Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Seth Robert Aframe
Nominee to be United States Circuit Judge for the First Circuit
November 8, 2023

1. **You have served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of New Hampshire since 2007. Before that, you served for four years as a law clerk for Judge Jeffrey R. Howard on the U.S. Court of Appeals for the First Circuit. You have also worked for a large law firm and clerked for a state court judge.**

    a. **How have your experiences as a law clerk informed your understanding of the role of a judge?**

    Response: Clerking for Judge Howard was a pivotal part of my legal career. I learned the importance of a judge keeping an open mind and being curious about arguments not previously considered. Judge Howard's response to a new argument was always to tell him more. That sort of openness and curiosity about different perspectives led to better decision making. In addition, I also came to appreciate the appellate judge's role in helping to obtain clarity in the law. Judge Howard spent substantial time with the law clerks editing and refining opinions. He understood the importance of publishing opinions that were useful to the bench and bar because they set forth clear statements of law and cogent applications of the law to the facts. He also believed that it was important that the Court's work was accessible to the litigants and the public more generally. I hope to emulate these traits in Judge Howard if I am confirmed.

    b. **How has your legal experience prepared you to serve on the Court of Appeals for the First Circuit?**

    Response: I have been fortunate to have a varied legal career. I have spent time clerking, practicing at a large law firm, and working as an attorney in the United States Attorney's Office. I have briefed and argued over 100 cases before the First Circuit. Through that experience I believe that I have developed the essential skills for an appellate judge. I know how to read a complex record, refine the issues, research effectively, and write cogently and succinctly. I also have had substantial experience in the trial court, trying almost 20 cases to verdict. I expect that my experience in the trial court will provide me with additional insight as I read trial records if I am confirmed as an appellate judge. Finally, I have been a leader within the United States Attorney's Office which has provided me with the opportunity to mentor more junior colleagues. I hope that this experience will translate into my being an outstanding mentor for law clerks in my chambers should I be confirmed.

2. **Sentencing guidelines may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence. If the sentencing range called for by the sentencing table would exceed the statutory maximum, the statutory maximum becomes the upper limit of the guideline range.**

a. Are you aware of any U.S. Attorney's Office that has a policy of recommending sentences that exceed statutorily authorized maximum sentences?

Response: No.

b. During your time in the U.S. Attorney's Office for the District of New Hampshire, have you ever recommended a sentence that exceeds a statutorily authorized maximum sentence?

Response: No.

c. During your time in the U.S. Attorney's Office for the District of New Hampshire, have you ever determined a guideline range or recommended a sentence based on evidence that the government is not prepared to present?

Response: No.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Seth Robert Aframe Nominee to the United States Circuit Court of Appeals for the First Circuit

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: While I am not familiar with this quotation, I do not agree with it. The obligation of a judge is to decide cases and controversies based on the record developed in the matter and the law. Judges should not decide cases based on "independent value judgments." In reaching decisions, a judge should employ a rigorous process of reviewing the parties' briefs and arguments, becoming familiar with the record, and researching the relevant legal materials. The purpose of employing this process is to make sure that decisions are rooted in the law and record and are not based upon the judges' individual values.

2. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's response was: "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I am not familiar with this quote or the context in which it was made. To the extent the Judge meant that he intentionally ignored precedent with which he disagreed, that is not an appropriate approach to judging that I would follow if I am confirmed to the First Circuit. As a judge, I would follow the First Circuit's admonition that "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's holdings . . . ." *United Nurses & Allied Professionals v. NLRB*, 975 F.3d 34, 40 (1st Cir. 2020). My objective would be to apply the Supreme Court precedent so that I would not envisage that a decision in which I participated would be reversed.

3. **Do you believe it is appropriate for the First Circuit to grant a petition for rehearing en banc because the relevant panel decision made a factual error?**

   Response: Federal Rule of Appellate Procedure 35(a) sets forth the standard for allowing en banc review. Under that Rule, en banc review is disfavored and will not ordinarily be ordered unless such review is necessary (1) to secure or maintain uniformity in the court's decisions or (2) the proceeding involves a question of exceptional importance. If confirmed, I would follow this standard in determining whether to vote for or against en banc review in a particular matter.

4. **Do you believe it is appropriate for the First Circuit to grant a petition for rehearing en banc because the relevant panel decision reached an undesirable policy outcome?**

   Response: See response to question 3, *supra*.

5. **What was the Sentencing Guidelines recommendation in the *United States v. Smith* prosecution discussed at your hearing?**

   Response: The sentencing guideline range, as stated in the pre-sentence report, was 2,160 months, which was based on the statutory maximum penalty of 360 months for each of six counts of conviction.

   My post-hearing review of the *Smith* sentencing transcript demonstrates the reason for my recollection at the Committee hearing that the defendant had been convicted on two counts. The defendant argued that imposing sentences on six counts would violate the double jeopardy prohibition on multiple punishments. Because the defendant produced all six video clips in one day at one location with one victim, the defendant argued that he could only be charged with one count, which would have capped his exposure at 30 years. The district court decided to sentence the defendant consecutively only on Counts 1 and 6 to avoid a double jeopardy issue because the video clips in Counts 1 and 6 were produced over an hour apart, which the court found was sufficiently distant in time to permit consecutive sentencing on those two counts. Here is what the court said:

   > The way the Court will impose a sentence here, which is going to be to impose 360 months on Count One and 360 months on Count Six, but 140 months of that concurrently for a total sentence of 600 months, which is 50 years' imprisonment, doesn't really require the Court to resolve the constitutional question and here's why.
   >
   > It's an interesting question whether . . . consecutively sentencing the defendant for all six of these counts raises a constitutional issue because the U.S. Supreme Court hasn't really addressed it and there's authority on both sides of the question, although the better authority comes from the prosecution in this case, which I'll explain in a moment.
   >
   > But the way I'm approaching it, to me, does not implicate double jeopardy because there's no question whatsoever that . . . the defendant's being doubly punished for the conduct set forth in Count One and Count Six. They are two separate and distinct offenses for the reasons and the law as set forth by the prosecutor . . . .
   >
   > Count One . . . which alleges a very specific time and place, down to the minute, described an act of child exploitation which involves oral penetration and one time and one place. Count Six involves an offense that took place and involves vaginal penetration over an hour later. There is no question in the Court's mind that consecutive sentencing for those two events does not implicate double jeopardy concerns at all. And . . . Counts Two through Five are going

> to involve concurrent sentencing with Count One.
> So the Court is not concerned that its sentence in some way implicates double jeopardy or places the defendant in danger of double jeopardy or it sentences him twice for the same criminal offense. Those are two separate and distinct criminal acts, criminal offenses, under the United States Criminal Code.

Based on the court's ruling to sentence consecutively only on Counts One and Six, the court imposed a 50-year sentence, which the court did not view as a variance. Indeed, the court indicated that "it can't imagine a case less appropriate for a variance." The court nevertheless sentenced the defendant to ten years less than the 60-year sentence recommended by the government.

6. **What was the highest sentence you could have requested in *United States v. Smith*?**

   Response: See response to question 5, *supra*.

7. **Do you consider a law student's public endorsement of or praise for an organization listed as a "Foreign Terrorist Organization," such as Hamas or the Popular Front for the Liberation of Palestine, to be disqualifying for a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes. Disagreement with the policies of the State of Israel would not be disqualifying. To the extent that a comment endorses the terrorist activity of Hamas as justified, that statement would be disqualifying for me.

8. **In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

   Response: Yes. Disagreement with the policies of the State of Israel would not be disqualifying. To the extent that this comment endorses the terrorist activity of Hamas as justified, that statement would be disqualifying for me.

9. **Please describe the relevant law governing when a federal court may entertain and grant a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court.**

Response: Sections 2241-2254, Title 28 of the United States Code govern habeas corpus proceedings for state prisoners. A federal court may issue a writ of habeas corpus to a state prisoner "only on the ground that [the prisoner] is in custody in violation of the Constitution or law or treaties of the United States." § 2254(a). Out of respect for the system of dual sovereignty, the availability of habeas relief for state prisoners "is narrowly circumscribed." *Shinn v. Ramirez*, 596 U.S. 366, 375 (2022). In a habeas proceeding challenging a state-court judgment, "a determination of factual issues made by a state court shall be presumed to be correct" and the prisoner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." § 2254(e)(1). An application for habeas relief from a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in the state proceeding unless the state adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in the light of the evidence presented in the state court proceeding. § 2254(d)(1-2). Under the "contrary to" provision, a writ may issue only if the state court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decided a case differently than the Supreme Court had decided on materially indistinguishable facts. Under the "unreasonable application" provision, a writ may issue only if the state court identifies the correct legal principle from Supreme Court decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). There are also certain procedural requirements, including exhaustion of available state remedies, § 2254(b)(2), and a one-year limitations period, § 2244(d).

10. **Please describe the relevant law governing how a prisoner in custody under sentence of a federal court may seek and receive relief from the sentence.**

Response: Section 2255, Title 28 of the United States Code governs a motion from a federal prisoner to attack a sentence. A federal prisoner may attack a sentence by showing "the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." § 2255(a). A § 2255 motion is subject to a one-year limitation period. § 2255(f). A federal prisoner is limited to filing one § 2255 motion without certification from the appropriate court of appeals. A court of appeals panel may only grant certification if the motion contains newly discovered evidence such that no reasonable factfinder would find the prisoner guilty of the offense or if the motion contains a previously unavailable new rule of constitutional law made retroactive to cases on collateral review. A federal prisoner may not raise a second or successive § 2255 motion that contains a previously unavailable change in statutory law. *Jones v. Hendrix*, 599 U.S. 65 (2023).

11. **Please explain the facts and holding of the Supreme Court decisions in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.**

    Response: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) addressed claims that race-conscious admissions systems operated by Harvard College and the University of North Carolina violated Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. The Court concluded that Students for Fair Admissions had Article III standing. It then concluded that the admissions systems failed strict scrutiny because the justification for the programs— the educational benefits of diversity— was not sufficiently measurable to permit judicial review under strict scrutiny and the institutions failed to articulate a sufficient connection between the means employed (race conscious admissions) and the goal of pursuing the educational benefits of diversity. Having concluded that neither the Harvard nor University of North Carolina programs survived strict scrutiny, the Court invalidated both programs.

12. **Have you ever participated in a decision, either individually or as a member of a group, to hire someone or to solicit applications for employment?**

    Response: Yes.

    If yes, please list each job or role where you participated in hiring decisions

    Response: Over many years, I have participated in hiring panels to select finalists for numerous Assistant United States Attorney positions. The panels selected between two and four candidates from which the United States Attorney made the final hiring decision.

13. **Have you ever given preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

    Response: No.

14. **Have you ever solicited applications for employment on the basis of race, ethnicity, religion, or sex?**

    Response: No.

15. **Have you ever worked for an employer (such as a law firm) that gave preference to a candidate for employment or for another benefit (such as a scholarship, internship, bonus, promotion, or award) on account of that candidate's race, ethnicity, religion, or sex?**

Response: I am not aware of having worked for such an employer.

If yes, please list each responsive employer and your role at that employer. Please also describe, with respect to each employer, the preference given. Please state whether you played any part in the employer's decision to grant the preference.

16. **Under current Supreme Court and First Circuit precedent, are government classifications on the basis of race subject to strict scrutiny?**

Response: Yes. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Cotter v. City of Boston,* 323 F.3d 160, 168 (1st Cir. 2003).

17. **Please explain the holding of the Supreme Court's decision in *303 Creative LLC v. Elenis*.**

Response: In *303 Creative,* the Supreme Court held that the application of Colorado's anti-discrimination law to require a web-site designer to provide services for same-sex weddings with which the designer disagreed on religious grounds constituted compelled speech prohibited by the First Amendment prohibition on laws that abridge the freedom of speech.

18. **In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), Justice Jackson, writing for the Court, said: "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*."**

Is this a correct statement of the law?

Response: Yes. This statement from *Barnette* has been quoted often by the United States Supreme Court, including most recently in *303 Creative v. Elenis*, 600 U.S. 570, 585 (2023) and *Janus v. Amer. Fed. of State, County, and Mun. Employees*, 138 S. Ct. 2448, 2463 (2018). This statement constitutes binding precedent that I would apply if confirmed.

19. **How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?**

Response: A regulation of speech is content based under the First Amendment if the regulation "applies to a particular speech because of the topic discussed or the idea or message expressed." *City of Austin v. Reagan Nat'l Advertising of Austin, LLC,* 596 U.S. 61, 69 (2022). First Amendment precedent does recognize that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral" so long as the law "does not single out any topic or subject matter for differential treatment." *Id.* By contrast "laws that confer benefits or impose burdens on speech without reference to the views or ideas expressed are in most instances content neutral." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

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

Response: The First Amendment protection for freedom of speech does not protect true threats. True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or groups of individuals." *Virginia v. Black*, 538 U.S. 343, 360 (2003). A true threat does not require that the speaker intend to act on the threat. *Id.* For a true threat to be actionable as a criminal offense, the defendant must be at least reckless as to the threatening nature of the communication. *Counterman v. Colorado*, 600 U.S. 66 (2023).

21. **Under Supreme Court and First 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: The Supreme Court has recognized that determining questions of law from questions of fact can be "vexing." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). "The appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). In hard cases, the "fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* For example, when a matter is intertwined with the credibility of a witness that can turn on an evaluation of the witness' demeanor, it may be best to treat the matter as factual whereby the trial court's view is given presumptive weight. *Id.* But where a legal standard can only be given meaning through application to particular facts, it may be better to treat the issue as a question of law or a mixed question of law and fact to preserve the appellate court's primary function as an "expositor of law." *Id.*

22. **Which of the four primary purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—do you personally believe is the most important?**

Response: Federal sentencing is governed by 18 U.S.C. § 3553(a). That section instructs that the objective of sentencing is to impose a sentence that is sufficient, but not greater than necessary to provide, *inter alia*, just punishment, deterrence, public protection, and rehabilitation. As an Assistant United States Attorney, I consider each of these factors in proposing a sentencing recommendation to the United States Attorney. Based on my experience, the significance of each factor depends on the circumstances of the offense and the history and characteristics of the defendant. Congress has not directed that one of these purposes of sentencing is entitled to greater weight than any other.

23. **Please identify a Supreme Court decision from the last 50 years that you think is particularly well reasoned and explain why.**

Response: Supreme Court opinions, unless overturned, are binding law. As an appellate advocate for the United States for over a decade, I have read Supreme Court precedent to determine how those opinions affect the United States' position in the matter I am handling. I have not made evaluative judgments on the quality of the reasoning in the opinions.

24. **Please identify a First Circuit judicial opinion from the last 50 years that you think is particularly well reasoned and explain why.**

Response: All First Circuit opinions, unless overturned by the Supreme Court or the First Circuit sitting en banc, are binding law in the District of New Hampshire. As an appellate advocate for the United States in the District of New Hampshire for over a decade, I have read First Circuit precedent to determine how those opinions affect the United States' position in the matter I am handling. I have not made evaluative judgments on the quality of the reasoning in the opinions.

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

Response: Section 1507 of Title 18, United States Code prohibits picketing or parading near a courthouse or residence of a judge, juror, witness or court officer, with the intent to interfere with, obstruct, or impede the administration of justice or with the intent to influence a judge, juror, witness or court officer in the discharge of his or her duty.

26. **Is 18 U.S.C. § 1507 constitutional?**

Response: To the best of my knowledge, the United States Supreme Court has not considered a constitutional challenge to § 1507. As a judicial nominee, the Code of Conduct for United States Judges and the associated Canons prevent me from providing an opinion on a matter that could come before me on the First Circuit, should I be

confirmed. I would decide the case by applying the relevant precedents from the Supreme Court and the First Circuit. I am aware that the Supreme Court upheld against constitutional challenge a similarly worded state statute in *Cox v. Louisiana*, 379 U.S. 559 (1965).

27. **Is it ever appropriate to consider foreign law in constitutional interpretation? If yes, please describe in which circumstances such consideration would be appropriate.**

Response: The Supreme Court has rarely referred to foreign law in its constitutional decisions. Although recognizing that such foreign law "does not become controlling," the Court "has referred to the law of other countries and to international authorities as instructive for the Eighth Amendment's prohibition on cruel and unusual punishment." *Roper v. Simmons*, 543 U.S. 551, 575 (2005). The Supreme Court has also looked to English law to interpret certain constitutional provisions, including the Seventh Amendment right to a civil jury. *Granfinanciera, A.S. v. Nordberg,* 492 U.S. 33, 41 (1989). If confirmed as a circuit judge, I will follow the Supreme Court and First Circuit precedent on the relevant materials for conducting constitutional interpretation.

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

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

Response: Yes. Whether the racial segregation of schools is constitutional is not likely to come again before the courts. For this reason, I believe that it is permissible as a judicial nominee to state my opinion that *Brown v. Board of Education* was correctly decided.

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

Response: Yes. Whether inter-racial marriage is constitutionally protected is not likely to come again before the courts. For this reason, I believe that it is permissible as a judicial nominee to state my opinion that *Loving v. Virginia* was 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?**

l. **Were *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* correctly decided?**
m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response to c-m: As a nominee for judicial office, the Code of Conduct for United States Judges and the associated Canons prohibit me from commenting on legal issues that may come before me should I be confirmed. These decisions all pertain to issues that may arise in future litigation. Regardless of my views on any of these decisions, I would follow them as a judge of the First Circuit should I be confirmed. I note, however, that *Roe* and *Casey* were overruled by *Dobbs* and are therefore no longer good law.

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

Response: In evaluating Second Amendment challenges to a regulation or statute, I would apply the pertinent precedent from the Supreme Court and First Circuit. In particular, I would look to the Supreme Court's 2022 decision in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), which held that, to justify a firearms regulation, the regulation must be "consistent with this Nation's historical tradition of firearm regulation" such that "[o]nly 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.'"

30. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

    b. **Are you currently in contact with anyone associated with Demand Justice? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with Demand Justice? If so, who?**

    Response: No.

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

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

    Response: No.

    b. **Are you currently in contact with anyone associated with the Alliance for Justice? If so, who?**

    Response: No.

    c. **Have you ever been in contact with anyone associated with the Alliance for Justice? If so, who?**

    Response: No.

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

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

    Response: No.

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

    Response: No.

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

    Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

b. **Are you currently in contact with anyone associated with Fix the Court? If so, who?**

Response: No.

c. **Have you ever been in contact with anyone associated with Fix the Court? If so, who?**

Response: No.

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

Response: I sent a letter and resume to Senator Jeanne Shaheen on May 26, 2023, indicating my interest in being considered for the nomination. On May 31, 2023, I was requested by Senator Shaheen's and Senator Maggie Hassan's staff to complete a preliminary questionnaire, which I submitted on June 6, 2023. On June 16, 2023, I participated in an interview with members of Senator Shaheen's and Senator Hassan's staff. On July 24, 2023, I met separately with Senator Shaheen and Senator Hassan. On July 28, 2023, I was interviewed by attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On October 4, 2023, the President announced his intent to nominate me.

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

Response: I have not and to the best of my knowledge no one has done so on my behalf.

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

Response: I have not and to the best of my knowledge no one has done so on my behalf.

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

Response: I have not and to the best of my knowledge no one has done so on my behalf.

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

Response: I have not and to the best of my knowledge no one has done so on my behalf.

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

Response: I have not and to the best of my knowledge no one has done so on my behalf.

41. **Since you were first approached about the possibility of being nominated, did anyone associated with the Biden administration or Senate Democrats give you advice about which cases to list on your committee questionnaire?**

Response: No. I chose the cases to list on the Committee questionnaire without any advice from anyone associated with the Biden Administration or Senate Democrats.

a. **If yes,**
   i. **Who?**
   ii. **What advice did they give?**
   iii. **Did they suggest that you omit or include any particular case or type of case in your questionnaire?**

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

Response: I interviewed with members of the White Counsel's Office on July 28, 2023. Beginning that same day, I had contacts with officials from the Department of Justice, Office of Legal Policy regarding the vetting and background check process. I was interviewed by a vetting attorney from that Office on August 9, 2023. I received a telephone call from the White House Counsel's Office on October 3, 2023, that President Biden intended to announce my nomination the following day, October 4, 2023.

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

Response: I drafted the answers to these questions myself. I received minor feedback, which mostly consisted of suggested style and proofreading edits, from the Office of Legal Policy.

Senate Judiciary Committee
Nominations Hearing
November 1, 2023
Questions for the Record
Senator Amy Klobuchar

For Seth Robert Aframe, nominee to serve as United States Circuit Judge for the First Circuit

Since 2007, you have served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of New Hampshire. During this period you served as the chief of the Office's Appellate Division and the Criminal Division. In this capacity you have argued over 100 appellate cases before the First Circuit.

- **How will your experience as a federal prosecutor inform your approach to working as an appellate court judge?**

  Response: I think that there are three ways that my time working in the United States Attorney's Office will inform my approach to working as an appellate judge. First, as the Office's appellate chief, who has briefed and argued over 100 cases before the First Circuit, I believe that I have developed the skills necessary to succeed as an appellate judge. I have learned how to digest a complex record, define the salient issues, research effectively, and write cogently and succinctly. Second, as a trial attorney, I have gained an appreciation for how trial work takes place. I hope that my time in the district court will provide me with needed perspective as I review trial issues from the appellate court vantage. Third, I have been a supervisor and a leader within the United States Attorney's Office, mentoring junior Assistant United States Attorneys. I hope that the mentorship and leadership skills that I have developed will help me be an excellent mentor for my law clerks and, over time, to become a leader on the Court.

Senator Hirono's Written Questions for Seth R. Aframe
Nominee to the United States Court of Appeals for the First Circuit
November 1, 2023

1. **As part of my responsibility as a member of this Committee to ensure the fitness of nominees, I ask each nominee to answer two questions:**

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

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
Seth Robert Aframe, Nominee for Circuit Judge on the United States First Circuit

1. How would you describe your judicial philosophy?

Response: If confirmed as a circuit judge my judicial philosophy would focus on fairness, fidelity, and clarity. By fairness, I mean the judge's responsibility to keep an open mind, study the briefs and record, listen and participate in oral argument, and consider the views of judicial colleagues. Fidelity refers to the judge's obligation to base the decision on a scrupulous adherence to the record and applicable precedent of the Supreme Court and First Circuit. Clarity means the judge's obligation to explain the court's decision in opinions that are accessible to the litigants and are useful to the bar and district court judges as guidance for future cases.

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

Response: In construing a federal statute, I would first determine if there was Supreme Court or First Circuit precedent already construing the language at issue. If not, I would turn to the text of the statute. If that text is unambiguous, the inquiry would end. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). If the text is ambiguous, I would consider other sources that have been relied on by the Supreme Court and the First Circuit in construing statutes. These include statutory context (*Encino Motors v. Navarro*, 138 S. Ct. 1134 (2018)), clear statement rules (*Lac du Flambeaus Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023)), and canons of statutory construction (*Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014)). The First Circuit also permits examining legislative history when a statute is not plain and unambiguous. *In re Financial Oversight and Management Bd. For Puerto Rico*, 919 F.3d 121, 128 (1st Cir. 2019). However, the use of legislative history should be undertaken with caution because, as the Supreme Court has observed, legislative history "is itself often murky, ambiguous and contradictory" and reliance on it may place undue weight on the views of unrepresentative members of Congress. *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005). Different forms of legislative history have been ascribed differing values toward the analysis. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: I would look to precedent of the Supreme Court and the First Circuit both to determine the meaning given to a particular constitutional provision and, if necessary, the sources that those Courts have relied upon in interpreting a certain provision.

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

Response: In interpreting the Constitution, I would scrupulously follow the Supreme Court's interpretive approach. That approach often focuses on the Constitution's text and the original public meaning of the provision as the places to begin and often end the analysis. *E.g.*, *New York State Rifle & Pistol Assoc. v. Bruen,* 142 S. Ct. 2111 (2022) (Second Amendment); *Gamble v. United States*, 139 S. Ct. 1960 (2019) (Double Jeopardy Clause); *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause).

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

Response: See response to question 2, *supra.*

6. 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 explained that "[w]hen called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). It has also said that, "Although 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." *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

7. What are the constitutional requirements for standing?

Response: Standing under Article III of the Constitution requires that the plaintiff demonstrate the following: (1) the plaintiff suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the identified injury was likely caused by the defendant; and (3) the injury likely would be redressed by judicial relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

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

Response: "The Federal Government is acknowledged by all to be one of enumerated powers." *Nat'l Fed. of Independent Business v. Sebelius*, 567 U.S. 519, 532 (2012). Congress' powers are set forth in Article I of the Constitution. One power granted to the Congress by Article I is the Necessary and Proper Clause. That Clause grants the Congress broad power to take actions, not otherwise forbidden by the Constitution, that are in furtherance of other enumerated powers. *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013). This Clause does, however, limit Congress to act only in

furtherance of matters that are within the Constitution's scope. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: The Supreme Court has held that "the question of the constitutionality of action taken by Congress does not depend on the recitals of the power which it undertakes to exercise." *Nat'l Federation of Indep. Business v. Sebelius*, 567 U.S. 519, 570 (2012). A court tests the congressional action against the enumerated powers set forth in the Constitution to assure that the congressional action was taken pursuant to at least one of the identified powers.

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

Response: The Supreme Court has recognized that the Due Process Clause "guarantees more than fair process;" it also provides "heightened protection against government interference with certain fundamental rights and liberty interests" which are not expressly listed in the Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). 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)); the right to direct the education and upbringing of one's children (*Meyers v. Nebraska*, 262 U.S. 390 (1923)); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); the right to marital privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); the right to use contraception (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)); the right to bodily autonomy (*Rochin v. California*, 342 U.S. 165 (1952)); and the right to engage in intimate conduct (*Lawrence v. Texas*, 539 U.S. 558 (2003)).

11. What rights are protected under substantive due process?

Response: See response to question 10*, supra.*

12. If you believe substantive due process protects some personal rights such as a right to contraceptives, 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: If confirmed as a judge, I would follow Supreme Court and First Circuit precedent pertaining to the identification of rights that trigger heightened scrutiny under the substantive due process doctrine. *See Dobbs v. Jackson's Women's Health Org.*, 142 S. Ct. 2228 (2022) (recognizing the repudiation of the *Lochner* line of cases while acknowledging that substantive due process does protect certain other personal rights).

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

Response: Article I, § 8, cl. 3 of the Constitution provides that Congress shall have the power to regulate Commerce with foreign nations, among the States, and with Indian Tribes. The Supreme Court has identified three general categories in which Congress is authorized to engage under its commerce power: (1) Congress can regulate the channels of interstate commerce; (2) Congress may regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) Congress may regulate activities that substantially affect interstate commerce. *Gonzalez v. Raich*, 545 U.S. 1, 16-17 (2005).

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

Response: Under the Equal Protection Clause, government action directed at suspect classes is subject to heightened judicial scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In determining whether a class is suspect for these purposes, the Court focuses on whether the group is defined by an immutable characteristic. *E.g., Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974). The Court has found that race, national origin, and alienage constitute suspect classes under the Equal Protection Clause. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

15. 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 essential aspects of our constitutional order. In this regard, "[t]he 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." *Seila Law LLC v. Consumer Fin. Prot. Bur.,* 140 S. Ct. 2183, 2202 (2020). Separation of powers and checks and balances are meant to guard against the concentration of power and thereby preserve liberty and our unique governmental structure.

16. 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 follow binding Supreme Court and First Circuit precedent on separation of powers issues. This precedent requires that each branch act within the authority afforded to it by the Constitution. As the Supreme Court has explained, "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *INS v. Chada*, 462 U.S. 959 (1983). The Supreme Court has employed the methodology set forth in Justice Jackson's *Youngstown Steel* concurrence to

evaluate claims that the executive branch has exceeded its constitutional authority. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

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

Response: Merriam-Webster Dictionary defines empathy as "the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experiences of another." If confirmed as a circuit judge, I will decide cases based on a fidelity to the record, the Constitution, and the applicable law. Empathy may be helpful as I develop a proper judicial temperament.

18. Which is worse; invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Both outcomes are undesirable. My objective as a judge would be to apply the law to the facts before me such that I reach the correct outcome in the matter before me.

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

Response: I have not studied judicial trends to determine the increase in the use of judicial review since 1857 or its causes. However, the expansion in the size of the federal government since the Civil War may be relevant to the statistics around judicial review as it pertains to invalidating federal laws. If I am confirmed as a judge, I will apply precedent to any statute fairly and without bias to determine whether that statute is constitutional.

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

Response: According to Black's Law Dictionary (11th ed. 2019), judicial review refers to "the court's power to review the actions of other branches or levels of government, especially the court's power to invalidate legislative and executive action as being unconstitutional." The same source defines judicial supremacy as "[t]he doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review, especially the U.S. Supreme Court interpretations, are binding on the coordinate branches of the federal government and the states."

21. 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 Constitution mandates that all officials take an oath to support the Constitution and Article VI makes the Constitution the "supreme Law of the Land." It is a basic principle of our constitutional system that "the federal judiciary is supreme in the exposition of the law of the Constitution . . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Thus, elected officials have an obligation to follow constitutional interpretations by the federal judiciary because those interpretations are supreme. Elected federal representatives may initiate the process to amend the Constitution, which is among the powers granted to them under Article V of the Constitution.

22. **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: Judges have a limited role under our constitutional system to decide cases and controversies by applying the law to a set of facts. Making decisions based on judgment alone separates the judicial power from the decision making in other parts of the government. It is imperative that judicial officers adhere to judgment as the only basis for decision making because doing so is essential to maintaining the legitimacy of Article III.

23. **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: This question appears to be directed toward a district court nominee. If I am confirmed as a circuit judge, I would follow the First Circuit's pronouncement that "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as the Court's outright holdings . . . . " *McCoy v. Mass. Inst. of Tech*., 950 F.2d 13, 19 (1st Cir. 1991). I would also follow the Supreme Court's admonition that if "a precedent of [the Supreme Court] has direct application in a case, [and] yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

24. 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: These factors should play no role in sentencing. *See U.S.S.G.* § 5H1.10 (describing various identities that "are not relevant in the determination of a sentence").

25. 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 have no prior familiarity with the Biden Administration's definition of equity nor do I subscribe to a particular definition of the term. Black's Law Dictionary (11th ed. 2019) defines equity as "fairness; impartiality; evenhanded dealing."

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

Response: See question 25, *supra,* for the definition of equity. Black's Law Dictionary (11th ed. 2019) defines equality as the "state of being equal, especially likeness in power or political status." The phrase "equality" is often associated with the Equal Protection Clause of the 14th Amendment. "[T]he equal protection clause requires equality of treatment before the law for all persons without regard to race or color." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 205 (2023).

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

Response: The Fourteenth Amendment's Equal Protection Clause provides that no State shall "deny to any person with its jurisdiction the equal protection of the laws." I am not aware of any Supreme Court or First Circuit precedent that uses the term "equity" to define the guarantees provided by the Equal Protection Clause.

28. How do you define "systemic racism?"

Response: I do not have a personal definition of systemic racism. Oxford English Dictionary defines systemic racism as "discrimination or unequal treatment on the basis of membership of a particular racial or ethnic group (typically one that is a

minority or marginalized), arising from systems, structures or expectations that have become established within society or an institution."

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

Response: I do not have a personal definition of critical race theory. Black's Law Dictionary (11th ed. 2019) defines critical race theory as a "reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law, have disadvantaged minorities and even perpetuated racism."

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

Response: See responses to questions 28 and 29, *supra*

31. You were the prosecutor in *United States v. Carpentino*. In that case, the defendant had previously served multiple sentences for forcefully sexually abusing children and had been released from custody mere months before the inciting incident. Here, the defendant kidnapped a disabled fourteen-year-old girl, transported her to an abandoned hotel, and assaulted her. You stated; "[t]hat the defendant would target such a weak child for his advances further demonstrates that he is a danger, who needs to be separated from the community for a long time," and that the previous thirteen year sentence "did nothing to deter him from engaging in the same conduct upon release."

Despite these facts, you recommended a sentence below the recommendation of the Pre-Sentence Report. The PSR recommended a sentence of 360 months to life. It is the duty of the finder of fact to evaluate the weight of the evidence, yet you made the decision not to present evidence in your possession. Because of your decision, the sentencing guidelines you recommended would not have imprisoned the serial child rapist for a life term. In your words, "[t]he sentence requested here will incapacitate the defendant until he is in his 60s. Hopefully, by that time, the danger that the defendant presents will have subsided."

Knowing that the previous sentence "did nothing to deter" the defendant from assaulting a disabled child, do you stand by your decision to withhold evidence and recommend a sentence below the sentencing guidelines in the PSR? Do you believe that 60-year-old repeat offenders are incapable of reoffending?

Response: The statement that the government recommended a sentence below the guideline range identified in the original pre-sentence report is incorrect. The original pre-sentence report recommended a sentencing range of 360 months to life. The government recommended a sentence of 405 months. That recommendation would have been within the guideline range as identified in the original pre-sentence report.

At the sentencing hearing, the government agreed -- and the district court found -- that the correct applicable guideline range was 324 months to 405 months. For the 360 month-to-life guideline range to apply, the government would have had to prove at a sentencing hearing that the defendant produced child sex exploitation images. No qualifying images were found in the defendant's possession, and therefore proving production of such images would have required calling the victim at the sentencing hearing. Given the state of the evidence and the vulnerability of the victim, the United States Attorney's Office, following consultation with the victim's family, determined that calling the victim and subjecting her to further cross-examination was unwarranted given our estimation of the limited likelihood of success on the issue and the possible further trauma giving additional testimony could have caused the victim. The government instead decided, after consultation with the victim's family, to request a 405-month sentence, the top of the guideline range found by the district court. The district court ultimately determined that the government's 405-month request was too harsh and sentenced the defendant to 384 months, 21 months less than the government's recommendation. I do believe that sex offenders in their 60s are capable of reoffending. I note, however, that studies have shown that the likelihood of recidivism often declines with age. *See* Rebecca Crookes *et al., Older Individuals Convicted of Sexual Offenses: Literature Review* (National Library of Medicine 2021) ("What was clear in the findings was that as age increases, the risk of reoffending decreases, with younger age bands representing the highest risk of reoffending").

32. In *United States v. Smith*, you again defied the sentencing recommendation in the PSR and recommended a lower sentence for a child rapist. The defendant was charged with six counts of manufacturing child pornography—each carrying a recommended sentence of life imprisonment. Instead, the sentencing memo you signed recommended a thirty year sentence on only two of the charges.

You told Senator Blackburn that "the guidelines are overridden by the statutory maximums . . . he was convicted of two counts, the statutory maximum was 60 years." However, the jury found Smith guilty on six counts of manufacturing child pornography, each carrying a statutory maximum of 30 years. Smith faced a potential 2,160 months.

In your words, Smith "has proven himself to be the most dangerous kind of sexual predator." Why did you recommend that the defendant only serve the maximum on two of the six counts for which he was convicted? What, in your mind, merited a more lenient sentence for this offender?

Response: At my Committee hearing, I stated that the defendant was convicted on two counts. Post-hearing, I have reviewed the sentencing hearing transcript which demonstrates the reason for my recollection. The defendant argued that imposing sentences on six counts would violate the double jeopardy prohibition on multiple punishments. Because the defendant produced all six video clips in one day, at one location, and with one victim, the defendant argued that he could only be charged with one count, which would have capped his exposure at 30 years. The district court

decided to sentence the defendant consecutively only on Counts 1 and 6 to avoid a double jeopardy issue because the video clips in Counts 1 and 6 were produced over an hour apart, which the court found was sufficiently distant in time to permit consecutive sentencing on those two counts. Here is what the court said:

> The way the Court will impose a sentence here, which is going to be to impose 360 months on Count One and 360 months on Count Six, but 140 months of that concurrently for a total sentence of 600 months, which is 50 years' imprisonment, doesn't really require the Court to resolve the constitutional question and here's why.
>
> It's an interesting question whether . . . consecutively sentencing the defendant for all six of these counts raises a constitutional issue because the U.S. Supreme Court hasn't really addressed it and there's authority on both sides of the question, although the better authority comes from the prosecution in this case, which I'll explain in a moment.
>
> But the way I'm approaching it, to me, does not implicate double jeopardy because there's no question whatsoever that . . . the defendant's being doubly punished for the conduct set forth in Count One and Count Six. They are two separate and distinct offenses for the reasons and the law as set forth by the prosecutor . . . .
>
> Count One . . . which alleges a very specific time and place, down to the minute, described an act of child exploitation which involves oral penetration and one time and one place. Count Six involves an offense that took place and involves vaginal penetration over an hour later. There is no question in the Court's mind that consecutive sentencing for those two events does not implicate double jeopardy concerns at all. And . . . Counts Two through Five are going to involve concurrent sentencing with Count One. So the Court is not concerned that its sentence in some way implicates double jeopardy or places the defendant in danger of double jeopardy or it sentences him twice for the same criminal offense. Those are two separate and distinct criminal acts, criminal offenses, under the United States Criminal Code.

Based on the court's ruling to sentence consecutively only on Counts One and Six to avoid a double jeopardy issue, the court imposed a 50-year sentence, which it did not view as a variance. Indeed, the court indicated that "it can't imagine a case less appropriate for a variance."

When Smith was sentenced, he was in his mid-30s. The government's request for a 60-year sentence, made after consultation with the victim's family, would have resulted in a sentence that was substantially longer than Smith's life expectancy. As I said at the sentencing hearing, the 60-year sentence requested by the government was "tantamount to a life sentence" and was intended to promote incapacitation, general deterrence, and public safety. Moreover, as demonstrated in the government's sentencing memorandum, the government's request for a 60-year sentence accorded

with the sentences imposed in the District of New Hampshire for other similar child-sex-abuse cases. Ultimately, the district court determined that the 60-year sentence recommended by the government was too harsh. As discussed above, the court sentenced the defendant to 50 years in prison, a full decade below the government's recommendation.

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

Questions for the Record for Seth Robert Aframe, nominated to be United States Circuit Judge for the First Circuit.

I. Directions

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

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

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

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

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

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

II. Questions

1. **Is racial discrimination wrong?**

Response: Yes. Racial discrimination is illegal under federal law. *E.g.*, 42 U.S.C. § 2000e *et seq.*

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: As a judicial nominee, it would be a violation of the Code of Conduct for United States Judges and the associated Canons to offer an opinion on additional rights that should be recognized under the Due Process Clause because such matters could come before me if I am confirmed. If confirmed, I would follow the Supreme Court and First Circuit precedent. For questions involving unenumerated rights, I would follow the Supreme Court's test as articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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 circuit judge, my judicial philosophy would focus on fairness, fidelity, and clarity. By fairness, I mean the judge's responsibility to keep an open mind, study the briefs and record, listen and participate in oral argument, and consider the views of judicial colleagues. Fidelity refers to the judge's obligation to base the decision on a scrupulous adherence to the record and applicable precedent of the Supreme Court and First Circuit. Clarity means the judge's obligation to explain the court's decision in opinions that are accessible to the litigants and are useful to the bar and district court judges as guidance for future cases. I am not sufficiently familiar with the judicial philosophies of these Courts to provide an opinion on which philosophy is most analogous to my own.

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

Response: Black's Law Dictionary (11th ed. 2019) defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted" and, more specifically, as "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." If confirmed as a First Circuit judge, I would serve on a middle-level court in a vertical court system governed by precedent. My role on that court would be to faithfully apply Supreme Court and First Circuit precedent to the cases before me, not to ascribe labels to my decision making. I note that the Supreme Court has employed an originalist approach when interpreting several constitutional provisions. *E.g., District of Columbia v. Heller*, 554 U.S. 570

(2008), the Fourth Amendment, *Florida v. Jardines*, 569 U.S. 1 (2013), and the Confrontation Clause under the Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Response: Black's Law Dictionary (11th ed. 2019) 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." If confirmed as a First Circuit judge, I would serve on a middle-level court in a vertical court system governed by precedent. My role on that court would be to faithfully apply Supreme Court and First Circuit precedent to the cases before me, not to ascribe labels to my decision making. I am, however, not aware of Supreme Court or First Circuit precedent that has applied "living constitutionalism" as an interpretive method.

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: If confirmed as a First Circuit judge, I would faithfully apply Supreme Court and First Circuit precedent to the cases before me. Applying that precedent would include applying original public meaning as the methodology for deciding cases of first impression where the Supreme Court has held that such methodology applies. The Supreme Court has prescribed original public meaning as the appropriate methodology for several constitutional provisions, including the Second Amendment. *E.g., District of Columbia v. Heller*, 554 U.S. 570 (2008), the Fourth Amendment, *Florida v. Jardines*, 569 U.S. 1 (2013), and the Confrontation Clause under the Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36 (2004).

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: If confirmed as a First Circuit judge, I would faithfully apply Supreme Court and First Circuit precedent to the cases before me. In construing statutes, the Supreme Court has said that a court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). The Supreme Court has taken a similar approach with some parts of the Constitution, *see New York Rife & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (Second Amendment), but not with others, *see Roper v. Simmons*, 543 U.S. 551 (2005) (recognizing that cruel and unusual punishment analysis requires reference to "the evolving standards of decency that mark the progress of a maturing society").

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

Response: The Constitution does not change; it was intended "to endure for ages to come." *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: Yes. *Dobbs* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a nominee for judicial office, the Code of Conduct for United States Judges and associated Canons prevent me from offering a view on whether a case was decided correctly where there is a reasonable probability that the case will be raised in future litigation before me if I am confirmed. If confirmed, I would follow *Dobbs* as precedent and would have no hesitation in doing so.

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

Response: Yes. *Bruen* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a nominee for judicial office, the Code of Conduct for United States Judges and associated Canons prevent me from offering a view on whether a case was decided correctly where there is a reasonable probability that the case will be raised in future litigation before me if I am confirmed. If confirmed, I would follow *Bruen* as precedent and would have no hesitation in doing so.

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

Response: Yes. *Brown* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: Because I view it as unlikely that constitutionality of racially segregated school will ever come before me if I am confirmed as a judge, I may answer, consistent with the Code of Conduct of United States Judges, that, in my view, *Brown* was correctly decided.

12. **Is the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* settled law?**

Response: Yes. *Students for Fair Admissions v. Harvard* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: As a nominee for judicial office, the Code of Conduct for United States Judges and associated Canons prevent me from offering a view on whether a case was decided correctly where there is a reasonable probability that the case will be raised in future litigation before me if I am confirmed. If confirmed, I would follow *Students for Fair Admissions* as precedent and would have no hesitation in doing so.

13. **Is the Supreme Court's ruling in *Gibbons v. Ogden* settled law?**

Response: Yes. *Gibbons* is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: While *Gibbons* has been a precedent of the Supreme Court since 1824, matters involving the extent of Congress' power under the Commerce Clause still arise in federal litigation. I therefore do not think that it is proper under the Code of Conduct for United States Judges and associated Canons for me to offer an opinion on whether *Gibbons* was correctly decided. If confirmed, I would follow *Gibbons* as precedent and would have no hesitation in doing so.

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

Response: The Bail Reform Act, 18 U.S.C. § 3142(e)(2) establishes a rebuttable presumption for drug offenses carrying a possible penalty exceeding ten years, certain violent crimes, and certain crimes with minor victims.

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

Response: The Bail Reform Act does not provide the policy rationale for the rebuttable presumption. I am also not aware of any Supreme Court or First Circuit decision that has articulated the rationale.

15. **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: The Constitution and federal statutory law place limits on what obligations governments may impose on religious organizations. The Free Exercise Clause of the First Amendment imposes strict scrutiny review on a law burdening religious practice if the law is not neutral and of general applicability. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law that is subject to strict scrutiny can only be sustained where the government proves "interests of the highest order" and that it has employed "means

narrowly tailored in support of those interests." *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021). The Religious Freedom Restoration Act prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell v. Hobby Lobby*, 573 U.S. 682, 705 (2014). A "person" under this Act includes closely-held, for-profit corporations. *Id.* at 708.

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

Response: Supreme Court precedent holds that laws burdening religion which are not neutral and generally applicable are subject to strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law that is subject to strict scrutiny can only be sustained where the government proves "interests of the highest order" and that it has employed "means narrowly tailored in support of those interests." *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021).

17. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.**

Response: In *Cuomo*, the Supreme Court held that religious organizations were likely to succeed on their Free Exercise claim where a COVID regulation was more restrictive to religious organizations than secular entities. Applying strict scrutiny, the Court acknowledged that limiting the spread of COVID was a compelling government interest but that it was not narrowly tailored because it treated otherwise similarly situated religious and secular entities differently.

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

Response: In *Tandon*, the Supreme Court held that California's restrictions on the size of private gatherings violated the Free Exercise Clause because it treated similarly-situated religious and secular gatherings differently and that differential treatment failed to satisfy strict scrutiny.

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

Response: Yes. In *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407 (2022), the Supreme Court held that the school district violated the Free Exercise and Free Speech Clauses of the First Amendment by punishing a football coach for engaging in prayer on the football field at the conclusion of a game.

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

Response: In *Masterpiece Cakeshop*, the plaintiff argued that Colorado could not impose sanctions, under its anti-discrimination in public accommodations law, against a baker who declined to make custom wedding cakes for same-sex weddings. The Supreme Court held that Colorado violated the baker's rights under the Free Exercise Clause because Colorado did not act neutrally toward religion insofar as there were statements by government officials in the plaintiff's case that demonstrated a hostility toward religion.

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

Response: Yes. The Supreme Court has held that whether a person has a sincerely held religious belief "does not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 714 (1981).

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

Response: I am not aware of any such limitation. The pertinent legal question is whether the religious belief professed is "truly held" not whether the belief is "true." *United States v. Seeger*, 380 U.S. 163, 185 (1965).

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

Response: See answer to question 19(a) *supra*.

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

Response: To the best of my knowledge, the Catholics Church's official position does not view abortion as acceptable and morally righteous.

22. **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 Sch. v. Morrisey-Berru*, the Supreme Court held that the ministerial exemption from fair employment statutes does not require that the employee at issue retain the title of "minister." The question is what the employee does, not his or her title. Because the teachers in the case had a role in providing religious instruction to students, the ministerial exemption applied even though the teachers were not ministers.

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

Response: The City of Philadelphia declined to renew a contract with a foster care agency that refused to certify same-sex couples based on the agency's religious views. The Supreme Court held that the City's decision violated the Free Exercise Clause. The Court held that the City's action was not neutral toward religion because the City's non-discrimination policy was subject to individual exemptions at the discretion of City officials. The Court proceeded to apply strict scrutiny and held that the City had failed to advance a compelling interest for declining to provide the agency with an exemption based on its religious views.

24. **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: The State of Maine operated a tuition assistance program for individuals living in areas that do not operate public schools. Maine's program required that the funds only be used to pay for a school that is "non-sectarian." The Supreme Court held that this non-sectarian limitation violated the Free Exercise Clause because (1) individuals were prohibited from using funds for the school of their choosing only because of the religious character of the school (2) and Maine failed to satisfy strict scrutiny for justifying the funding restriction because there is no compelling interest in separating state funds from religious entities more broadly than is required by the Establishment Clause.

25. **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 Sch. Dist.*, the Supreme Court held that the public school district violated that Free Speech and Free Exercise Clauses of the First

Amendment by preventing a football coach for engaging in prayer on the field after a game. 142 S. Ct. 2407 (2022). The Court ruled that the school district's policy was not neutral and generally applicable and that the school district could not satisfy strict scrutiny for its policy. The Court concluded that the coach's prayer was protected, private speech and the school's claim that the coach's prayer raised Establishment Clause concerns was incorrect.

26. **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* involved a Free Exercise challenge by an Amish community against the application of an ordinance requiring the installation of certain modern septic systems to dispose of gray water. The Court vacated the order requiring the Amish community to comply with the ordinance in light of *Fulton v. City of Philadelphia*. Justice Gorsuch concurred. He noted that the Religious Land Use and Institutionalized Persons Act mandates strict scrutiny for government actions that burdens religion. Justice Gorsuch argued that, in determining whether the government has stated a compelling interest, the focus should not be on the government's general interest but rather on the specific application of the rule to the particular person or community. Justice Gorsuch also noted that in the litigation below there was insufficient attention paid to exemptions from the rule that other groups enjoy and how other jurisdictions had handled similar situations. Finally, Justice Gorsuch explained that the government had to conduct a more thorough review of the feasibility of the Amish community's proposed alternative before rejecting it.

27. **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: As a judicial nominee, the Code of Conduct for United States Judges and associated Canons make it inappropriate for me to comment on a hypothetical matter that could come before the court to which I may be confirmed. I am not aware of any Supreme Court or First Circuit precedent in the context of protests outside of a judge or justice's home that addresses whether the First Amendment right to assemble limits the application of 18 U.S.C § 1507.

28. **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.

29. **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.

30. **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.

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

Response: The obligation to make political appointments rests with the official empowered by law subject to constitutional and relevant statutory limitations. As a judicial nominee, the Code of Conduct for United States Judges and associated Canons makes it inappropriate for me to comment on a hypothetical matter that could come before the court to which I may be confirmed.

32. **If a program or policy has a racially disparate outcome, is this evidence of either purposeful or subconscious racial discrimination?**

Response: No. Some statutes permit liability based on a discriminatory outcome even when there is no evidence of a discriminatory motive. *E.g.*, *Texas. Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). For the government to violate the Equal Protection Clause, however, it must act with a discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976). Disparate impact alone does not establish a discriminatory intent under the Equal Protection Clause; such impact however can serve "as the starting point" in the analysis. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

33. **Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.**

Response: The Constitution does not set forth the number of justices who shall serve on the Supreme Court. Therefore, the number of justices on the Court is a matter of policy determined through the passage of legislation. As a judicial nominee, it would be inappropriate for me to comment on a matter of policy reserved to the legislative and executive branches.

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

Response: No.

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

Response: The Supreme Court has held that the Second Amendment protects a personal right to keep and bear arms in the home and in public. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

36. **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: The Supreme Court addressed this question in *Bruen:*

"[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."
New York State Rifle & Pistol Assn., Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022).

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

Response: The right to bear arms is a personal right under the Bill of Rights that has been incorporated onto the States under the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: "The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees*." New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022). The Supreme Court has found Second Amendment rights to be fundamental and has therefore held that Second Amendment rights are incorporated on the States under the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

Response: No.

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

Response: The Constitution imposes on the President the obligation "to take Care that Laws be faithfully executed." U.S. Const. art. II, § 3. The executive's discretion to execute the laws is "broad" but not "unfettered" as it is subject to "constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985).

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

Response: Black's Law Dictionary (11th ed. 2019) defines "prosecutorial discretion" as "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Substantive administrative rule changes arise from agency action taken consistent with the Constitution and in accord with the Administrative Procedures Act, 5 U.S.C. §§ 551-559.

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

Response: The federal death penalty is codified in the United States Code based on a duly enacted statute. The President does not have the authority to abolish such a statute.

43. **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*, the Court vacated a nationwide moratorium of evictions that had been promulgated by the Centers for Disease Control (CDC) during the pandemic. The Court concluded that the CDC likely did not have authority under the statute to impose the moratorium because the Court would expect "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." 141 S. Ct. 2485, 2489 (2021).

44. **Is it appropriate for a prosecutor to publicly announce that they are going to**

prosecute a member of the community before they even start an investigation as to that person's conduct?

Response: As a federal prosecutor, I have never announced an intention to prosecute a person before the conclusion of the investigation and the filing of an appropriate charging document with the court.

Senator Josh Hawley
Questions for the Record

Seth Robert Aframe
Nominee, U.S. Circuit Judge for the First Circuit

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

   Response: No.

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

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

   Response: In several areas, the Supreme Court has ruled that the Constitution should be interpreted based on original public meaning. *E.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment Confrontation Clause).

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

Response: In construing a federal statute, I would first determine if there was Supreme Court or First Circuit precedent already construing the language at issue. If not, I would turn to the text of the statute. If that text is unambiguous, the inquiry would end. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). If the text is ambiguous, I would consider other sources that have been relied on by the Supreme Court and the First Circuit in construing statutes. These include statutory context (*Encino Motors v. Navarro*, 138 S. Ct. 1134 (2018)), clear statement rules (*Lac du Flambeaus Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023)), and canons of statutory construction (*Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 2014)). The First Circuit also permits examining legislative history when a statute is not plain and unambiguous. *In re Financial Oversight and Management Bd. for Puerto Rico*, 919 F.3d 121, 128 (1st Cir. 2019). However, the use of legislative history should be undertaken with caution because, as the Supreme Court has observed, legislative history "is itself often murky, ambiguous and contradictory" and reliance on it may place undue weight on the views of unrepresentative member of Congress. *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005).

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

Response: The Supreme Court has stated that among sources of legislative history "Committee Reports are more authoritative than comments from the floor." *Garcia v. United States*, 469 U.S. 70, 76 (1984). I would follow this admonition to the extent legislative history is considered.

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

Response: The Supreme Court has rarely referred to foreign law in its constitutional decisions. Although recognizing that such foreign law "does not become controlling," the Court "has referred to the law of other countries and to international authorities as instructive for the Eighth Amendment's prohibition on cruel and unusual punishment." *Roper v. Simmons*, 543 U.S. 551, 575 (2005). The Supreme Court has also looked to English law to interpret some provisions of the Constitution, including the Seventh Amendment right to a civil jury. *Tull v. United States*, 481 U.S. 412, 417 (1987). If confirmed as a circuit judge, I will follow the Supreme Court and First Circuit precedents on the relevant materials for conducting constitutional interpretation.

4. 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 recently concluded that such an Eighth Amendment claim would require that the intended execution method presented "a substantial risk of serious harm," and that an alternative method of execution exists that is "feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 220 (2022).

5. 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.

6. 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: The Supreme Court has declined to constitutionalize access to DNA evidence. *Dist. Atty's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009). I am not aware of any First Circuit precedent on this question.

7. 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.

8. 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: Under the Free Exercise Clause, government actions which burden religion that are not neutral and generally applicable may only stand if those actions satisfy strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). For government action that is not neutral or generally applicable, the government must show that its action furthers "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

For federal government action, the Religious Freedom Restoration Act restricts the government "from substantially burdening 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*, 573 U.S. 682, 705 (2014).

9. 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: See response to question 8*, supra.* Additionally, in *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018), the Supreme Court held that "to respect the Constitution's guarantee of free exercise, [the state] cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."

10. 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 standard for determining whether a religious belief is sincere is whether the evidence demonstrates that the assertion is a pretext to obtain a benefit. *Burwell v. Hobby Lobby*, 573 U.S. 682,717 n. 28 (2014). The resolution of the question should not turn on "a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 714 (1981).

11. 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: *Heller* recognized a personal right under the Second Amendment to keep and bear arms in the home.

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

Response: No.

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

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

Response: Justice Holmes' statement, as I understand it, expressed his view that the Constitution does not mandate a particular economic philosophy.

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

Response: If confirmed as a court of appeals judge, I am committed to following precedent. *Lochner* has been overruled and was recently referred to by the Supreme Court as a "discredited" example "of "freewheeling judicial policymaking." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022).

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

Response: I understand that phrase to reflect the Supreme Court's view that *Korematsu* was incorrectly decided.

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

Response: The Supreme Court has held that if "a precedent of [the Supreme Court] has direct application in a case, [and] yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). I am committed to following all Supreme Court precedents as they are decided unless they are overruled by the Supreme Court.

a. If so, what are they?
b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

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

a. Do you agree with Judge Learned Hand?
b. If not, please explain why you disagree with Judge Learned Hand.
c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: The Supreme Court has found that controlling over two-thirds of the market may constitute a monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). The First Circuit has said that "87% market share would almost certainly be a clear indication of market dominance, but a 2% share would be too puny to provide any semblance of market power." *Flovac, Inc. v Airvac, Inc.*, 817 F.3d 849, 854 (1st Cir. 2016); *Grappone Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (stating the 5.6% market share does not demonstrate market power). If confirmed as a judge, I will follow all applicable precedent relevant to defining market power.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "federal common law" as "[t]he body of decisional law derived from federal courts when adjudicating federal

questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law."

17. 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: Within our federalist system, it has long been the rule that the construction given by the highest state court to the state constitution is binding on the federal courts as a rule of decision. *Post v. Kendall County Supervisors*, 105 U.S. 667, 669 (1881). I will follow this precedent if I am confirmed as a federal judge.

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

Response: See response to question 17*, supra*.

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

Response: "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

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

Response: Yes. The constitutionality of racial segregation in schools is a question that is not likely to come before the courts again. For that reason, I believe it is permissible as a judicial nominee to state my opinion that *Brown* was correctly decided.

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

Response: Whether federal courts have the legal authority to issue nationwide injunctions is an unsettled topic. *Dep't of Homeland Sec. v. N.Y.*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring in stay). If I am confirmed, an issue regarding the authority for such an injunction could come before the court. Therefore, under the Code of Conduct for United States Judges and the associated Canons, I do not believe it is proper for me to provide an opinion on this issue.

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

Response: See response to question 19, *supra*.

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

Response: See response to question 19*, supra.*

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

Response: See response to question 19, *supra.*

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

Responding: As the Supreme Court has explained, the "federalist structure of joint sovereigns preserves to the people numerous advantages. It 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).

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

Response: The Supreme Court has recognized several so-called abstention doctrines whereby a federal court should abstain from deciding a question to permit adjudication by the state court in the interests of comity. These doctrines are:

(1) *Younger* abstention, *Younger v. Harris*, 401 U.S. 37 (1971), provides that a federal court should abstain when there is an ongoing state criminal prosecution, or a state civil proceeding that is akin to a prosecution or implicates the State's interest in enforcing the judgments and orders of its courts in order to prevent the federal court from enjoining the ongoing state proceeding. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013).

(2) *Pullman* abstention provides that abstention is proper where (1) substantial uncertainty exists over the meaning of the state law in question, and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question. *Batterman v. Leahy*, 544 F.3d 370, 373 (1st Cir. 2008).

(3) *Burford* abstention is intended to "prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution." *Chico Servs. Station, Inc. v. Sol Puerto Rico, Ltd.*, 633 F.3d 20, 29 (1st Cir. 2011).

(4) *Colorado River* abstention is an abstention doctrine that "allows federal courts in limited instances to stay or dismiss proceedings that overlap with concurrent litigation in state court." *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 21 (1st Cir. 2010). To

determine whether *Colorado River* abstention is appropriate, the federal court considers whether either court has assumed jurisdiction over a res; the geographical inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the order in which the forums obtained jurisdiction; whether state or federal law controls; the adequacy of the state forum to protect the parties' interests; the vexatious or contrived nature of the federal claim; and respect for the principles underlying removal jurisdiction.

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

Response: Damages are usually employed to redress a past harm, while injunctive relief can be used to stop ongoing and future harm. The nature of the relief is determined based on the type of case and the requests of the party bringing the action. As a judicial nominee, the Code of Conduct for United States Judges and associated Canons prevents me from offering an opinion on what type of relief would be appropriate in a hypothetical case.

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

Response: The Supreme Court has recognized that the Due Process Clause "guarantees more than fair process"; it also provides "heightened protection against government interference with certain fundamental rights and liberty interests" which are not expressly listed in the Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). In *Glucksberg,* the Supreme Court reiterated the "established method" of substantive due process analysis: for a right to be deemed fundamental such that heightened scrutiny applies, the right at issue must be carefully described and that right must be "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Id.* at 720-21.

25. 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: See my response to question 8, *supra*.

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

Response. The Supreme Court has described the Free Exercise Clause as protecting both "the freedom of worship and freedom of conscience in religious matters." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

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

Response: For federal government action, the Religious Freedom Restoration Act restricts the government "from substantially burdening 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*, 573 U.S. 682, 705 (2014).

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: See response to question 10 *supra*.

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

Response: The Supreme Court explained that the Religious Freedom Restoration Act (RFRA) applies to all Federal law, and the implementation of that law, whether statutory or otherwise. However, Congress may exempt statutes from RFRA's reach. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2382 (2020).

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

Response: No.

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

Response: The First Circuit has cautioned against providing precise definitions of reasonable doubt. Indeed, the Court has said that reasonable doubt "does not require

definition;" "the term reasonable doubt itself has a self-evident meaning comprehensible to the lay juror;" and "most efforts at clarification result in further obfuscation of the concept." *United States v. Fields*, 660 F.3d 95, 96-97 (1st Cir. 2011). Should I be confirmed, questions about reasonable doubt instructions could come before me. The Code of Conduct for United Judges and associated Canons require that I not offer an opinion on a matter that could come before me if confirmed.

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

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

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

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

Response: In *Harrington,* the Supreme Court did not define "fairminded jurist" or opine on what constitutes a disagreement among fairminded jurists. In short, *Harrington*, which is binding precedent, does not indicate whether a circuit spilt or a split between state and federal courts constitutes a disagreement among fairminded jurists.

28. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

c. If confirmed, would you treat unpublished decisions as precedential?

d. If not, how is this consistent with the rule of law?

e. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

f. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

g. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: The First Circuit permits unpublished opinions and permits their citation. Local Rule 32.1(a). The First Circuit has held that unpublished opinions do not have precedential force. *Narragansett v. Indian Tribe v. Rhode Island*, 449

F.3d 16, 29 n. 8 (1st Cir. 2006). If confirmed, I will follow the First Circuit's local rule and other precedent on the topic of unpublished opinions.

29. In your legal career:

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

Response: 16

b. How many have you tried as second chair?

Response: 3

c. How many depositions have you taken?

Response: I estimate 15 to 20.

d. How many depositions have you defended?

Response: I estimate 20 to 30.

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

Response: Between 100 and 105.

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

Response: 1

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

Response: 0

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

Response: I estimate 10 to 15.

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

Response: I estimate between 75 and 100.

30. If any of your previous jobs required you to track billable hours:

a. What is the maximum number of hours that you billed in a single year?

Response: My best recollection is 2,100 hours.

b. What portion of these were dedicated to pro bono work?

Response: My best recollection is approximately 200 hours.

31. 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: Justice Scalia was explaining that the policy preferences of a judge should not always align with the outcome demanded by faithful application of the law to the facts.

32. Chief Justice Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

b. Do you agree or disagree with this statement?

Response: Chief Justice Roberts was explaining that the job of the judge is to apply fairly and impartially the legal rules enacted by other actors. Assuming I have interpreted the quote correctly, I agree with the Chief Justice's comment.

33. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: Justice Holmes was explaining that a judge's role is the faithful application of the law to facts rather than reaching a preferred outcome. Black's Law Dictionary (11th ed. 2019) defines "justice" as "the fair and proper administration of laws." In that respect, I disagree in part with Justice Holmes in that I believe the judge's duty is to ensure the fair and proper administration of the laws. I do agree, however, that a judge should not consider a preferred outcome in deciding a case.

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

a. If yes, please provide appropriate citations.

Response: No.

35. 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.

36. What were the last three books you read?

Response: *The Second Founding* by Eric Foner; *Scorpions* by Noah Feldman; *Every Day is for the Thief* by Teju Cole.

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

Response: As a judicial nominee, it is not appropriate for me to comment on a question that is the subject of political debate and could arise in litigation. As an attorney for the United States, I personally have worked diligently to assure that the laws of the United States are enforced without bias.

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

Response: It is difficult to select one legal representation about which I am most proud. Having the opportunity to represent the United States, with the objective of making New Hampshire a safer and better place to live, is the aspect of my legal career about which I am most proud.

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

Response: Yes.

a. How did you handle the situation?

Response: I provided an explanation to my client about the basis for my view. I then handled the matter zealously for my client.

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

Response: Yes.

40. What three law professors' works do you read most often?

Response: I do not read legal work based on the law professors who wrote it. I typically select articles to read based on the topic that is being discussed.

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

Response: No Federalist Paper has shaped my view of the law more than any other. Federalist 51, however, has shaped my view about the importance of check and balances and the separation of powers in our constitutional system.

42. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: While I am influenced by the legal materials that I read, I cannot pinpoint a single opinion or article that has, by itself, changed my mind on a topic.

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

Response: As a nominee for judicial office, the Code of Conduct for United States Judges and the associated Canons prohibit me from commenting on legal issues that may come before the court should I be confirmed. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022), the Supreme Court returned the issue of abortion to the people and their elected representatives and further held that voters may decide whether "fetal life" constitutes "an unborn human being."

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

Response: To the best of my recollection, no.

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

a. *Roe v. Wade,* 410 U.S. 113 (1973)?
b. The Supreme Court's substantive due process precedents?
c. Systemic racism?
d. Critical race theory?

Response: No.

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

a. Apple?
b. Amazon?
c. Google?
d. Facebook?
e. Twitter?

Response: I presently own shares in Apple, Amazon, Google, and Facebook.

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

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

Response: As the appellate chief at the United States Attorney's Office, I wrote most briefs filed by my Office since 2010. I have edited a few briefs written by others. To the best of my knowledge, my name has appeared on those briefs in my supervisory role along the with the principal author.

48. Have you ever confessed error to a court?

Response: Yes.

a. If so, please describe the circumstances.

Response: On appeal, I once confessed error in a supervised release revocation because I determined that the line prosecutor had failed to submit sufficient evidence to sustain the violation.

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

Response: I took an oath to testify truthfully at my Committee Hearing on November 1, 2023, and have certified in my written responses to the Committee that my materials are true and correct to the best of my ability. In the context of those answers, I have stated my views on my judicial philosophy truthfully and accurately. As noted in numerous other responses, I know that the Code of Conduct for United States Judges and the associated Canons prohibit me as a judicial nominee from commenting on legal issues that may come before the court should I be confirmed.

Questions from Senator Thom Tillis
for Seth Robert Aframe nominee to be United States Circuit Judge for the First Circuit

1. **Can a judge's personal views and background benefit them in interpreting and applying the law, or would you say that they are irrelevant?**

   Response: A judge's personal views are irrelevant in interpreting and applying the law. A judge's background (education and experience) can be relevant to a judge's performance in applying the law.

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

   Response: A judge has an obligation to be impartial. *See* 28 U.S.C. § 453.

3. **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." In my view, judicial activism is inappropriate.

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: Judges should not consider whether the outcome in a case is desirable beyond making sure that the judge has done his or her best to apply the law to the facts fairly and impartially.

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

   Response: I will faithfully apply the Supreme Court and First Circuit precedent in this area of the law, which has recognized an individual right incorporated on the States to keep and bear arms in the home and in public. The leading Supreme Court cases in this area are *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *New York State Rifle & Pistol Assoc. v. Bruen,* 142 S. Ct. 2111 (2022).

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

   Response: I would apply the Supreme Court and First Circuit precedent in any case raising qualified immunity as an immunity from suit. Government officials are entitled to qualified immunity "if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under First Circuit law, "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Hoffman v. Reali*, 973 F.2d 980, 985 (1st Cir. 1992). As an Assistant United States Attorney, I have represented federal government officials in cases where I have raised qualified immunity on their behalf.

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

   Response: As a judicial nominee, I pledge to apply binding legal precedent from the Supreme Court and First Circuit on any qualified immunity issues that would come before me should I be confirmed. However, the Code of Conduct for United States Judges and the associated Canons preclude me from offering an opinion on the legal doctrine generally or its application to a hypothetical situation to avoid the appearance that I have prejudged any qualified immunity question that could arise.

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

   Response: The scope of the doctrine of qualified immunity is a policy question for the political branches of government.

10. **What are your thoughts regarding the importance of ensuring that all IP rights are in fact enforced?**

    Response: One of Congress' enumerated powers under Article I of the Constitution is to protect intellectual property to "promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Federal courts should fairly enforce the laws passed by Congress to protect intellectual property.

11. **In the context of patent litigation, in some judicial districts plaintiffs are allowed to request that their case be heard within a particular division. When the requested division has only one judge, this allows plaintiffs to effectively select the judge who will**

hear their case. What are your thoughts on this practice, which typically is referred to as "forum shopping" and/or "judge shopping?"

Response: The Supreme Court and the First Circuit have both criticized "forum shopping" and "judge shopping" *Atl. Marine Const Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tx,* 571 U.S. 49, 65 (2013); *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997). If confirmed, I will faithfully apply the Supreme Court and First Circuit precedent related to forum and judge shopping.

12. **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 shambles. What are your thoughts regarding the Supreme Court's patent eligibility jurisprudence?**

Response: As a judicial nominee, I am prohibited from commenting on the quality of judicial opinions because doing so may suggest that I have prejudged an issue that may come before me which is prohibited by the Code of Conduct for United States Judges and the associated Canons. I would note that jurisdiction over patent appeals is conferred by Congress to the United States Court of Appeals for the Federal Circuit, 28 U.S.C. § 1295(a)(1).