrine free from governmental interference.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that Philadelphia's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. The Supreme Court determined that Philadelphia's policy was not generally applicable because it allowed discretionary individual exemptions. Applying strict scrutiny, the Court concluded that because Philadelphia could not show that its refusal to contract with CSS was narrowly tailored to advance a compelling governmental interest, its failure to do so violated the Free Exercise Clause.

22. **In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.**

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments to parents who live in school districts that do not operate a secondary school of their own violated the First Amendment's Free Exercise Clause because it barred

religious school students from receiving tuition assistance solely because of the exercise of their religion.

23. **Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.**

Response: In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court held that a school district violated the First Amendment by terminating a high school football coach who engaged in personal prayer on the field at the conclusion of games. The Supreme Court determined that the school district's restriction of the coach's private speech and religious expression violated the Free Speech and Free Exercise Clauses where "the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." *Id.* at 2433.

24. **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: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated a Minnesota state court judgment and remanded the case for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). The petitioner, an Amish community, claimed that the County's refusal to grant an exception to its septic system mandate based on their sincerely held religious beliefs violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*. In his concurrence, Justice Gorsuch explained that RLUIPA triggers strict scrutiny, where courts "cannot rely on broadly formed governmental interests, but must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." 141 S. Ct. at 2432 (internal quotation marks omitted). Justice Gorsuch suggested that, on remand, the Minnesota court should analyze whether the county had demonstrated a compelling interest in denying the petitioners an exception; consider the exceptions provided to others and why those exceptions could not be provided to petitioners; and, question whether the evidence demonstrated the workability of the less restrictive proposal advanced by petitioners.

25. **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: 18 U.S.C. § 1507 prohibits picketing or parading in or near a courthouse or a residence of, among others, a judge, juror, or witness, with the intent of influencing that person. As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to express an opinion on how this statute should be interpreted in

any particular context.

26. **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**;

    Response: No.

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

    Response: No.

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

    Response: No.

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

    Response: No.

27. **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 would neither encourage nor support such trainings.

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

    Response: Yes.

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

    Response: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to comment on the political decisions of either the executive or legislative branches, or whether actions following such decisions are constitutional.

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

    Response: In every civil or criminal matter that has come before me as a United States

Magistrate Judge I have treated every litigant – plaintiff or defendant, government, corporation, or individual – fairly and with respect, and to the best of my knowledge the judges with whom I have been pleased to serve with or appear before have done the same. Beyond that it would be inappropriate for me to comment on the criminal justice system more broadly.

31. **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: Whether to increase or decrease the number of Justices on the Supreme Court is a matter for the political branches of government to decide. As a sitting United States Magistrate Judge and a judicial nominee, it would not be appropriate for me to comment on this issue.

32. **In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?**

Response: No.

33. **What do you understand to be the original public meaning of the Second Amendment?**

Response: In its trilogy of *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that the original public meaning of the Second Amendment guarantees the individual right to keep and bear arms, applicable to the States through the Fourteenth Amendment, both inside and outside the home.

34. **What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court explained that the individual right to keep and bear arms was not without limitations including, but not limited to, "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626–627. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that restrictions on the Second Amendment must be consistent with the nation's historical tradition of firearm regulation. *Id.* at 2129–30.

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

Response: The ability to own a firearm is a constitutional right protected by the Second Amendment.

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

Response: No. In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that the "the constitutional right to bear arms in public for self-defense is not a second class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id*. at 2156 (quoting *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010)) (internal quotation marks omitted).

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

Response: No.

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

Response: As a general matter, the executive retains broad prosecutorial discretion, limited in that it may not be exercised based upon unjustifiable standards like race, religion, or other suspect or arbitrary classification. *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974). The question of whether an executive is properly exercising prosecutorial discretion is a matter of a policy best left to elected representatives and the political process. As a sitting United States Magistrate Judge and a judicial nominee, it is inappropriate for me to comment on particular prosecutorial decisions of the executive. However, if a case came before me where the executive's refusal to enforce a law was challenged, I would consider the arguments of the parties and all binding Supreme Court and Second Circuit precedent relevant to the question.

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

Response: "Prosecutorial discretion" refers to the prosecutor's ability in criminal matters to choose from a variety of options, including, among other things, whether to file charges, what charges to file, who to file charges against, which plea bargain to accept, and what sentence to recommend to the court. Outside of the Administrative Procedure Act (APA) context, I am not aware of the definition of a "substantive administrative rule change." To the extent the question refers to the APA, when expressly authorized by Congress, an executive branch agency may issue legislative rules through the notice-and-comment ruling making process. Such rules have the force of law.

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

Response: I am unaware of any constitutional authority for the President to unilaterally abolish the death penalty. However, Article II of the Constitution vests the President with the authority to "grant reprieves and pardons for offenses against the United States," including cases in which the death penalty was imposed.

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

Response: In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Supreme Court held that the Center for Disease Control lacked the authority to impose a nationwide moratorium on evictions to protect tenants from COVID-19, and to slow the spread of the disease. Finding that the petitioners were likely to succeed on the merits of their claim, the Court vacated a stay imposed pending appeal of a district court's nationwide injunction against the imposition of the moratorium.

42. **In *Johnson v. Bellnier*, you recommended the defendant be granted habeas relief after he fired a gun approximately ten times down a street in the dark at a fleeing victim. After the shooting, the defendant fled not only the scene of the crime, but the state as well.**

a. **Do you agree with the Second Circuit who reversed you that a rational trier of fact could have found that defendant guilty of depraved indifference murder beyond a reasonable doubt?**

Response: Respectfully, I detailed my reasoning in my report and recommendation, *Johnson v. Bellnier*, No. 09–CV–00381 (KAM)(RER), 2010 WL 7100915 (E.D.N.Y. Nov. 8, 2010), which the district court adopted, 2011 WL 3235708 (E.D.N.Y. July 27, 2011). I respect the decision of the United States Court of Appeals for the Second Circuit and will apply it going forward if a similar issue arises in a subsequent case, as I would so apply all binding Supreme Court and Second Circuit precedent.

43. **In the March 2019, Federal Magistrate Judge's Association Bulletin, you noted "the FMJA Diversity Committee will unveil a new program at the Miami conference, 'Robes in Schools.' The program will target six high schools in the Miami area with diverse student populations and send two diverse Magistrate Judges to those schools to impart civic education information about Federal Courts and the role of Magistrate Judges."**

a. **Who qualifies as a "diverse" magistrate judge?**

Response: The FMJA Diversity Committee is comprised of more than 30 Magistrate Judges from across the country, representing different races, ethnicities, national

origins, genders, and geographic and professional backgrounds. The goal of this program was to inspire students to learn more about our system of government, and to consider careers in the law – and to see that federal judges come from all different personal and professional backgrounds.

44. **You spoke at the memorial service for Judge Trager, for whom you clerked. In your remarks, you made several interesting comments about how Judge Trager viewed the role of judging.**

a. **Do you think a judge's role is to achieve a "just result" or to say what the law is?**

Response: A judge's role is to adhere to the oaths of office to "support and defend the Constitution of the United States against all enemies, foreign and domestic [and to] bear true faith and allegiance to the same; [and] administer justice without respect to persons, and do equal right to the poor and to the rich, and [] faithfully and impartially discharge and perform all the duties incumbent upon [the judge] under the Constitution and laws of the United States." 5 U.S.C. § 3331; 28 U.S.C. § 453.

b. **Is it your belief that a judge should tailor voir dire to reach a desired outcome in terms of the racial composition of the jury?**

Response: No.

c. **Does this calculus change if the case is "racially charged?"**

Response: No.

d. **What does it mean to "take the time…to find a way" to downward depart from a high guideline sentence?**

Response: I clerked for Judge Trager twenty-eight years ago, when the Sentencing Guidelines were mandatory, which they no longer are. Judge Trager believed, as did many federal judges, that at times the Sentencing Guidelines constrained judges' abilities to fashion just sentences based on the facts of particular cases. As a result, he thought long and hard about each sentencing decision. In so doing, he considered all arguments and evidence, and always rendered sentences that were based on the facts and law, and within the confines of 18 U.S.C. § 3553, even if he departed downwardly from the Guidelines.

e. **Your comment about your judge in this regard would seem to imply that the**

judge was figuring out where he wanted to end up, and working backward, finding Guideline provisions to justify it. Would you consider such a methodology improper?

Response: I agree that any "result oriented" methodology is improper; and to be clear, I have never taken that approach as a judge. Judges should approach each case with an open mind, carefully consider all arguments, apply the law to the facts, including all applicable precedent, and do so without regard to any personal beliefs as to what the result should be. Respectfully, I disagree with the question's premise that Judge Trager "was figuring out where he wanted to end up" and was "working backward." That was never his approach, nor were my comments intended to suggest that it was.

If confirmed, in every criminal sentencing matter, I will evaluate each case before me on the facts and evidence presented. In doing so, I will apply the factors set forth in 18 U.S.C. § 3553(a), including considering the advisory Sentencing Guidelines and any relevant enhancements, as well as all binding precedent of the Supreme Court and Second Circuit.

Senator Ben Sasse
Questions for the Record for Ramon Ernesto Reyes, Jr.
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 30, 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 derives from my adherence to the rule of law, my oath to decide cases fairly and impartially, and my commitment to treat all parties equally and with respect. From that philosophy evolves the obligations to treat each case with an open mind and without any preconceived personal beliefs, or policy or political preferences; to carefully listen to and consider the parties' factual presentations and legal arguments; to neutrally and impartially apply the law to the facts, faithfully applying all binding Supreme Court and Second Circuit precedent; and to issue thorough and detailed decisions that are restrained to the specific issues presented.

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

   Response: "Originalism" is "the doctrine that words of a legal instrument are to be given the meanings they had when they were adopted . . . 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." Black's Law Dictionary (11th ed. 2019). I do not use a particular label to characterize my judicial philosophy. If confirmed, I will apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

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

   Response: "Textualism" is "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." Black's Law Dictionary (11th ed. 2019). I do not use a particular label to characterize my judicial philosophy. Constitutional interpretation begins with an examination of the text of the provision and any binding precedent of the Supreme Court or Circuit interpreting it. If confirmed, I will apply binding Supreme Court and Second Circuit precedent regarding issues of constitutional interpretation.

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

Response: The Supreme Court has stated that the meaning of the Constitution is fixed. *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understanding of those who ratified it."). The Constitution may only be changed through the formal amendment process set forth in Article V.

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

   Response: I have not carefully studied the jurisprudence of the Supreme Court Justices since January 20, 1953, and therefore cannot identify any single Justice whose jurisprudence I most admire. If confirmed as a district judge, I will faithfully apply all Supreme Court precedent, regardless of which Justice authored the opinion.

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: Absent controlling Supreme Court precedent, a circuit court is required to apply its own precedent unless it is overruled by a subsequent *en banc* panel. *See* Fed. R. App. P. 35(a); *see also United States v. Felder*, 760 F. App'x 74, 76 (2d Cir. 2019) (citing *In re Sokolowski*, 205 F.3d 532 (2d Cir. 2000)). As a district court judge, I would be bound to follow the decisions of the Second Circuit regardless of any perceived conflict with the original public meaning of the Constitution.

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

   Response: Please see my response to Question 7.

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

   Response: When interpreting a statute, I begin with the text. If the text is unambiguous, the inquiry ends and "extrinsic factors" play no interpretive role. If the statutory text is ambiguous, however, I would look to extrinsic sources, including the canons of statutory construction, analogous precedent from the Supreme Court and the Second Circuit, persuasive authority from other courts addressing the same or similar issues, and finally legislative history.

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. A court must consider the factors provided in 18 U.S.C. § 3553 in imposing a sentence. Under 18 U.S.C. § 3553(a)(6), the court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." However, the Sentencing Guidelines explicitly state that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sentencing Guidelines Manual § 5H1.10. If confirmed, I would apply the factors set forth by Congress in 18 U.S.C. § 3553, the Sentencing Guidelines, and any applicable Supreme Court and Second Circuit precedent, in making any sentencing decisions.

Senator Josh Hawley
Questions for the Record

Ramon Reyes
Nominee, Eastern District of New York

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    Response: If confirmed, in every criminal sentencing matter, I will evaluate each case before me on the facts and evidence presented. In doing so, I will apply the factors set forth in 18 U.S.C. § 3553(a), including considering the advisory Sentencing Guidelines and any relevant enhancements, as well as all binding precedent of the Supreme Court and Second Circuit.

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

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

    c. **The enhancement for offenses involving the use of a computer**

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

    d. **The enhancements for the number of images involved**

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

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

c. If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?

Response to subparts (a) – (c): The alignment of penalties across criminal statutes is a matter best left to Congress. As a sitting United States Magistrate Judge and a judicial nominee, it is inappropriate for me to opine on whether criminal penalties should be aligned across criminal statutes. If confirmed, I will analyze each criminal sentence based upon its individual facts and circumstances, I will consider the relevant factors in 18 U.S.C. § 3553(a); the applicable Sentencing Guidelines; binding Supreme Court and Second Circuit precedent; the submissions of the parties, the presentence report, the victim impact statement, and any other relevant materials.

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

a. Do you agree with that philosophy?

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

Response to subparts (a) – (b): I am unfamiliar with Justice Marshall's quote or the specific context in which it was made. Judges take an oath to faithfully and impartially uphold and apply the Constitution and laws of the United States, and are bound by the Rule of Law to decide all cases based upon the facts and the applicable law. I have followed this oath as a United States Magistrate Judge for almost seventeen years. If confirmed, I will continue to do the same by faithfully applying all binding Supreme Court and Second Circuit precedent, regardless of my personal preferences as to what the outcome of any case should be.

4. Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me, including *Dobbs v. Jackson Women's Health Organization*.

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

Response: Under the *Pullman* abstention doctrine, federal courts "ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (citation omitted); *see R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–501 (1941). In the Second Circuit, courts should exercise *Pullman* abstention "when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible 'to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (citations omitted). However, "[e]ven when these conditions are fulfilled, [courts in the Second Circuit] are not required to abstain, and, to the contrary, 'important federal rights can outweigh the interests underlying the *Pullman* doctrine.'" *Id.* (citations omitted).

Under the *Younger* abstention doctrine, federal courts are "forbid[den from] stay[ing] or enjoin[ing] pending state court proceedings except under special circumstances." *Younger v. Harris*, 401 U.S. 37, 41 (1971). In the Second Circuit, "*Younger* abstention is mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003) (citations omitted).

Under the *Burford* abstention doctrine, "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (citation omitted); *see also Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Courts in the Second Circuit consider the following factors when analyzing a *Burford* abstention issue: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 650 (2d Cir. 2009) (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998)).

Under the *Rooker-Feldman* abstention doctrine, federal courts are precluded from exercising subject-matter jurisdiction to review "cases brought by state-court losers complaining of injuries caused by state- court judgments rendered before the [federal] district court proceedings commenced and inviting district court review and rejection of

those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In the Second Circuit, there are "four requirements that must be met for *Rooker-Feldman* to apply: (1) 'the federal-court plaintiff must have lost in state court;' (2) 'the plaintiff must complain of injuries caused by a state-court judgment;' (3) 'the plaintiff must invite district court review and rejection of that judgment;' and (4) 'the state-court judgment must have been rendered before the district court proceedings commenced.'" *Dorce v. City of New York*, 2 F.4th 82, 101 (2d Cir. 2021) (citation omitted). "[T]he second requirement – that the plaintiff complains of an injury caused by a state-court judgment – is the core requirement from which the other *Rooker-Feldman* requirements derive." *Id.* at 102 (citing *Sung Cho v. City of New York*, 910 F.3d 639, 646 (2d Cir. 2018)).

Under the *Colorado River* abstention doctrine, federal courts "may abstain in order to conserve federal judicial resources . . . 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) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976)). In the Second Circuit, courts "should consider (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less inconvenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights." *Id.* (internal citations omitted).

Under the *Brillhart*/*Wilton* abstention doctrine, "[t]o avoid wasteful and duplicative litigation, district courts may often dismiss declaratory judgment actions 'where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.'" *Kanciper v. Suffolk Cnty. Soc. for the Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 91 (2d Cir. 2013) (citations omitted); *see Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). In the Second Circuit, when deciding whether to abstain, courts consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 105 (2d Cir. 2012) (internal quotation marks and citations omitted).

Under the *Thibodaux* doctrine, federal courts "may refrain from deciding questions of state law otherwise within [their] jurisdiction" when "a difficult question of state law of

substantial import is presented." *Smith v. Metro. Prop. Liab. Ins. Co.*, 629 F.2d 757, 759 (2d Cir. 1980) (citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27–29 (1959)).

6. **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: Not applicable.

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

   Response: The original meaning of a constitutional provision can play a role in interpreting the Constitution. Analysis of any constitutional provision must begin with an examination of the text and any binding interpretations of the text by the Supreme Court and relevant Circuit Court. In a number of cases, the Supreme Court has emphasized the role of original meaning in interpreting a constitutional provision. *See, e.g.*, *District of Columbia v. Heller,* 554 U.S. 570 (2008). The Supreme Court has applied the original public meaning in various contexts. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

8. **Do you consider legislative history when interpreting legal texts?**

   Response: When interpreting "legal texts," I begin with the text. If the text is unambiguous, the inquiry ends and legislative history plays no part in the interpretation of the text. If the text is ambiguous, however, I would look to extrinsic sources, including the canons of construction, precedent from the Supreme Court and the Second Circuit, persuasive authority from other courts addressing the same or similar issues, and finally legislative history, if necessary.

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

      Response: The Supreme Court has held that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," *Garcia v. United States*, 469 U.S. 70, 76 (1984), while "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). If confirmed as

a district court judge, I will faithfully and impartially follow binding Supreme Court and Second Circuit precedent regarding legislative history.

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

Response: I am unaware of any Supreme Court or Second Circuit precedent that stands for the proposition that it is appropriate to consult the laws of foreign nations when interpreting the provisions of the United States Constitution.

9. 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: To successfully challenge an execution protocol under the Eighth Amendment, "a prisoner must show a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Baze v. Rees*, 553 U.S. 35, 52 (2008); *Glossip v. Gross*, 576 U.S. 863, 867–68 (2015)).

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

Response: Yes.

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

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

12. 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.

13. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a 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: To survive a constitutional challenge under the Free Exercise Clause, a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 110 S. Ct. 1595, 1598–1606 (1990). However, if a law affecting the free exercise of religion is either not neutral or is not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *see also Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018). If confirmed, I will follow binding Supreme Court and Second Circuit precedent on this issue.

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

Response: Please see my response to Question 13.

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

Response: The Supreme Court has held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (citing *Thomas v. Review Bd. of Indian Employment Security Div.*, 450 U.S. 707, 714 (1981)). A court's "narrow function" in evaluating the sincerity of a religious belief is whether the asserted belief "reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas*, 450 U.S. at 716).

In the Second Circuit, a court's "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 589–90 (2d Cir. 2003) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996)). If confirmed, I will follow binding Supreme Court and Second Circuit precedent on this issue.

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

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

Response: In *Heller*, the Supreme Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). More broadly, the Court determined that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

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.

17. 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: In this statement and his dissent, Justice Holmes seems to convey that the Constitution "is not intended to embody a particular economic theory . . . ." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). As a sitting United States Magistrate Judge and a judicial nominee, it is inappropriate for me to comment or express an opinion on whether I agree with a comment made by another judge.

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

Response: The decision in *Lochner* was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In a subsequent decision, the Supreme Court stated that the "[t]he doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

18. 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: No. I will follow all Supreme Court precedent that has not been formally overruled by the Supreme Court.

a. If so, what are they?

Response: Not applicable.

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

Response: I commit to faithfully apply all Supreme Court precedent.

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

a. Do you agree with Judge Learned Hand?

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

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

Response to subparts (a) – (c): To my knowledge, *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), has not been explicitly overruled and I would therefore be bound to apply its holding. The Second Circuit has held, however, that market share percentages alone are not conclusive in determining monopoly power. *Broadway Delivery Corp. v. United Parcel Serv. of*

America, Inc., 651 F.2d 122, 128 (2d Cir. 1983) (citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948)). Determining monopoly power is a fact specific inquiry, considering market share along with "additional market characteristics, among them, the strength of the competition, the probable development of the industry, and consumer demand." *Id.* If a case came before me presenting the issue of what percentage of market share was necessary to constitute a monopoly, I would look to binding Supreme Court and Second Circuit precedent and faithfully apply that precedent to the relevant facts of the case.

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

Response: Although the Supreme Court has indicated that "there is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court has recognized limited areas in which "federal common law" may apply, in cases or controversies with Article III standing, in the absence of a statute. *See Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

21. 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: On questions of state constitutional interpretation, federal courts must defer to the decisions of the highest court in the state at issue. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts.") (citations omitted). If confirmed, I will look to the decisions of the highest court of the state whose constitution is at issue.

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

Response: Because federal courts must interpret the Constitution according to Supreme Court and Circuit Court precedent, while "the views of the state's highest court with respect to state law are binding on the federal courts," *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), federal courts may interpret identical federal and state constitutional provisions differently.

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

Response: In general, yes. A state may provide greater, but not less protection, under their state's constitution than is provided by the federal constitution. See *Rice v. Santa Fe Elevator Grp.*, 331 U.S. 218 (1947).

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it is generally inappropriate for me to opine on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and Second Circuit precedent to the cases that would come before me. That being said, it is generally understood that *Brown v. Board of Education* was "correctly decided" as it has become so firmly rooted in American jurisprudence and the issue is not likely to come before the Court again.

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

Response: Yes, in certain circumstances.

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

Response: The authority to issue injunctions is found in Federal Rule of Civil Procedure 65. The Supreme Court has explained that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). To date, the Supreme Court has not held that "nationwide injunctions" are per se impermissible.

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

Response: Under Federal Rule of Criminal Procedure 65, injunctive relief may be granted where the party seeking such relief demonstrates (1) a likelihood of success on the merits; (2) that they will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. If confirmed, I will faithfully and impartially follow all precedents of the Supreme Court and Second Circuit regarding the proper scope of injunctive relief.

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

Response: Please see my response to Question 23.

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

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

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

Response: Please see my response to Question 5.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to comment on or express my opinion regarding any issue which potentially could come before me.

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

Response: The Supreme Court has held that the Due Process Clause of the Fifth and Fourteenth Amendments protect unenumerated rights "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Under this standard, the Supreme Court has recognized a limited number of unenumerated rights, including *inter alia* the right to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to live with one's family, *Moore v. East Cleveland*, 431 U.S. 494 (1977); the right of parents to control their children's education, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and the right to engage in intimate relations in private, *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Supreme Court reaffirmed that the Due Process Clause protects certain substantive rights not otherwise enumerated in the Constitution which are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2242 (quoting *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted)).

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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

Response: Please see my responses to Questions 13, 14, and 15.

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

Response: The right to free exercise is broader than freedom of worship. "The Free Exercise Clause embraces a freedom of conscience and worship[.]" *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: Please see my response to Questions 13, 14, and 15.

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

Response: Please see my response to Question 15.

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

Response: The Supreme Court has held that the Religious Freedom Restoration Act applies to all federal law. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

30. 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 or the context in which it was made. However, I understand this statement to acknowledge a judge's obligation to impartially apply the law to the facts of a case, regardless of his personal beliefs as to what the outcome should be.

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

Response: No.

a. If yes, please provide appropriate citations.

Response: Not applicable.

32. 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.

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

Response: I am deeply proud to be an American, and of our Country's commitment to the rule of law and equal justice under law. As a judge, when cases come before me involving claims of racial discrimination I adjudicate them on a case-by-case basis and adhere strictly to the rule of law and equal justice under law. I treat every litigant – plaintiff or defendant, government, corporation, or individual – fairly and with respect, and to the best of my knowledge the judges with whom I have been pleased to serve with or appear before have done the same. Beyond that it would be inappropriate for me to comment more broadly on whether the United States of America is a systemically racist country.

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

Response: No.

35. How did you handle the situation?

Response: Not applicable.

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

Response: Yes.

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

Response: No single Federalist Paper has shaped my view of the law more than any other Federalist Paper.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court did not address the question of whether "an unborn child is a human being," and returned the question of abortion regulation to the people and their elected representatives. As a sitting United States Magistrate Judge and a judicial nominee, it is inappropriate for me to comment or express my opinion regarding any issue which potentially could come before me.

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

Response: Yes, once in the late-1980s. I do not have a record of that testimony and as far as I am aware the testimony is not "available online or as a record."

40. 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.

41. 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.

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

Response: No.

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

Response: Not applicable.

43. Have you ever confessed error to a court?

Response: No.

a. If so, please describe the circumstances.

Response: Not applicable.

44. 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: My understanding of the duty of candor is that I have a duty to answer all questions truthfully in connection with my nomination to the United States District Court for the Eastern District of New York

Questions from Senator Thom Tillis
for Ramon Ernesto Reyes, Jr.
Nominee to be United States District Judge for the Eastern District of New York

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

   Response: Yes.

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

   Response: Judicial activism is "[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 do not consider judicial activism appropriate.

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

   Response: Both the Code of Conduct for United States Judges and the judicial oath of office require judges to commit to impartiality. It is an aspiration, an expectation, and a requirement.

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

   Response: No.

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

   Response: Yes. A judge must faithfully interpret and neutrally apply the law to the facts of the case, without regard to personal preferences and without regard to any desired outcome. It is for the executive and legislative branches to consider whether a particular outcome is desirable.

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

   Response: No.

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

   Response: If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning the Second Amendment, including *New York Rifle & Pistol*

Association v. Bruen, 142 S. Ct. 2111 (2022), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

   Response: If confirmed, I would evaluate the facts of the case and apply all binding Supreme Court and Second Circuit precedent concerning Second Amendment rights and pandemic-related restrictions affecting constitutional rights. *See, e.g.*, *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

   Response: Law enforcement personnel and departments are entitled to qualified immunity from civil damages liability "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." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotations and citations omitted); *see also Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020). If confirmed, I would follow all binding Supreme Court and Second Circuit precedent concerning qualified immunity.

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

    Response: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policymakers to consider. As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to comment on issues of public policy. If confirmed, I would follow all binding and applicable Supreme Court and Second Circuit precedent concerning qualified immunity.

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

    Response: The proper scope of qualified immunity protections is an issue for policymakers to consider. As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to comment on issues of public policy. If confirmed, I would follow all binding and applicable Supreme Court and Second Circuit precedent concerning qualified immunity.

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate to express an opinion regarding the Supreme Court's jurisprudence on an issue that may come before me in the future. If confirmed, I would address any case involving patent eligibility by applying the Patent Act, 35 U.S.C. § 101, and would apply all applicable and binding precedent from the Supreme Court and the Second Circuit, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), to the facts of the case before me.

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

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

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

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

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla's* billing

system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?

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

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

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

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

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

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

Response to subparts (a) – (j): If confirmed, I would faithfully and impartially apply the Patent Act, 35 U.S.C. § 101, and all binding Supreme Court and Second Circuit precedent regarding patent eligibility, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), to the specific facts of any case that comes before me. *Alice Corp. Pty. Ltd.* and *Mayo Collaborative Services* set forth a two-step approach to patent eligibility: First, it must be determined whether the subject claim is directed to something the Supreme Court has indicated is unpatentable. Second, if so, the court must evaluate whether the claim, taken as an ordered combination, nonetheless contains an inventive concept sufficient to render the claim eligible for patent protection. The outcome of such cases are dependent upon the specific facts and require careful consideration of the precise wording of the claim, the evidence presented, and the applicable precedent. As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate comment on or apply the law to hypothetical fact patterns involving issues that may come before me in the future.

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

Response: Whether the current jurisprudence provides the clarity and consistency needed to achieve any particular goal is a question for policymakers to consider. As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to comment on this policy issue. If confirmed, I would faithfully and impartially apply all binding Supreme Court and Second Circuit precedent regarding patent eligibility, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), to the specific facts of the case before me.

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

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

Response: As an associate at O'Melveny & Myers LLP from 1995 to 1998, my practice involved copyright infringement cases. In such cases, I worked directly with a partner, and performed a wide variety of tasks from drafting pleadings, discovery requests and responses, and motions, to negotiating discovery disputes with adversaries.

As a United States Magistrate Judge, I have handled the pre-trial discovery and case management for many cases involving copyright law. I have also issued several reports and recommendations and memoranda and opinions in cases

involving copyright law. *See, e.g.*, *Bari v. Impremedia Operating Co., LLC,* No. 20-CV-310 (EK) (RER), 2021 WL 724904 (E.D.N.Y. Jan. 8, 2021), *report and recommendation adopted*, 2021 WL 720705 (E.D.N.Y. Feb. 24, 2021); *Lowery v. Fire Talk LLC*, No. 19-CV-3737 (LDH) (RER), 2020 WL 5441785 (E.D.N.Y. June 29, 2020), *report and recommendation adopted*, 2020 WL 5425768 (E.D.N.Y. Sept. 10, 2020); *Broad. Music, Inc. v. The Living Room Steak House, Inc.*, No. 14-CV-6298 (FB) (RER), 2016 WL 756567 (E.D.N.Y. Feb. 26, 2016), 2016 WL 1056609 (E.D.N.Y. Mar. 17, 2016); *Zlozower v. Barlotta*, No. 11-CV-1555 (RER), 2012 WL 13098709 (E.D.N.Y. Apr. 3, 2012); *Seoul Broad. Sys. Int'l, Inc. v. John Kim Sang*, 754 F. Supp. 2d 562 (E.D.N.Y. 2010).

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

Response: As a United States Magistrate Judge, I have handled the pre-trial discovery and case management for a number of cases involving the Digital Millennium Copyright Act, and have issued a number of reports and recommendations in cases involving the Act. *See Feliciano v. Food Trucks in the Valley LLC*, No. 20-CV-1759 (MKB) (RER), 2021 WL 4150800 (E.D.N.Y. Aug. 26, 2021), *report and recommendation adopted*, 2021 WL 4147240 (E.D.N.Y. Sept. 13, 2021); *Prokos v. IQ Homes & Co. Inc.*, No. 20-CV-1220 (EK) (RER), 2021 WL 982878, (E.D.N.Y. Feb. 11, 2021), *report and recommendation adopted*, 2021 WL 980869 (E.D.N.Y. Mar. 16, 2021); *Simhaq v. Kid Carter Touring, Inc*., No. 20-CV-2057 (RPK) (RER), 2021 WL 3810754 (E.D.N.Y. Aug. 11, 2021), *report and recommendation adopted*, 2021 WL 3793876 (E.D.N.Y. Aug. 26, 2021).

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

Response: To the best of my knowledge, I have not had any experience as a United States Magistrate Judge or as a practicing attorney involving intermediary liability for online service providers that host unlawful content posted by users.

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

Response: As an associate at O'Melveny & Myers LLP from 1995 to 1998, approximately half of my practice involved intellectual property cases involving trademark and copyright infringement issues. In such cases, I worked directly with a partner, and performed a wide variety of tasks from drafting pleadings,

discovery requests and responses, and motions, to negotiating discovery disputes with adversaries.

As a United States Magistrate Judge, I have been involved in the pre-trial discovery and case management of several cases involving First Amendment free speech issues, intellectual property, and copyright law, and have written several reports and recommendations and memoranda and orders in cases regarding these issues.

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

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

    Response: When interpreting any statute, I begin with the text. If the text is unambiguous, the inquiry ends and extrinsic factors, including legislative history, play no interpretive role. If the statutory text is ambiguous, however, I would look to extrinsic sources, including the canons of statutory construction, analogous precedent from the Supreme Court and the Second Circuit, persuasive authority from other courts addressing the same or similar issues, and finally legislative history.

    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: If confirmed, I would review and apply binding Supreme Court and Second Circuit precedent regarding the appropriate level of deference to give an expert agency's analysis or advice, depending on the facts and circumstances of the case before me. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78 (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: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to provide an opinion on a hypothetical issue that may come before me in the future. If confirmed, I would follow all binding and applicable Supreme Court and Second Circuit precedent on copyright infringement issues.

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

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

Response: If confirmed, I would apply the DMCA and any binding Supreme Court or Second Circuit precedent concerning the statute. It is the role of the legislative branch to determine whether the DMCA should be amended in response to technological changes.

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

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

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

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

Response: As a sitting United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to comment on litigants' use of specific strategies or procedural devices, or the practices of other federal district court judges. To the best of my knowledge, cases in the Eastern District of New York are randomly assigned by the Clerk of the Court. *See* Local Rules for the Division of Business for the Eastern District of New York, Rule 2(b). If confirmed as a district judge, I would follow all binding Supreme Court and Second Circuit precedent concerning venue issues, and would apply all the relevant statutes and rules of the United States District Courts and the local rules of the Eastern District of New York.

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

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

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

Response: No. If confirmed, I commit to abide by the rules and procedures of the Second Circuit and the Eastern District of New York, and will not proactively take steps to attract any particular type of case or litigant, as I have for the past sixteen years as a United States Magistrate Judge.

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

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

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

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

Response: A complaint regarding a district judge's conduct may be made under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364. Such a complaint would then be considered by the proper authorities within the Circuit, including the chief judge of the circuit.

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

Response: As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to express an opinion on these issues.

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

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

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

Response to Questions 20(a) and (b): As a sitting United States Magistrate Judge and judicial nominee, it would be inappropriate for me to express an opinion on these issues.

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

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

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

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

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