Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. Arun Srinivas Subramanian
Nominee to be United States District Judge, Southern District of New York

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

   Response: I do not agree that in rendering judgments about the Constitution, judges exercise their own independent value judgments. The role of a judge is to apply the law to the facts and circumstances of each case in a fair and neutral manner.

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

   Response: Black's Law Dictionary (11th ed. 2019) defines the term living constitution as "A constitution whose interpretation and application can vary over time according to changing circumstances and changing social values."

3. **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 Justice Jackson's statement or her views on a "living constitution." The Constitution has a fixed meaning and its provisions can only be modified through the amendment process set forth in Article V of the Constitution. In all cases involving the interpretation of the Constitution, I would faithfully follow the binding precedent of the Supreme Court and Second Circuit.

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

   Response: In *Troxel v. Granville*, 530 U.S. 57, 66 (2000), the Supreme Court stated that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." The Court in *Troxel* also stated that "the 'liberty' protected by the Due Process Clause includes the right of parents . . . to 'control the education of their own.'" *Troxel*, 530 U.S. at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). As a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit, including on the issue of parents' constitutional right to direct the education of their children.

5. **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: If presented with a case that raises this question, I would faithfully follow binding precedent from the Supreme Court and Second Circuit, and I would apply the

law in a fair and neutral manner to the best of my ability. As a judicial nominee, canons of judicial ethics prohibit me from further commenting on this matter.

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

   Response: The sentencing of defendants is a serious matter, and it is important to follow the law faithfully and to apply the law in a fair and neutral manner to the facts and circumstances of every case. The law to be applied includes binding precedent from the Supreme Court and Second Circuit, the factors enumerated in 18 U.S.C. § 3553(a), and the relevant provisions of the United States Sentencing Guidelines.

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

   Response: I am not familiar with this statement or the context in which it was made. Criminal defendants have a right to counsel under the Sixth Amendment to the Constitution. Civil litigants generally do not have the right to counsel under federal law. In each case where this situation arises, I would faithfully follow binding precedent from the Supreme Court and Second Circuit, as well as all applicable law.

8. **Under Supreme Court and Second Circuit precedent, what is a "fact" and what sources do courts consider in determining whether something is a question of fact or a question of law?**

   Response: Black's Law Dictionary (11th ed. 2019) defines a "fact" as, *inter alia*, "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." In determining whether something is a question of fact or a question of law, I would faithfully apply binding precedent from the Supreme Court and Second Circuit, and I would utilize the sources permitted by that precedent. Depending on the case, those sources may include prior caselaw, statutes or rules, or dictionaries or treatises as permitted by law.

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

   Response: Judicial decisions should be based solely on an application of the applicable law to the facts and circumstances of each case.

10. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

    Response: The former is directed at the judge personally, while the latter is directed to an evaluation of the judge's opinion. As a judge I would faithfully follow the Code of Conduct for United States Judges, including its requirement for a judge to "be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity," and to "require similar conduct by

those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process." Canon 3(a)(3).

11. **Do you think the Supreme Court should be expanded?**

    Response: As a judge, I would faithfully follow binding precedent from the Supreme Court regardless of its size or any proposal to modify its size. The question of whether the Supreme Court should be expanded is one for Congress to consider, and not for judges whose job is to apply Supreme Court precedent in a fair and neutral manner regardless of any policy considerations concerning the size or membership of the Court.

12. **Which of the four primary purposes sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important? Which of these principles, if confirmed, will guide your approach to sentencing defendants?**

    Response: The principle that will guide my approach to sentencing defendants is to follow the law faithfully and to apply the law in a fair and neutral manner to the facts and circumstances of every case. The law to be applied includes binding precedent from the Supreme Court and Second Circuit, the factors enumerated in 18 U.S.C. § 3553(a), and the relevant provisions of the United States Sentencing Guidelines. In 18 U.S.C. § 3553(a)(2), Congress highlighted all four purposes identified in the question as being important to the sentencing of defendants, but Congress did not indicate that one purpose is of greater importance than the others. In sentencing defendants, I intend to follow the guidance of Congress, and my personal beliefs concerning the relative importance of these purposes will be irrelevant.

13. **In what situation(s) does qualified immunity not apply to a law enforcement officer in New York?**

    Response: "[O]fficers are entitled to qualified immunity §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (internal quotation marks and citations omitted). As a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit, including *Wesby*.

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

    Response: The issue of the reallocation of funds away from police departments to other support services by local governments is one for policymakers to consider. If presented with a case that raises this question, I would faithfully follow binding precedent from the

Supreme Court and Second Circuit, and I would apply the law in a fair and neutral manner to the best of my ability.

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

Response: If confirmed as a district judge, my judicial philosophy will be to treat every case as if it is the most important case I will handle as a judge. This means making sure that I approach each case with an open mind, hear fully from every litigant, and that I give serious and thoughtful consideration to the contentions of all parties. My decisions in all cases will be based on a thorough review of the law and the facts. I will strive for the outcome required by an even-handed application of the law, including binding precedent from the Supreme Court and Second Circuit, even if my personal views in a given case might suggest a different result. I will do my best to adjudicate cases in an efficient manner, understanding that prompt decision-making is a critical aspect of justice. My philosophy will be to act in a manner such that all litigants in my courtroom—whether they win or lose—will feel that they received a full, fair, and just hearing. I have not studied whether there is one decision, or one judge or justice, that best represents this philosophy of judging. However, I am confident that these views are shared widely among judges across the nation.

16. **Please identify a Second Circuit or Southern District of New York judicial opinion from the last 50 years that is a typical example of your judicial philosophy and explain why.**

Response: Please see my response to Question 15.

17. **Please state the governing law for self-defense in New York and the Second Circuit.**

Response: The Supreme Court, in *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, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), has held that the Second and Fourteenth Amendments to the Constitution protect the right of an ordinary, law-abiding citizen to possess a handgun in the home and publicly for self-defense. In a criminal case, New York and federal law recognizes an exculpatory defense of self-defense, subject to limitations addressed in statutes and caselaw. *See, e.g.,* N.Y. Penal Law §§ 35.05, 35.15; *United States v. Thomas*, 34 F.3d 44, 47 (2d Cir. 1994).

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

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

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

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

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

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

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

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

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

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

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

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

Response to all subparts: Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on whether particular cases were in my personal view correctly decided. As prior judicial nominees have observed, the legal issues presented in *Brown v. Board of Education* and *Loving v. Virginia* are unlikely to become the subject of litigation, and therefore I am comfortable expressing my view that *Brown* and *Loving* were correctly decided.

19. **What legal standard would you apply in evaluating whether or not a regulation or statutory provision infringes on Second Amendment rights?**

Response: I would apply the standard set forth in binding precedent of the Supreme Court and Second Circuit. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court stated the following standard: "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

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

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

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

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

Response to all subparts: Not to the best of my knowledge.

21. **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. In 2020, I was invited to consider joining the board of directors of the Alliance for Justice, but I did not elect to join the board.

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?**

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 to subparts b and c: I have spoken with Nan Aron and Rakim Brooks, who described the nomination process generally. At no point has anyone associated with the Alliance for Justice discussed with me any pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

22. **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?**

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.**

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.**

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 to all subparts: Not to the best of my knowledge.

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

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

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

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

Response to all subparts: Not to the best of my knowledge.

24. **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?**

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

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

Response to all subparts: Not to the best of my knowledge.

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

Response: On October 30, 2020, I submitted an application to the judicial screening committee for Senator Charles Schumer. On March 24, 2021, I interviewed with Senator Schumer's screening committee. On May 27, 2022, I interviewed with Senator Schumer. On June 10, 2022, the White House Counsel's Office informed me that Senator Schumer had recommended me as a potential candidate for nomination. On June 13, 2022, I interviewed with attorneys from the White House Counsel's Office, who informed me on June 15, 2022, that I would be moving forward in the selection process. Since then, I have been in contact with attorneys from the Department of Justice Office of Legal Policy as well as attorneys from the White House Counsel's Office. On September 6, 2022, my nomination was submitted to the Senate.

26. **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: Not to the best of my knowledge.

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

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

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

Response: Not to the best of my knowledge.

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

    Response: Not to the best of my knowledge.

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

    Response: Not to the best of my knowledge.

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

    Response: On June 10, 2022, the White House Counsel's Office informed me that Senator Schumer had recommended me as a potential candidate for nomination. On June 13, 2022, I interviewed with attorneys from the White House Counsel's Office, who informed me on June 15, 2022, that I would be moving forward in the selection process. Since then, I have been in contact with attorneys from the Office of Legal Policy at the Department of Justice as well as attorneys from the White House Counsel's Office.

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

    Response: On December 20, 2022, I received questions from the Committee via the Department of Justice Office of Legal Policy (OLP). I drafted my answers, and, where necessary, conducted legal research and reviewed my records to refresh my recollection. I shared my draft with OLP, which provided feedback. I reviewed and considered OLP's feedback, and then submitted my answers to the Committee.

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

1. How would you describe your judicial philosophy?

Response: If confirmed as a district judge, my judicial philosophy will be to treat every case as if it is the most important case I will handle as a judge. This means making sure that I approach each case with an open mind, hear fully from every litigant, and that I give serious and thoughtful consideration to the contentions of all parties. My decisions in all cases will be based on a thorough review of the law and the facts. I will strive for the outcome required by an even-handed application of the law, including binding precedent from the Supreme Court and Second Circuit, even if my personal views in a given case might suggest a different result. I will do my best to adjudicate cases in an efficient manner, understanding that prompt decision-making is a critical aspect of justice. My philosophy will be to act in a manner such that all litigants in my courtroom—whether they win or lose—will feel that they received a full, fair, and just hearing.

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

Response: In deciding cases turning on the interpretation of a federal statute, I would faithfully apply Supreme Court and Second Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends there. If the text is not clear, I would consult the sources authorized by Supreme Court and Second Circuit precedent. These include cases from other jurisdictions, as well as recognized canons of statutory construction and interpretive principles. If directed by Supreme Court and Second Circuit precedent, these sources may include interpretations by a regulatory agency. As a last resort, I would consider the types of legislative history that the Supreme Court and Second Circuit have identified as being reliable.

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

Response: In deciding cases turning on the interpretation of a constitutional provision, I would faithfully apply Supreme Court and Second Circuit precedent. If there is no applicable precedent, I would follow the interpretive methods set out in the binding precedent of the Supreme Court and the Second Circuit. For example, in the context of evaluating a firearm regulation under the Second Amendment, the Supreme Court "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2131 (2022).

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

Response: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit when interpreting the Constitution. The Supreme Court has recognized the importance of text and original meaning when interpreting provisions of the Constitution. *See, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2136-2137 (2022); *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407, 2411 (2022).

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

Please see the response to Question 2. In addition, the Second Circuit has stated that "[i]t is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous." *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (cited with approval in *Springfield Hospital, Inc. v. Guzman*, 28 F.4th 403, 422 (2d Cir. 2022)).

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

Response: The Supreme Court has held that the ordinary public meaning of a text at the time of enactment is a primary consideration in determining the plain meaning of that text. *See, e.g., Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). If confirmed as a judge, I would faithfully follow binding precedent of the Supreme Court and Second Circuit in determining the proper approach to determining the plain meaning of a statute or constitutional provision.

6. What are the constitutional requirements for standing?

Response: An injury in fact that is concrete and particularized; that is fairly traceable to the challenged conduct of the defendant; and that is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

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

Response: Congress is limited to those powers enumerated in the Constitution. However, the Supreme Court has recognized that the express grant of powers to Congress in the Constitution "necessarily implies the grant of all usual and suitable

means for the execution of the powers granted," and that "Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it." *McCullogh v. Maryland*, 17 U.S. 316, 323-324 (1819).

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

Response: If confirmed as a judge, I would evaluate the constitutionality of that law by following the precedents of the Supreme Court and the Second Circuit. The Supreme Court has held that the "'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

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

Response: The Supreme Court has held that fundamental rights and liberties that 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" are protected by the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997) (quotation marks and citations omitted). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

10. What rights are protected under substantive due process?

Response: Please see the response to Question 9.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), the Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1978), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and held that the Due Process Clause does not protect a right to abortion. As to the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court has stated that "[t]he doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and

economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

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

Response: The Supreme Court has recognized that Congress' power under the Commerce Clause includes: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities" and 3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995).

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

Response: Classifications based on race, national origin, or alienage are subject to strict scrutiny. The Supreme Court has stated that "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

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

Response: Checks and balances and separation of powers are vital to the Constitution's structure. They prevent any branch of government from gaining excessive power over any other branch; preserve state autonomy; and protect individual liberty. These values are inherent in the Constitution's structure, and they are reflected in provisions such as the Ninth and Tenth Amendments to the Constitution. The Supreme Court has recognized the importance of checks and balances and separation of powers to our constitutional republic. *See, e.g., Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Their solution to governmental power and its perils was simple: divide it." (quotation marks and citations omitted)); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." (quotation marks and citations omitted)).

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

Response: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit concerning the proper scope of authority for the branch of government at issue, and I would apply that law in a fair and neutral manner to the facts and circumstances of the case.

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

Response: In considering a case, a judge is required to apply the law in a fair and neutral manner to the facts and circumstances of the case. Judges are also required to adhere to the Code of Conduct for United States Judges, which makes clear that judges should be "patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Canon 3(a)(3). The Code of Conduct further requires judges to "accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law." If confirmed as a judge, I will faithfully follow the law and applicable rules of conduct in every case that I consider.

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

Response: It is undesirable to reach either result. Judges should strive to avoid invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional. By adhering to precedent, being hard-working and thorough, and through a strong commitment to the rule of law, I hope to avoid either outcome in any case I consider.

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

Response: I have not researched the historical trends in the exercise of the power of judicial review. I do not believe it is appropriate for a judge to act either aggressively or passively in the exercise of judicial review. The role of a judge is to uphold the rule of law in all cases by faithfully following precedent, and by applying the law to the facts and circumstances of each case in a fair and neutral manner. If confirmed as a judge, I would strive to follow this approach in every case I consider.

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

Response: Judicial review refers to the role of the judicial branch to review actions of the legislative or executive branch to determine whether they are constitutionally valid. Judicial supremacy refers to the principle that the Supreme Court's

determinations of constitutionality are binding on the other branches and levels of government, subject to the Supreme Court's overturning of prior precedents, as well as the amendment process set forth in Article V of the Constitution.

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

Response: The question of how elected officials should balance the obligations of their positions is one for policymakers and elected officials to consider. If presented with a case raising this question, I would faithfully follow binding precedent from the Supreme Court and Second Circuit regardless of my personal views. As a judicial nominee, canons of judicial ethics prohibit me from further commenting on the manner in which elected officials should balance the obligations of their offices.

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

Response: The role of a judge is to decide cases and controversies, to faithfully apply the law as it stands, and to uphold the rule of law. Judges do not make law, nor do they execute or enforce the laws. The principle described in the question serves as an important reminder of a judge's proper role in our constitutional structure.

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

Response: The proper role of a district judge in the Southern District of New York is to apply binding precedent from the Supreme Court and Second Circuit. The law should be applied in a fair and neutral manner to the facts and circumstances of the case at issue without regard to the judge's personal views. Following this approach, if a particular precedent is inapplicable to the case presented, then it is the role of the district judge to follow Supreme Court and Second Circuit precedent as to the proper method of analysis the judge should follow, as well as the sources to be consulted in conducting that analysis, to reach the correct outcome consistent with the rule of law.

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

Response: The sentencing of defendants is a serious matter, and it is important to follow the law faithfully and in a fair and neutral manner. The law to be applied includes binding precedent from the Supreme Court and Second Circuit, consideration of the factors enumerated in 18 U.S.C. § 3553(a), and the relevant provisions of the United States Sentencing Guidelines. The Sentencing Guidelines provide that factors such as race and national origin "are not relevant in the determination of a sentence." U.S.S.G. §5H1.10; *see also* 28 U.S.C. §994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

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

Response: I am not familiar with the statement referred to in the question or the context in which it was made. Black's Law Dictionary (11th ed. 2019) defines the term "equity" as, *inter alia*, "[f]airness; impartiality; evenhanded dealing."

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

Response: Black's Law Dictionary (11th ed. 2019) defines the term "equity" as, *inter alia*, "[f]airness; impartiality; evenhanded dealing," and the term "equality" as, *inter alia*, "[t]he quality, state, or condition of being equal; esp., likeness in power or political status."

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

Response: As previously noted in response to Question 24, I am not familiar with the statement in question, concerning the Biden Administration's definition of "equity," or the context in which it was made. The Fourteenth Amendment's Equal Protection Clause guarantees that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit as to the Equal Protection Clause and the scope of its protections.

27. How do you define "systemic racism?"

Response: I do not have a definition for this term personally. Black's Law Dictionary (11th ed. 2019) defines "racism" as, *inter alia*, the "[u]nfair treatment of people, often including violence against them, because they belong to a different race from one's own." To the extent such conduct occurs on a systemic basis, it may be defined by one as "systemic racism."

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

Response: I do not have a definition for this term personally. Black's Law Dictionary (11th ed. 2019) defines "critical race theory" as, *inter alia*, "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities."

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

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

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

Questions for the Record for Arun Subramanian nominated to be United States District Judge for the Southern District of New York

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: The law prohibits and makes racial discrimination illegal in various respects. This includes the Fourteenth Amendment's Equal Protection Clause, which provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This also includes federal, state, and local statutes and regulations that prohibit racial discrimination in different settings. *See, e.g.*, Title VI of the Civil Rights Act of 1964, § 42 U.S.C. 2000d; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); Fair Housing Act of 1968, 42 U.S.C. § 3605(a); Civil Rights Act of 1866, 42 U.S.C. § 1981. The Supreme Court and Second Circuit apply strict scrutiny to any regulation that makes race-based classifications. Conduct violating these and other applicable laws would be illegal. If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit to ensure that these laws are properly applied in every case before me.

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: The Supreme Court has held that fundamental rights and liberties that 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" are protected by the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997) (quotation marks and citations omitted). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in addressing a question concerning the scope of rights secured by the Constitution.

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: If confirmed as a district judge, my judicial philosophy will be to treat every case as if it is the most important case I will handle as a judge. This means making sure that I approach each case with an open mind, hear fully from every litigant, and that I give serious and thoughtful consideration to the contentions of all parties. My decisions in all cases will be based on a thorough review of the law and the facts. I will strive for the outcome required by an even-handed application of the law, including binding precedent from the Supreme Court and Second Circuit, even if my personal views in a given case might suggest a different result. I will do my best to adjudicate cases in an efficient manner, understanding that prompt decision-making is a critical aspect of justice. My philosophy will be to act in a manner such that all litigants in my courtroom—whether they win or lose—will feel that they received a full, fair, and just hearing. I have not studied whether

there is one decision, or one judge or justice, that best represents this philosophy of judging. However, I am confident that these views are shared widely among judges across the nation.

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

Response: The term "originalism" is defined in Black's Law Dictionary (11th ed. 2019) as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I would not characterize myself as subscribing to any particular ideological label, but I recognize that the Supreme Court has stated that original public meaning is a primary consideration in the interpretation of texts. *See, e.g., Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in any case concerning constitutional or statutory interpretation and follow the methods that this precedent dictates.

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

Response: The term "living constitution" is defined in Black's Law Dictionary (11th ed. 2019) as "[a] constitution whose interpretation and application can vary over time according to changing circumstances and changing social values." This dictionary also defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I would not characterize myself as subscribing to any particular ideological label, but I believe that the Constitution has a fixed meaning, and that the provisions of the Constitution can be modified only through the amendment process specified in Article V of the Constitution. If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in any case concerning constitutional or statutory interpretation and follow the methods that this precedent dictates.

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: Yes.

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: The Supreme Court has made clear that that the original meaning of the Constitution is a primary consideration. With respect to particular provisions of the

Constitution, the Court has made reference to "evolving standards of decency" or contemporary community standards as relevant when interpreting them. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560-561 (2005) ("The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)); *Miller v. California*, 413 U.S. 15, 33–34 (1973) (holding requirement that jury review materials alleged to be obscene and not subject to First Amendment protection according to "contemporary standards" of California was "constitutionally adequate")).

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

Response: No.

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

Response: If confirmed as a judge, *Dobbs v. Jackson Women's Health Organization* would be settled law and I would follow this binding precedent. The ruling in *Dobbs* can only be altered by a subsequent decision of the Supreme Court, or through the constitutional amendment process specified in Article V of the Constitution.

a. **Was it correctly decided?**

Response: Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on whether *Dobbs* was correctly decided.

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

Response: If confirmed as a judge, *New York Rifle & Pistol Association v. Bruen* would be settled law and I would follow this binding precedent. The ruling in *Bruen* can only be altered by a subsequent decision of the Supreme Court, or through the constitutional amendment process specified in Article V of the Constitution.

a. **Was it correctly decided?**

Response: Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on whether *Bruen* was correctly decided.

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

Response: If confirmed as a judge, *Brown v. Board of Education* would be settled law and I would follow this binding precedent. The ruling in *Brown* can only be altered by a subsequent decision of the Supreme Court, or through the constitutional amendment process specified in Article V of the Constitution.

a. **Was it correctly decided?**

Response: Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation. As prior judicial nominees have observed, the legal issues presented in *Brown v. Board of Education* are unlikely to become the subject of litigation, and therefore I am comfortable expressing my view that *Brown* was correctly decided.

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. § 3142(e)(3), provides for a rebuttable presumption in favor of pretrial detention for certain enumerated drug offenses carrying a sentence of ten years or more, certain crimes involving acts of terrorism, certain crimes of violence, and certain crimes involving minors as victims.

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

Response: I am not aware of Supreme Court or Second Circuit precedent describing the policy rationales for this presumption. However, the statute itself states that where the presumption applies and subject to rebuttal, courts should presume that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). Further, in *United States v. Salerno*, 481 U.S. 739, 742 (1987), the Supreme Court stated the following: "Responding to 'the alarming problem of crimes committed by persons on release,' S. Rep. No. 98–225, p. 3 (1983), U.S. Code Cong. & Admin. News 1984, pp. 3182, 3185 Congress formulated the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.* (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to 'give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.' S.Rep. No. 98–225, at 3, U.S. Code Cong. & Admin. News 1984, p. 3185."

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.

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

Response: Laws prohibiting religious discrimination include the First Amendment's Free Exercise Clause, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. In order to engage in actions that may burden religion, the government must comply with the requirements of these and other relevant federal, state, and local laws. Under the First Amendment's Free Exercise Clause, burdens on "sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable'" will be subject to strict constitutional scrutiny, requiring narrow tailoring to achieve a compelling governmental interest. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2421-2422 (2022). Laws or policies accompanied by "'official expressions of hostility'" will be set aside "without further inquiry." *Id*. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1732 (2018)). If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit to ensure that the laws identified here and other applicable laws prohibiting discrimination on the basis of religion are properly applied in every case I consider.

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: The Supreme Court held that the plaintiffs had "shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). According to the Supreme Court's decision, the religious organizations had demonstrated a likelihood of success on the merits on their First Amendment claim, because the regulations at issue were not neutral to religion or generally applicable; the regulations "single[d] out houses of worship for especially harsh treatment"; and there was insufficient support in the record that the regulations were narrowly tailored to achieve the compelling state interest, as necessary to satisfy strict scrutiny. *Id*. at 67.

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

Response: In *Tandon v. Newsom*, 141 S.Ct. 1294, 1297 (2021), the Supreme Court held that the plaintiffs were entitled to an injunction pending appeal regarding prohibitions affecting at-home worship imposed by California during the COVID-19 pandemic. In reaching its decision, the Supreme Court observed as to the challenged prohibitions that "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at

sporting events and concerts, and indoor restaurants to bring together more than three households at a time," but not those seeking to engage in religious practice. *Id*. at 1297. The Supreme Court concluded that the plaintiffs were "likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time'; and the State has not shown that 'public health would be imperiled' by employing less restrictive measures." *Id*. The Court in its decision relied in part on its prior decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 66 (2020), addressed further in response to Question 15.

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 Commission*, 138 S.Ct. 1719 (2018), the Supreme Court set aside an enforcement order from the Colorado Civil Rights Commission under the First Amendment's Free Exercise Clause. The Supreme Court's decision was based on evidence of official expressions of hostility against the subject of the order, a baker who refused to bake a cake for a wedding for a same-sex couple based on his religious beliefs.

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: The Supreme Court has rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). The question concerning the protection of an individual's religious beliefs is whether they are "sincerely held." *Id*.

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

Response: Please see my response to Question 19 above.

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

Response: Please see my response to Question 19 above.

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

Response: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in any case concerning issues surrounding abortion. As a judicial nominee, it would not be proper for me to comment on whether any particular church's doctrine is acceptable or morally righteous.

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. Morrissey-Berru*, 140 S.Ct. 2049 (2020), the Supreme Court held that the First Amendment precluded employment discrimination claims brought by two elementary school teachers at Catholic schools. The Supreme Court applied the "ministerial exception" to those laws recognized in a prior decision of the Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opp. Employment Comm'n*, 565 U.S. 171 (2012). The Court concluded that while the teachers, unlike the minister in *Hosanna-Tabor*, lacked the title of "minister" and had less religious training, the "the religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Our Lady of Guadalupe School*, 140 S.Ct. at 2055.

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, 1882 (2021), Catholic Social Services was a foster care agency in Philadelphia. The City of Philadelphia refused to refer children to that agency upon discovering that the agency would not certify same-sex couples to be foster parents based on its religious beliefs. The Supreme Court held that the City's actions violated the First Amendment's Free Exercise Clause. The Court applied the test for whether government action violates the Free Exercise Clause, which asks whether government action burdening religious beliefs is neutral and generally applicable. The Court concluded that Philadelphia's actions were not generally applicable. The City's actions were therefore subject to strict scrutiny, and the Supreme Court held that they were not narrowly tailored to achieve a compelling governmental interest. The Supreme Court

observed in this regard that "[t]he creation of a system of exceptions under the [City's] contract [with foster care agencies] undermines the City's contention that its non-discrimination policies can brook no departures. . . . The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *Id*. at 1882 (citations omitted). The Supreme Court concluded that "the refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id*.

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 struck down on First Amendment grounds "a Maine program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own," *id*. at 1993, based on the limitation that the program was only available for "nonsectarian" schools. The Supreme Court held that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id*. at 2002.

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 the dismissal of a high school football coach based on the coach's practice of engaging in quiet prayer at midfield after games violated the Free Exercise and Free Speech Clauses of the First Amendment. The Court held that the school district's actions were neither neutral nor generally applicable and therefore that the district's actions were subject to strict constitutional scrutiny. Applying strict scrutiny, the Supreme Court held that the school district had failed to demonstrate that its actions were narrowly tailored to achieve a compelling government interest. The Supreme Court held that summary judgment was properly granted to the coach on his First Amendment claims, and observed as follows: "Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And 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. The Constitution neither mandates nor tolerates that kind of discrimination." *Id*. at 2432-2433.

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: *Mast v. Fillmore County*, 141 S.Ct. 2430 (2021), concerned the enforcement of regulations requiring Amish homes to have septic systems to dispose of "gray water," and religious objections to the enforcement of those regulations by petitioners under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The lower court rejected petitioners' claim that enforcement of the regulations would violate RLUIPA. The Supreme Court granted the petition for certiorari, vacated the decision of the lower court, and remanded for further consideration in light of its decision in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1882 (2021). Justice Gorsuch agreed with the outcome, and wrote separately to "highlight a few issues the lower courts and administrative authorities may wish to consider on remand." *Mast*, 141 S. Ct. at 2430. Reviewing the background of the parties' dispute, the efforts of the petitioners to provide alternatives to enforcement that would be consistent with their religious views, and the government's refusal to entertain such alternatives, Justice Gorsuch's view was that the lower courts had failed to apply a sufficiently rigorous strict scrutiny analysis under RLUIPA, and he observed that the government "must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate." *Id*. at 2433.

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: If confirmed as a judge, I would faithfully apply binding precedent from the Supreme Court and Second Circuit in any case presenting the issue of the interpretation and application of 18 U.S.C. § 1507. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on how I would interpret this statute in the context presented.

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: Yes.

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: If confirmed as a judge, I would faithfully apply binding precedent from the Supreme Court and Second Circuit in any case presenting the issues presented by this question. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on my personal views as to the appropriateness or constitutionality of the issues presented.

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

Response: If confirmed as a judge, I will strive to ensure that in my courtroom all litigants in criminal cases are treated in a fair, just, and non-discriminatory manner, consistent with the principle of equal justice under law. If any case were to come before me concerning claims that the criminal justice system is systematically racist, I would faithfully follow binding precedent from the Supreme Court and Second Circuit, and I would apply that precedent in a fair and neutral manner to the facts and circumstances of the case.

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: As a judge, I would faithfully follow binding precedent from the Supreme Court regardless of its size or any proposal to modify its size. The question of whether the Supreme Court should be expanded is one for Congress to consider, and not for judges whose job is to apply Supreme Court precedent in a fair and neutral manner regardless of any policy considerations concerning the size or membership of the Court.

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: The Supreme Court, in *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, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), held that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home and publicly for self-defense. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court stated the following standard for evaluating the constitutionality of government restrictions under the Second Amendment: "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

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: Please see my response to Question 33.

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

Response: Yes, consistent with the precedent described in response to Question 33.

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

Response: No. I am not aware of any precedent that compares the rights secured under the Second Amendment to other individual rights specifically enumerated in the Constitution.

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

Response: Please see response to Question 36 above.

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

Response: The Supreme Court has stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). As a judicial nominee, it is not proper for me to comment on whether it is appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns. In confirmed as a judge, I will faithfully follow binding precedent from the Supreme Court and Second Circuit.

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

Response: An act of prosecutorial discretion refers to a prosecutor's discretion as to whether to proceed with criminal charges against a defendant, and what charges to proceed on, in an individual case. A substantive administrative rule change refers to a change in administrative rules that is substantive in nature. Such a rule change would be subject to requirements imposed by applicable law. As a judge in the Southern District of New York, this would include binding precedent of the Supreme Court and Second Circuit, as well as statutory law including the Administrative Procedures Act.

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

Response: No.

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. Dep't of Health and Human Servs.*, 141 S.Ct. 2485, 2489 (2021), the Supreme Court vacated the stay of a district court's decision to vacate the Center for Disease Control's (CDC) nationwide moratorium of evictions for tenants in certain counties affected by COVID-19. In vacating the stay, the Supreme Court stated as follows concerning the record in the case: "careful review of that record makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority. It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened.

Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts." *Id*. at 2486.

42. **You represented NYU in its legal fight to maintain affirmative action policies in its selection of members for its Law Review journal and for articles included in that journal. In a press release you stated, "This is a significant win for NYU and its Law Review. We are proud to have proven that Law Review's policies do not hurt its members, nor are they discriminatory against any group."**

a. **Is reserving twelve of fifty available spots for the Law Review a quota?**

Response: As an attorney for New York University in this matter, I was required to advocate for my client, and argued in the case that the plaintiff's complaint did not plausibly allege that the policy in question violated the law. The District Court dismissed the complaint on standing grounds and for failure to plausibly allege a viable claim. *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review*, 18 Civ. 9184, 2020 WL 1529311, at *5-*7 (S.D.N.Y. Mar. 31, 2020). The case was dismissed by the Second Circuit on standing grounds, 11 F.4th 68, 76-77 (2d Cir. 2021), and the Supreme Court denied the plaintiff's petition for a writ of certiorari as to that decision, 142 S.Ct. 2813 (2022). Neither the Supreme Court nor the Second Circuit addressed the merits of the claims asserted in the plaintiff's complaint, or the arguments raised by New York University concerning why the plaintiff failed to plausibly allege a claim for relief in light of the law, the allegations in the complaint, and the specific language of the policy being challenged in the case. I understand that my role as a judge will be different from that as an advocate. In deciding any case involving issues arising under the Equal Protection Clause or relating to affirmative action, I would faithfully follow binding precedent from the Supreme Court and Second Circuit. This will include not only existing precedents such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), but also the forthcoming decisions of the Supreme Court in the pending Harvard University and the University of North Carolina cases. *See Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions v. Univ. of North Carolina*, No. 21-707. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment further on my personal views on the merits of the closed New York University case.

b. **If a university used a set-aside affirmative action program like NYU's Law Review, would it be struck down as unconstitutional pursuant to the holding of *Regents of the University of California v. Bakke*?**

Response: In deciding any case involving issues arising under the Equal Protection Clause or relating to affirmative action, I would faithfully follow binding precedent from the Supreme Court and Second Circuit. This will include not only existing

precedents such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), but also the forthcoming decisions of the Supreme Court in the pending Harvard University and the University of North Carolina cases. *See Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions v. Univ. of North Carolina*, No. 21-707. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to address whether New York University's policy would be struck down under the holding in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

c. **Do diverse students need unique accommodations to become successful?**

Response: In deciding any case involving issues arising under the Equal Protection Clause or relating to affirmative action, I would faithfully follow binding precedent from the Supreme Court and Second Circuit. This will include not only existing precedents such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), but also the forthcoming decisions of the Supreme Court in the pending Harvard University and the University of North Carolina cases. *See Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions v. Univ. of North Carolina*, No. 21-707. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to address the subject matter of this question, which could arise in a future case.

d. **Do you support the use of race as a factor in university admission decisions?**

Response: In deciding any case involving issues arising under the Equal Protection Clause or relating to affirmative action, I would faithfully follow binding precedent from the Supreme Court and Second Circuit. This will include not only existing precedents such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), but also the forthcoming decisions of the Supreme Court in the pending Harvard University and the University of North Carolina cases. *See Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions v. Univ. of North Carolina*, No. 21-707. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to address my personal views on the use of race as a factor in university admission decisions.

e. **In 2022, nearly twenty years after the *Grutter* decision, is the use of race as a factor in university admission decisions still appropriate? If yes, when will it become inappropriate?**

Response: In deciding any case involving issues arising under the Equal Protection Clause or relating to affirmative action, I would faithfully follow binding precedent from the Supreme Court and Second Circuit. This will include not only existing precedents such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), but also the forthcoming

decisions of the Supreme Court in the pending Harvard University and the University of North Carolina cases. *See Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions v. Univ. of North Carolina*, No. 21-707. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to address the appropriateness of the use of race in university admission decisions given the lapse of time after *Grutter*, an issue that has been raised in a number of cases.

43. **You co-authored 2018 article praising Justice Ruth Bader Ginsburg's "long game." The article applauds the "power" of Justice Ginsburg's arguments, and the influence of her arguments outside of the Court. The article seemingly approves of judicial activism.**

a. **Is it ever appropriate to be a judicial activist?**

Response: No. The article in question does not refer to and was not intended to approve of judicial activism. If confirmed as a judge, I will faithfully follow Supreme Court and Second Circuit precedent and will uphold the rule of law in all cases.

b. **Is it appropriate for a judge to tailor his or her approach in individual cases or controversies in order to bring about a long-term desired policy result?**

Response: No.

44. **You a board member of The Fund for Modern Courts. Prior to your service on the board, the organization published a document seeking to provide illegal aliens with a path to avoid detention by Immigration and Customs Enforcement (ICE) in New York State Courthouses.**

a. **Would you have opposed such a program if it were introduced while you were a board member?**

Response: As I stated during my confirmation hearing, I am not familiar and was not involved in the drafting, approval, or publishing of the document in question, which is dated three years prior to my becoming a member of the board of directors of the Fund for Modern Courts. The Fund for Modern Courts is a "non-partisan statewide organization committed to ensuring that the New York State Judiciary is independent and that our courts are just and equitable for all." As a judge I will faithfully follow binding precedent from the Supreme Court and Second Circuit, and I strive to uphold the rule of law and to promote equal justice under law in all cases. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on any policy recommendation made in the document in question.

Senator Ben Sasse
Questions for the Record for Arun Subramanian
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
December 13, 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: If confirmed as a district judge, my judicial philosophy will be to treat every case as if it is the most important case I will handle as a judge. This means making sure that I approach each case with an open mind, hear fully from every litigant, and that I give serious and thoughtful consideration to the contentions of all parties. My decisions in all cases will be based on a thorough review of the law and the facts. I will strive for the outcome required by an even-handed application of the law, including binding precedent from the Supreme Court and Second Circuit, even if my personal views in a given case might suggest a different result. I will do my best to adjudicate cases in an efficient manner, understanding that prompt decision-making is a critical aspect of justice. My philosophy will be to act in a manner such that all litigants in my courtroom—whether they win or lose—will feel that they received a full, fair, and just hearing.

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

   Response: I would not describe myself as subscribing to any particular ideological label. If confirmed as a judge, I will faithfully follow binding precedent from the Supreme Court and Second Circuit. The Supreme Court has recognized the importance of text and original meaning when interpreting statutes or provisions of the Constitution. *See, e.g., Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2136-2137 (2022); *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2411 (2022).

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

   Response: Please see response to Question 3.

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

Response: The Constitution has a fixed meaning, and the provisions of the Constitution can only be modified through the amendment process set forth in Article V of the Constitution. In all cases involving the interpretation of the Constitution, I would faithfully follow the binding precedent of the Supreme Court and Second Circuit. The Supreme Court has stated as to Constitution's meaning that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2132 (2022).

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 admire many jurists who have sat on the Supreme Court as well as on other courts across the nation. However, there is no particular Supreme Court Justice whose jurisprudence I admire the most above all others.

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

   Response: The Second Circuit has held that a panel is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

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. In addition, the Second Circuit has held that the doctrine of "stare decisis 'carries enhanced force' when . . . the relevant precedent 'interprets a statute.' *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). In such cases, 'unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.' *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)." *McKinney v. City of Middletown*, 49 F.4th 730, 748–49 (2d Cir. 2022).

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: In deciding cases turning on the interpretation of a federal statute, I would faithfully apply Supreme Court and Second Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends there. If the text is not clear, I would consult the sources authorized by Supreme Court and Second Circuit precedent. These include cases from other jurisdictions, as well as recognized canons of statutory construction and interpretive

principles. If directed by Supreme Court and Second Circuit precedent, these sources may include interpretations by a regulatory agency. As a last resort, I would consider the types of legislative history that the Supreme Court and Second Circuit have identified as being reliable.

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: The sentencing of defendants is a serious matter, and it is important to follow the law faithfully. The law to be applied includes binding precedent from the Supreme Court and Second Circuit, consideration of the factors enumerated in 18 U.S.C. § 3553(a), and the relevant provisions of the United States Sentencing Guidelines. The Sentencing Guidelines provide that factors such as race and national origin "are not relevant in the determination of a sentence." U.S.S.G. §5H1.10; *see also* 28 U.S.C. §994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

Senator Josh Hawley
Questions for the Record

Arun Subramanian
Nominee, Southern 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 as a judge, I will follow the law faithfully and apply the law in a neutral and fair manner to the facts and circumstances of every case. The law to be applied includes binding precedent from the Supreme Court and Second Circuit, consideration of the factors that Congress enumerated in 18 U.S.C. § 3553(a), and the United States Sentencing Guidelines, including any relevant enhancements.

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

    Response: Please see my response to Question 2a.

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

    Response: Please see my response to Question 2a.

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

    Response: Please see my response to Question 2a.

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?**

    Response: The question of whether the penalties for the offenses identified in the question should be aligned is one for Congress to consider, and not for judges whose job is to apply the law in a fair and neutral manner. If confirmed as a judge, I will faithfully apply federal law, including the law

specifying the penalties for federal offenses, without regard to my personal views about whether that law should be changed.

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

Response: Please see my response to Question 2a.

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: Please see my response to Question 2a.

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?

Response: I am not familiar with the referenced statement or the context in which it was made. However, a judge's role is not to base decisions on personal beliefs or value judgments, but rather to faithfully follow the law, even where the judge's personal views might suggest a different outcome than what the law requires.

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

Response: As a judge, it is important to follow the law and binding precedent. That is what I will do if confirmed.

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

Response: If confirmed as a judge, *Dobbs v. Jackson Women's Health Organization* would be settled law and I would follow this binding precedent. The ruling in *Dobbs* can only be altered by a subsequent decision of the Supreme Court, or through the constitutional amendment process specified in Article V of the Constitution.

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

Response: *Younger* abstention doctrine: *Younger* abstention applies "in three exceptional circumstances involving (1) ongoing state criminal prosecutions, (2) certain civil enforcement proceedings, and (3) civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Cavanaugh v. Geballe*, 28 F.4th 428, 432 (2d Cir. 2022) (citations and

quotation marks omitted). "[B]efore invoking *Younger* a federal court may appropriately consider three additional factors laid out in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), that further counsel in favor of abstention: Whether there is (1) an ongoing state judicial proceeding that (2) implicates important state interests and (3) provides an adequate opportunity to raise federal challenges." *Id*. (citations, quotation marks, and alterations omitted). "But these conditions are not dispositive; they are, instead, additional factors appropriately considered by the federal court before invoking *Younger*." *Id*. (emphasis in original, citations and quotation marks omitted).

Pullman abstention doctrine: *Pullman* abstention applies "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." *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000) (citations, quotation marks, and alterations omitted). "Satisfaction of all three criteria does not automatically require abstention, however. The doctrine of abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id*. (citations, quotation marks, and alterations omitted). For this reason, "the abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. . . . In deciding how to exercise this discretion, federal courts are instructed to engage in a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Id*. (citations, quotation marks, and alterations omitted).

Colorado River abstention doctrine: *Colorado River* abstention applies in exceptional circumstances "due to the presence of a concurrent state proceeding for reasons of wise judicial administration." *Gentes v. Osten*, 2022 WL 16984686, at *1 (2d Cir. Nov. 17, 2022) (unpublished) (quotation marks and citations omitted). However, "abstaining from exercising federal jurisdiction is the exception, not the rule." *Id*. (quotation marks and citations omitted). "District courts follow a two-step inquiry to determine whether abstention is warranted. The first step is to determine whether the state and federal proceedings are parallel. Federal and state proceedings are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." *Id*. at *2 (quotation marks and citations omitted). "If a district court finds that two actions are parallel under *Colorado River*, it must then weigh six factors, with the balance heavily weighted in favor of the exercise of jurisdiction. These six factors are: (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.* (quotation marks

and citations omitted). "In this analysis, the balance is heavily weighted in favor of the exercise of jurisdiction." *Id.* (quotation marks, citations, and brackets omitted).

Burford abstention doctrine: "The Supreme Court in *New Orleans Public Service, Inc. v. Council of New Orleans,* 491 U.S. 350, 361 (1989), 'distilled' the *Burford* doctrine as follows: 'Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Liberty Mutual Ins. Co. v. Hurlbut*, 585 F.3d 639, 649–650 (2d Cir. 2009). The Second Circuit has "identified three factors to consider in connection with the determination of whether federal court review would work a disruption of a state's purpose to establish a coherent public policy on a matter involving substantial concern to the public. Those factors are as follows: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Id*. (quoting *Hachamovitch v. DeBuono,* 159 F.3d 687, 697 (2d Cir.1998)).

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

   Response: No. Although there was not a party's religious liberty claim at issue, out of an abundance of caution, I would note that my firm and I have represented the Mayor and City Council of Baltimore in a case involving an administrative challenge to a Department of Health and Human Services (HHS) rule entitled Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (May 21, 2019). The opposing parties in that case are HHS and the Secretary of HHS.

   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: The docket number for the case referenced in response to Question 6 is *Mayor and City Council of Baltimore v. Becerra et al.*, 19 Civ. 1672 (D. Md.). My involvement in the *Baltimore* case has been to oversee the preparation of pleadings, help prepare attorneys for oral argument, and supervise the Susman Godfrey legal team. The case was filed in June 2019. It was held in abeyance in November 2019 after the rule in question was vacated by two district courts in separate actions. The *Baltimore* action remains in abeyance.

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

   Response: As a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit when interpreting the Constitution. The Supreme Court has recognized the importance of text and original meaning when interpreting provisions of the Constitution. *See, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2136-2137 (2022); *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407, 2411 (2022).

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

   Response: In deciding cases turning on the interpretation of a federal statute, I would faithfully apply Supreme Court and Second Circuit precedent. If there is no such precedent, I would first review the statutory text and any relevant statutory definitions. If the text is clear, the inquiry ends there. If the text is not clear, I would consult the sources authorized by Supreme Court and Second Circuit precedent. These include cases from other jurisdictions, as well as recognized canons of statutory construction and interpretive principles. If directed by Supreme Court and Second Circuit precedent, these sources may include interpretations by a regulatory agency. As a last resort, I would consider the types of legislative history that the Supreme Court and Second Circuit have identified as being reliable.

   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: In deciding cases turning on the interpretation of a federal statute, I would faithfully apply Supreme Court and Second Circuit precedent in deciding what types of legislative history may properly bear on the interpretation of the statute. *See, e.g.*, *United States v. Craft*, 535 U.S. 274, 287 (2002) (failed legislative proposals not probative of legislative intent); *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 832 n.28 (1983) (noting report of entire conference committee would carry greater weight than manager's statement not contained in committee report).

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

      Response: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit when addressing this question. I am not presently aware of any such precedent from the Supreme Court or Second Circuit where either court has consulted the laws of foreign nations to interpret the provisions of the U.S. 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: The Supreme Court has held that an execution protocol may violate the Eighth Amendment's prohibition on cruel and unusual punishment where the method presents "a substantial risk of serious harm" and where there is "an alternative that is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citations and quotation marks omitted).

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. Please see my response to Question 9.

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: No. *See District Attorney's Office for Third Judicial District. v. Osborne*, 557 U.S. 52, 72 (2009).

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: Laws prohibiting religious discrimination include the First Amendment's Free Exercise Clause, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. In order to engage in actions that may burden religion, the government must comply with the requirements of these laws. For example, under the First Amendment's Free Exercise Clause, burdens on "sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable'" will be subject to strict constitutional scrutiny, requiring narrow tailoring to achieve a compelling governmental interest. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2421-2422 (2022). Laws or policies accompanied by "'official expressions of hostility'" will be set aside "without further inquiry." *Id*. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1732 (2018)). In cases where the Religious Freedom

Restoration Act or Religious Land Use and Institutionalized Persons Act applies, government action is subject to strict scrutiny if it substantially burdens the free exercise of religion, even if the action is facially neutral and generally applicable. *See, e.g., Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 694–95 (2014). If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit to ensure that the laws identified here and other applicable laws prohibiting discrimination on the basis of religion are properly applied in every case I consider.

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 Second Circuit has observed that courts have "refused to evaluate the objective reasonableness of a [claimant's] belief, holding that our 'scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.'" *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996)).The court in *Ford* quoted precedent stating that "'courts are not permitted to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be. While it is a delicate task to evaluate religious sincerity without questioning religious verity, our free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions. . . . We have no competence to examine whether plaintiff's belief has objective validity." *Ford*, 352 F.3d at 590 (quoting *Jolly*, 76 F.3d at 476).

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 *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595. The Court held that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense.

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?

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

Response to all subparts: In his dissent in *Lochner v. New York*, 198 U.S. 45 (1905), Justice Holmes expressed his view that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Id*. at 75-76 (Holmes, J., dissenting). The Supreme Court has since stated that "[t]he doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit with regard to the Due Process Clauses of the Fifth and Fourteenth Amendments and their proper application.

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?

a. If so, what are they?

Response: In *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018), the Supreme Court stated the following with respect to its decision in *Korematsu v. United States*, 323 U.S. 214 (1944): "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution." *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (citations and quotation marks omitted).

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

Response: Yes.

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?

Response: If confirmed as a judge, I will faithfully follow binding precedent from the Supreme Court and Second Circuit with respect to the proof of market share needed to sustain a claim of unlawful monopolization, without regard to my personal beliefs concerning this subject. The question as to whether there should be fixed percentage of market share required to constitute a monopoly is one for Congress to consider, and not for judges whose job is to interpret and apply the law in a fair and neutral manner.

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

Response: Please see my response to Question 19a.

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: The Second Circuit has stated that "[s]ometimes, but not inevitably, it will be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power. But when the evidence presents a fair jury issue of monopoly power, the jury should not be told that it must find monopoly power lacking below a specified share or existing above a specified share." *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 129 (2d. Cir. 1981).

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

Response: Generally speaking, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has recognized, however, certain "limited areas" in which "federal judges may appropriately craft the rule of decision," such as "admiralty disputes and certain controversies between States." *Rodriguez v. Fed. Deposit Insur. 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: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit on the question of the proper method of interpretation of such a provision. The Supreme Court and Second Circuit have directed courts to follow the interpretation of a state's highest court in interpreting a state constitutional provision. This includes where the language of a state and federal constitutional provision is analogous. *See, e.g., In re Nassau Cnty. Strip Search Cases*, 639 Fed. Appx. 746, 749 (2d Cir. 2016) (unpublished) ("[W]e fail to see how a Supreme Court decision interpreting any federal constitutional provision could ever control the meaning of an analogous state constitutional provision, at least absent extraordinary circumstances not presented here. *See California v. Greenwood,* 486 U.S. 35, 43 (1988) ('Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.'); *McGrath v. Toys "R" Us, Inc.,* 356 F.3d 246, 250 (2d Cir. 2004) ('State courts are not bound to interpret state laws in accordance with federal court interpretations of analogous federal statutes . . . .')").

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

Response: Please see my response to Question 21.

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

Response: Please see my response to Question 21.

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

Response: Canons of judicial ethics prohibit judges from commenting on legal issues that could become the subject of litigation. As prior judicial nominees have observed, the legal issues presented in *Brown v. Board of Education* are unlikely to become the subject of litigation, and therefore I am comfortable expressing my view that *Brown* was correctly decided.

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

Response: In any case involving the question of the legal authority to issue nationwide injunctions, I would faithfully follow binding precedent from the Supreme Court and Second Circuit. Neither the Supreme Court nor the Second Circuit has issued binding precedent as to the precise circumstances in which a nationwide injunction may be authorized. In *New York v. United States Department of Homeland Security*, 969 F.3d 42, 86 (2d Cir. 2020), *cert. granted*, 141 S.Ct. 1370 (2021), and *cert. dismissed*, 141 S.Ct. 1292 (2021), the Second Circuit stated its view that "the law, as it stands today, permits district courts to enter nationwide

injunctions," and that "such injunctions may be an appropriate remedy in certain circumstances – for example, where only a single case challenges the action or where multiple courts have spoken unanimously on the issue." 969 F.3d at 88. The Second Circuit also noted that "courts have long held that when an agency action is found unlawful under the APA, 'the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed.' *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). This aligns with the general principle that 'the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.' *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)." 969 F.3d at 87. Nevertheless, the Second Circuit has recognized the "difficult question implicated in this debate." *Id*.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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: The Supreme Court has recognized that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Court further observed that "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power." *Id.*

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: Generally speaking, damages provide monetary compensation to the complaining party, while injunctive relief provides equitable relief in the form of a requirement of certain action or inaction by the responding party. In some cases, an award of damages may adequately remedy the complaining party's injury. In other cases, damages may be insufficient and injunctive relief may be warranted based on the nature of the complaining party's injury and the requirements of the law in demonstrating an entitlement to injunctive relief. If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in determining the appropriate remedies available to claimants in every case I consider.

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

Response: The Supreme Court has held that fundamental rights and liberties that 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" are protected by the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotation marks and citations omitted). These rights include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in addressing a question concerning the scope of rights secured by the Constitution.

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

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

Response: Please see my response to Question 13.

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 of religion includes freedom of worship, but the Supreme Court has not limited the right solely to worship. The Supreme Court has stated that the Free Exercise Clause "protects religious exercises, whether communicative or not," and "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2421 (2022) (quotation marks and citations omitted).

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 responses to Questions 13 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 Religious Freedom Restoration Act prohibits "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the Government demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 705 (2014) (quotation marks omitted).

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: Judges should faithfully follow the law, rather than make decisions based on the desirability of the outcome.

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

Response: Not to the best of my knowledge.

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: If confirmed as a judge, I will strive to ensure that in my courtroom all litigants are treated in a fair, just, and non-discriminatory manner, consistent with the principle of equal justice under law. If any case were to come before me concerning claims of systemic racism, I would faithfully follow binding precedent from the Supreme Court and Second Circuit, and I would apply that precedent fair and neutral manner to the facts and circumstances of the case. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment further on this matter.

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

Response: Yes.

35. How did you handle the situation?

Response: Understanding the role of an advocate, I presented the best case I could for my client consistent with the law and all ethical rules and standards. If confirmed as a judge, my role will be to faithfully follow binding precedent from the Supreme Court and Second Circuit, to apply the law fairly and neutrally to the facts and circumstances of each case, and to uphold the rule of law, even if the outcome may conflict with my personal views.

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: There is no single Federalist Paper that has most shaped my views of the law.

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 overruled *Roe v. Wade*, 410 U.S. 113 (1978), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and held that the Due Process Clause does not protect a right to abortion. If confirmed as a judge, I will faithfully follow binding precedent from the Supreme Court and Second

Circuit, including *Dobbs*. As a judicial nominee, it would be inappropriate for me to comment further on this matter.

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: No.

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: I have not authored any brief that was filed in court without my name on the brief. As a partner, member of the Susman Godfrey executive committee, pro bono chair, and frequent mentor to junior attorneys, I frequently suggest edits or review briefs authored and filed by other attorneys that may not list my name.

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

Response: *See, e.g., Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 22-407 (2d Cir.); *Vanbezooyen v. Garland*, 20-73114 (9th Cir.); *Speech First Inc. v. Khator*, 22 Civ. 582 (S.D. Tex.).

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: As a judicial nominee, I took an oath that the testimony I provided to the Senate Judiciary Committee would be, to the best of my knowledge, true and accurate. I have attempted to answer each of these questions truthfully, to the best of my ability, and in a manner consistent with my ethical obligations under Canon 3 of the Code of Conduct for United States Judges as it applies to judicial nominees.

Questions from Senator Thom Tillis
for Arun Srinivas Subramanian
Nominee to be United States District Judge for the Southern 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: Black's Law Dictionary (11th ed. 2019) defines judicial activism as: "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, [usually] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." I do not think such an approach would be appropriate.

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

   Response: Impartiality is an expectation for a judge. Canon 3 of the Code of Conduct for United States Judges states that "A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently."

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: Faithfully interpreting the law may on occasion result in an outcome that conflicts with a judge's personal views. A judge's role is to put aside the judge's personal views and faithfully apply the law without bias or prejudice. This approach is necessary to uphold the rule of law and promote the principle of equal justice under the law. This principle is also reflected in the Code of Conduct for United States Judges. *See* Canon 3 (judge "should not engage in behavior that is harassing, abusive, prejudiced, or biased"); Canon 3(A)(1) (judge "should not be swayed by partisan interests, public clamor, or fear of criticism").

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

   Response: No.

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

Response: If confirmed as a judge, I will faithfully follow binding precedent of the Supreme Court and Second Circuit. This includes the decisions in *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, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), which held that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home and publicly for self-defense. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court stated the following standard for evaluating the constitutionality of government restrictions under the Second Amendment: "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 2126.

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 as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit in any case presented. This includes the decisions described in response to Question 7 concerning the Second Amendment, as well as decisions regarding COVID-19 policies bearing on religious practice, such as *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020). Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on how I would evaluate the matters described in the question.

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: In any case presenting a question of qualified immunity, I would faithfully follow binding precedent of the Supreme Court and Second Circuit. The Supreme Court has stated that "officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citations and quotation marks omitted).

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: Please see my response to Question 9. If confirmed as a judge, I will faithfully apply federal law concerning qualified immunity without regard to my personal views about whether that law is correct or should be changed. The question of whether current qualified immunity jurisprudence provides sufficient protection for law enforcement officers is for Congress and policymakers to consider, and not for judges whose job is to apply the law in a fair and neutral manner.

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

Response: Please see my response to Question 10.

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

Response: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Federal Circuit concerning patent eligibility. The Federal Circuit has stated that "Section 101 provides that a patent may be obtained for 'any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.' 35 U.S.C. § 101. This provision contains an implicit exception: 'Laws of nature, natural phenomena, and abstract ideas are not patentable.' *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012)). The Supreme Court has established a two-step framework for evaluating patent eligibility under § 101. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014); *Mayo*, 566 U.S. at 70–73. At step one, we determine whether a patent claim is directed to an unpatentable law of nature, natural phenomena, or abstract idea. *Alice*, 573 U.S. at 217. If so, we proceed to step two and determine whether the claim nonetheless includes an 'inventive concept' sufficient to '"transform the nature of the claim" into a patent-eligible application.' *Id.* (quoting *Mayo*, 566 U.S. at 72)." *Int'l Bus. Machines Corp. v. Zillow Group, Inc.*, 50 F.4th 1371, 1377 (Fed. Cir. 2022).

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

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-

discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

Response: As a judge presented with a case involving this kind of invention, I would faithfully follow binding precedent from the Supreme Court and Federal Circuit. This includes the precedent described in response to Question 12. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to comment on whether the invention described in the question would be patent eligible under 35 U.S.C. § 101.

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?

Please see my response to Question 13a.

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

Response: Please see my response to Question 13a. The Supreme Court has also stated in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 596 (2013), that "genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material." In deciding a case involving a patent disclosing a human gene or gene fragment, I would faithfully follow binding precedent from the Supreme Court and Federal Circuit, including *Myriad Genetics* and its progeny.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a.

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

Response: Please see my response to Question 13a. I would defer to Congress to determine whether current jurisprudence concerning the application of 35 U.S.C. § 101's patent eligibility requirement provides the clarity and consistency needed to incentivize innovation, and to determine whether statutory changes should be considered as a result. If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Federal Circuit concerning patent eligibility.

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

a. What experience do you have with copyright law?

Response: In my 15 years of practicing as a complex civil litigator, I have had experience in the field of patent law, but I do not recall having the opportunity to handle matters involving copyright law. I may have addressed certain copyright, trademark, or trade dress matters when I served as a law clerk in the Southern District of New York, Second Circuit, or Supreme Court.

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

Response: In my 15 years of practicing as a complex civil litigator, I have had experience in the field of patent law, but I do not recall having the opportunity to handle matters involving the Digital Millennium Copyright Act.

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

Response: I have handled cases involving child pornography posted to online service providers' websites, raising questions concerning the interpretation and application of the Communications Decency Act, 47 U.S.C. § 230, as well as sex-trafficking laws, such as 18 U.S.C. §§ 1591, 1595.

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: Please see my response to Question 15a. In my 15 years of practicing as a complex civil litigator, I have had experience in the field of patent law. I have had experience with First Amendment and free speech issues, although this has not been a primary focus of my practice. I may have addressed certain First Amendment or free speech cases when I served as a law clerk in the Southern District of New York, Second Circuit, or Supreme Court.

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

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

Response: If the text of a statute is not clear, I would consult the sources authorized by Supreme Court and Second Circuit precedent in order to determine the statute's meaning. These sources include cases from other jurisdictions, as well as recognized canons of statutory construction and interpretive principles. If directed by Supreme Court and Second Circuit precedent, these sources may include interpretations by a regulatory agency. As a last resort, I would consider the types of legislative history that the Supreme Court and Second Circuit have identified as being reliable.

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 as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit when determining the role that advice and analysis of an agency such as the U.S. Copyright Office should have in any case I consider. This includes the analysis set forth in cases such as *Chevron U.S.A., Inc. v.*

Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *See, e.g., WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012) ("[T]he Copyright Office—the federal agency charged with overseeing § 111—has spoken on the issue of whether § 111's compulsory licenses extend to Internet retransmissions. Accordingly, we utilize the two-step process outlined in *Chevron* . . . .").

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

Response: If confirmed as a judge, in determining any question concerning notice of copyright infringement I would faithfully follow binding precedent of the Supreme Court and Second Circuit. Canons of judicial ethics prohibit judicial nominees and judges from commenting on legal issues that could become the subject of litigation, and it would therefore be inappropriate for me to further comment on this matter.

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

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

Response: If confirmed as a judge, I would faithfully follow binding precedent from the Supreme Court and Second Circuit when interpreting and applying laws like the DMCA. Questions of modifications to the DMCA in response to the technological changes described in the question are for Congress to consider, and not for judges whose job is to apply and interpret the law as written.

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 17a.

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

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

Response: In the Southern District of New York, there are no divisions with a single district judge. Pursuant to the Rules for the Division of Business Among District Judges, cases are assigned randomly pursuant to an Individual Assignment System, so that the issues raised in the question would not pose an issue in the Southern 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 18a. As a judge, I would expect and encourage all litigants to follow the rules concerning case filing and assignment applicable in the Southern District of New York.

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: A judge should at all times follow applicable laws and rules, including rules governing the assignment of cases and judicial canons of conduct concerning the treatment of cases and litigants. A judge should "perform the duties of the office fairly, impartially and diligently," and "should not engage in behavior that is . . . prejudiced[] or biased." Code of Conduct for United States Judges, Canon 3. A judge should focus on adjudicating the cases assigned to the judge by the rules of the court based on a fair and neutral application of the law to the facts and circumstances of each case.

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 18c.

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 judge should not flaunt binding caselaw. If confirmed as a judge, I will do my best to faithfully follow binding precedent, even if it conflicts with my personal views and beliefs. Questions concerning the appropriateness of mandamus relief in individual cases are reserved to appellate judges, such as the judges of the

Second Circuit. As a district judge in the Southern District of New York, my role will be to follow the precedent of the Supreme Court, Second Circuit, or Federal Circuit concerning the issues arising in cases presented before me.

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

Response: Please see my response to Question 19a. The question of whether or what corrective measures beyond intervention by an appellate court may be appropriate in such a circumstance is not one for a district judge, whose job is to faithfully apply binding caselaw. I would follow any rules in this regard specified by Congress, the Second Circuit, the Federal Circuit, or in the rules and regulations applicable to a district judge sitting in the Southern District of New York.

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 all subparts: Please see my response to Questions 18a and 19b. In the Southern District of New York, there are no divisions with a single district judge. Pursuant to the Rules for the Division of Business Among District Judges, cases—including patent cases—are assigned randomly pursuant to an Individual Assignment System, so that the issues raised in the question would not pose an issue in the Southern District of New York.

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

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

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

Response to all subparts: If confirmed as a judge, I would do my best to faithfully follow binding precedent, even if it conflicts with my personal views and beliefs. Questions concerning the appropriateness of mandamus relief in individual cases are reserved to appellate judges, such as the judges of the Second Circuit. As a district judge in the Southern District of New York, my role will be to follow the precedent of the Supreme Court, Second Circuit, or Federal Circuit concerning the issues arising in cases presented before me.