Senator Chuck Grassley, Ranking Member
Questions for the Record
Associate Justice Myong J. Joun
Judicial Nominee to the United States District Court for the District of Massachusetts

1. **In 2011, you criticized the Department of Homeland Security's Secure Communities program, arguing that it "had too many problems to work effectively." The program cross-references fingerprints from people arrested by state and local police with immigration records to determine whether or not an arrestee is in the country illegally. Please explain what problems existed with cross-referencing fingerprints for those arrested by state and local police.**

   Response: I believe this statement was attributed to me in a newspaper article after my appearance before the Fitchburg Massachusetts Human Rights Commission more than a decade ago in 2011. I do not recall the exact words that I used but my memory is that the statement was made in reference to concerns raised by chiefs of police with whom I had discussions regarding the Secure Communities program. One concern the chiefs raised was that victims of violent crimes were afraid of reporting crimes out of fear that they would be identified as undocumented. Another concern I recall hearing from the chiefs was that, contrary to the program's stated goal of removing dangerous criminal aliens, in practice, the majority of the deportations were for minor non-violent crimes which resulted in the breakup of families, which further eroded the trust of the communities they served. I have been a judge on the Boston Municipal Court since 2014. My involvement in these policy issues as an attorney and advocate for my former clients ended when I took the bench. As a Boston Municipal Court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will continue doing the same.

2. **You also reportedly claimed that "[t]aking fingerprints from those involved in minor crimes could reduce cooperation with police by immigrants, who could be afraid that reporting crime may backfire on them." Given that the program involved sharing fingerprints of those arrested for crimes, please explain how this could "backfire" on those reporting crimes.**

   Response: Please see my response to Question 1 above.

3. **You also reportedly criticized the program because "50% of those who have been deported were never arrested for violent or dangerous crimes." Although a goal of the program was to prioritize removal of "dangerous criminal aliens," immigration law also contains classes of crimes that are also prioritized for removal. This seems to imply that you disagree with removing aliens for those other bases, which include aggravated felonies (including large financial frauds) or crimes involving moral turpitude. Please explain why you believed that the program was not effective.**

   Response: Please see my response to Question 1 above.

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

   Response: I am not familiar with the statement or the context within which the statement was made. A judge should not inject his or her own value judgments. A judge should impartially apply the law to the facts. As a sitting state court judge and as a federal judicial nominee, it is otherwise not appropriate for me to opine or comment on the statement further. If confirmed, I would apply all binding Supreme Court and First Circuit precedent.

5. **When asked why he wrote opinions that he knew the Supreme Court would reverse, Judge Stephen Reinhardt's stock 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 the statement by Judge Stephen Reinhardt or the context within which the statement was made. However, a judge should impartially apply the law to the facts. If confirmed, I would apply all binding Supreme Court and First Circuit precedent.

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

   Response: Black's Law Dictionary 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." Black's Law Dictionary (11th ed. 2019).

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

   Response: I am not familiar with the statement made by then-Judge Ketanji Brown Jackson in 2013 or the context within which the statement was made. However, my understanding is that the Constitution has an enduring and fixed quality, unless it is amended through the Article V process. If confirmed, I would follow the text of the Constitution as well as Supreme Court and First Circuit precedent.

8. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: I am not familiar with all of the decisions issued by the Supreme Court in the last 50 years. If confirmed, I would approach each case by faithfully applying the law to the facts without fear or favor following the precedent set by the Supreme Court and the First Circuit. As I have done for the last eight years as a state court judge, I will treat all who appear before me fairly and impartially.

9. Please identify a First Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.

Response: I am not familiar with all of the decisions issued by the First Circuit in the last 50 years. If confirmed, I would approach each case by faithfully applying the law to the facts without fear or favor following the precedent set by the Supreme Court and the First Circuit. As I have done for the last eight years as a state court judge, I will treat all who appear before me fairly and impartially.

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

Response: The issue of reallocating funds away from police departments to other support services is best left to policymakers and legislatures to determine. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on this issue. If confirmed, I will faithfully apply binding precedent of the Supreme Court and the First Circuit.

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

a. Was *Brown v. Board of Education* correctly decided?
b. Was *Loving v. Virginia* correctly decided?
c. Was *Roe v. Wade* correctly decided?
d. Was *Planned Parenthood v. Casey* correctly decided?
e. Was *Griswold v. Connecticut* correctly decided?
f. Was *Gonzales v. Carhart* correctly decided?
g. Was *McDonald v. City of Chicago* correctly decided?
h. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
i. Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?
j. Was *Dobbs v. Jackson Women's Health* correctly decided?

Response: If confirmed, I am bound to faithfully apply all binding Supreme Court precedent. As a sitting state court judge and as a federal judicial nominee, it generally would not be appropriate for me to opine or comment on whether any binding Supreme Court precedent was correctly decided. However, because *Brown v. Board of Education* and *Loving v. Virginia* are cases that are so firmly rooted in American jurisprudence that they are not likely to come before me as a judge, I am comfortable in stating that they were decided correctly.

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

Response: 18 U.S.C. § 1507 makes it unlawful, among other things, to picket or parade in or near a building, courthouse, or residence occupied or used by a judge, juror, witness,

or court officer "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing" the judge, juror, witness, or court officer, in the discharge of his duty. Conviction of this misdemeanor offense is punishable by a fine or up to one year of incarceration.

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

Response: I am not aware of Supreme Court precedent that has determined that 18 U.S.C. § 1507 is constitutional on its face. However, a Louisiana statute with similar language was held to be facially valid and as applied in *Cox v. Louisiana*, 379 U.S. 559 (1965). As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on whether it is constitutional.

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

Response: A statement is not protected free speech under the "fighting words" doctrine where "by their very utterance inflict injury or tend to incite an immediate breach of the peace," or instigate violent reactions by listeners. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Subsequent cases have narrowed the "fighting words" doctrine as established in *Chaplinsky*. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (holding that the government generally cannot criminalize the display of profane words in public places), and *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (striking down a city ordinance that made it a crime to place a burning cross or swastika anywhere "in an attempt to arouse anger or alarm on the basis of race, color, creed, or religion."). If confirmed, I would apply all binding Supreme Court and First Circuit precedent when faced with an issue relating to the "fighting words" doctrine.

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

Response: A statement is not protected free speech under the true threats doctrine where the speaker's purpose is to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). If confirmed, I would apply all binding Supreme Court and First Circuit precedent when faced with an issue relating to the true threats doctrine.

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

Response: The right to criticize public officials is protected by the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Supreme Court has stated that, because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" found in the First Amendment,

public officials must reasonably anticipate criticism, including "vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S. at 270. If confirmed, I would apply Supreme Court and First Circuit precedent when faced with an issue involving criticism or attacks on judges or other public officials are raised.

17. Do you think the Supreme Court should be expanded?

Response: This is a subject best left to policymakers and legislators to determine. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on the size of the Supreme Court. If confirmed, I would fairly and faithfully apply any binding precedent from the Court, no matter how many justices are sitting on the Court at the time the opinion issued.

18. Is the federal judicial system systemically racist? Please explain.

a. If you answered yes, if confirmed how will you feel comfortable working in a systemically racist system?

Response including subpart (a): I understand that there have been a number of studies documenting disparate impact on communities of color at different stages of the federal criminal justice system. A widely discussed example is the disparity in sentencing for powder cocaine on the one hand and crack cocaine on the other. However, these issues are best left to policymakers and legislatures to address. During my eight years as a state court judge, I have presided over thousands of criminal matters. But I have handled them one case at a time. I have treated all individuals fairly, impartially, and equally without regard to their race, gender, socio-economic status, or any other characteristic. If confirmed, I will continue doing the same.

19. Is the federal judiciary affected by implicit bias?

Response: This is a question for policymakers and legislators determine. As a state trial court judge for the past eight years, I have strived to ensure that my decisions are made free of bias and that I treat every person fairly without regard to their race, gender, socio-economic status, or any other characteristic.

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

Response: Bail, sentencing, and other prisoner-release determinations require case-by-case analysis and determination by applying any binding precedent from the Supreme Court and the First Circuit. Public safety is always a significant consideration.

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

Response: In *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court stated that a firearm regulation must be consistent with the text and historical understanding of the Second Amendment. In order to find that a regulation is consistent with the Second Amendment, the party proposing the regulation must demonstrate that the "modern and historical regulations impose a comparable burden on the right of armed self-defense," and the "regulatory burden is comparably justified." *Id*. at 2118.

22. What is implicit bias?

Response: According to the Merriam-Webster Dictionary, implicit bias is "a bias or prejudice that is present but not consciously held or recognized." "implicit bias." Merriam-Webster Online Dictionary. 2022. http://www.merriam-webster.com (26 Nov. 2022).

23. Do you have any implicit biases? If so, what are they?

Response: My understanding is that all people have unconscious assumptions, including myself. During my eight years as a state court judge in a very busy criminal court, I have tried to mitigate any potential implicit bias by being mindful that I am more likely to give in to those biases when I am under pressure to make quick decisions. I have also consciously made an effort to see the person in front of me as an individual rather than as a member of some group.

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

Response: No.

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

Response: No.

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

Response: No.

27. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New

Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: On July 29, 2022, I received an email from Christopher Kang congratulating me on the nomination and wishing me luck.

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

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

Response: No.

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

Response: No.

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

Response: No.

31. 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.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited**

to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?

Response: No.

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

Response: No.

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

Response: No.

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

Response: On March 30, 2022, I submitted an application to the Advisory Committee on Massachusetts Judicial Nominations. I interviewed with the Committee on April 11, 2022. On April 25, 2022, I was interviewed by Senators Elizabeth Warren and Edward J. Markey. On May 2, 2022, I was interviewed by attorneys from the White House Counsel's Office. Since May 10, 2022, I have been in contact with officials at the Office of Legal Policy of the U.S. Department of Justice. On August 1, 2022, my nomination was submitted to the Senate.

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

Response: I received the questions on November 22, 2022 from the Office of Legal Policy. I drafted my response to each question after reviewing the questions and conducting research. The Office of Legal Policy provided input on my draft responses, which I considered. I then finalized and submitted my responses.

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

Questions for the Record for Myong J. Joun, Nominee for the United States District Judge for the District of Massachusetts

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Racial discrimination is generally unlawful under the Constitution and various federal statutes prohibiting racial discrimination in employment, public accommodations, and other contexts. Race is a suspect classification that is subject to strict scrutiny and thus only permissible when narrowly tailored to achieve a compelling government interest. I would apply binding precedent of the Supreme Court and First Circuit to determine whether alleged instances of racial discrimination violate the law.

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

Response: The Supreme Court held that unenumerated rights can be recognized under the Due Process Clause of the Fourteenth Amendment if such rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). As a sitting state court judge and as a federal judicial nominee, it would otherwise not be appropriate for me to opine or comment whether there are any yet unarticulated unenumerated rights in the Constitution. If confirmed, I would follow binding Supreme Court and the First Circuit precedent relating to the existence of unenumerated rights.

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: I have not researched or studied the judicial philosophies of the Supreme Court Justices from the Warren, Burger, Rehnquist, and Roberts Courts so I cannot comment on whose philosophy is the most analogous with mine. My judicial philosophy is that federal courts are courts of limited jurisdiction, and a district court judge should exercise care to rule only on the questions necessary to the specific case or controversy before the court, based on a fair and impartial application of the law to the actual evidence in the record, without fear or favor, following all Supreme Court and the First Circuit precedent.

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

Response: As I understand the term, it refers to an interpretative methodology of the Constitution that requires giving constitutional text its original public meaning, as understood by an ordinary person at that time. The Supreme Court has applied originalism in certain constitutional contexts, such as adjudicating Second Amendment

rights. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would be guided in my rulings by Supreme Court and First Circuit precedent, rather than by any label or interpretive philosophy.

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

Response: As I understand the term, it refers to an interpretative methodology that interprets the Constitution as adaptable, with the capacity to change its application and meaning over time. The Supreme Court has applied currently prevailing standards in certain constitutional contexts, such as adjudicating First Amendment rights, e.g., *Miller v. California*, 413 U.S. 15 (1973), and Eighth Amendment rights, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). If confirmed, I would be guided in my rulings by Supreme Court and First Circuit precedent, rather than by any label or interpretive philosophy.

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: "[T]he authoritative statement is the statutory text." *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). In interpreting the Constitution, the text of the provision at issue always controls. If confirmed, I would follow the precedent established by the Supreme Court and the First Circuit to determine when the original public meaning of the text of the Constitution should be used to interpret its provisions. See e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *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: The public's current understanding of the Constitution or of a statute is generally not relevant when determining the meaning of the Constitution or a statute. When interpreting a constitutional or statutory provision, judges should be guided by the plain language of the constitutional or statutory text and applicable precedent. However, as discussed above in my answer to Question 5, the Supreme Court has applied currently prevailing standards in certain constitutional contexts, such as adjudicating First Amendment rights, e.g., *Miller v. California*, 413 U.S. 15 (1973), and Eighth Amendment rights, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). If confirmed, I would consider the public's current understanding only if such an approach is consistent with Supreme Court and First Circuit precedent.

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

Response: The Constitution has endured for 233 years. It is fixed and has only been changed when amended pursuant to Article V.

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

Response: The Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is binding precedent.

a. Was it correctly decided?

Response: As a sitting state court judge and as a federal judicial nominee, it generally would not be appropriate for me to opine or comment on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and the First Circuit precedent.

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

Response: The Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* is binding precedent.

a. Was it correctly decided?

Response: As a sitting state court judge and as a federal judicial nominee, it generally would not be appropriate for me to opine or comment on whether any binding Supreme Court precedent was correctly decided. If confirmed, I will apply all binding Supreme Court and the First Circuit precedent.

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

Response: The Supreme Court's ruling in *Brown v. Board of Education* is binding precedent.

a. Was it correctly decided?

Response: As a sitting state court judge and as a federal judicial nominee, it generally would not be appropriate for me to opine or comment on whether any binding Supreme Court precedent was correctly decided. However, because *Brown v. Board of Education* is a case that is so firmly rooted in American jurisprudence that it is not likely to come before me as a judge, I am comfortable in stating that it was decided correctly. If confirmed, I will apply all binding Supreme Court and the First Circuit precedent.

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

Response: 18 U.S.C. § 3142 addresses pretrial detention. 18 U.S.C. § 3142(e)(3) establishes that in certain types of cases a rebuttable presumption of detention arises that no release conditions will reasonably assure the defendant's appearance in court and the safety of the community. These types of cases include drug offenses carrying ten years or maximum sentences carrying ten years or more, offenses involving underage victims, crimes involving slavery or human trafficking, and other enumerated offenses. Additionally, 18 U.S.C. § 3142(e)(2) specifies that certain prior convictions can trigger a presumption in favor of pretrial detention.

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

Response: The policy rationales underlying such a presumption are stated in the rule itself: where "the judicial officer finds that there is probable cause to believe that the person committed" one of the enumerated offenses, "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3).

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

Response: Yes. The Establishment Clause and Free Exercise Clause of the First Amendment generally limit what the government can require or prohibit of religious organizations. The Supreme Court has held that a law violates the First Amendment if the law burdens the free exercise of religion, is not neutral or generally applicable, and if the law is not narrowly tailored to meet a compelling government interest (i.e., the law must survive strict scrutiny because religion is a suspect classification). See generally, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). In addition to the First Amendment, Congress has also created other limitations on state and federal regulation via statute; for example, the Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA) both require that federal and certain state actions not substantially burden the free exercise of religion unless doing so furthers a compelling government interest and is the least restrictive means of furthering that government interest.

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

Response: Under the Free Exercise Clause of the First Amendment, laws that burden the free exercise of religion are first analyzed to determine whether they are both

neutral and generally applicable. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). Government regulation that discriminates against religious organizations or religious people is not neutral and generally applicable and must survive the strict scrutiny analysis. Strict scrutiny requires the law to be narrowly tailored to meet a compelling government interest. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 1264 (2022). Further, the federal government is subject to the restrictions of the Religious Freedom Restoration Act (RFRA), and the federal government in certain state actions is subject to the Religious Land Use and Institutionalized Persons Act (RLUIPA).

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

Response: The Supreme Court held that the that the plaintiff church and synagogues were entitled to a preliminary injunction because (1) they had "made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion" and likely to succeed on the merits, (2) the restrictions could cause irreparable harm if enforced because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and (3) granting the injunction would not harm the public interest because "the State has not shown that public health would be imperiled if less restrictive measures were imposed." *Roman Catholic Diocese of Brooklyn v. Cuom*o, 141 S. Ct. 63, 66–68 (2020) (citation omitted).

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

Response: Applying strict scrutiny, the Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), held that California's COVID regulations treated "comparable secular activity more favorably than religious exercise" and were therefore neither neutral nor generally applicable. The Court concluded that (1) the plaintiffs were likely to succeed on the merits of their free exercise claim under the First Amendment, (2) they were likely to suffer an irreparable harm, and (3) there was no evidence that "public health would be imperiled" by granting a preliminary injunction against the restrictions pending appeal.

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

Response: Yes. Americans have the right to their religious beliefs outside the walls of their houses of worship and homes under the First Amendment. See, e.g., *West Virginia*

State Board of Education v. Barnette, 406 U.S. 205 (1972); *Employment Div., Dep't. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court set aside the state administrative agency's enforcement of Colorado's anti-discrimination laws against a baker who refused to make a wedding cake for a same-sex couple. Finding that members of the Commission demonstrated "a clear and impermissible hostility toward the [baker's] sincere religious beliefs," the Court held that the state violated the Free Exercise Clause of the First Amendment because the Colorado Civil Rights Commission had not considered the baker's case "with the religious neutrality that the Constitution requires."

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

Response: Yes, if the religious beliefs are sincerely held, even if the belief is not based upon a "tenet, belief or teaching of an established religious body." *Frazee v. Illinois Department of Employment*, 489 U.S. 829, 833-34 (1989). Religious belief is "sincere," in that it is "sincerely based on a religious belief and not some other motivation." See, e.g., *Ramirez v. Collier*, 142 S. Ct. 1264, 1277–78 (2022). An individual's religious belief need not be "logical, consistent and comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Person Act both also expressly include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." See, e.g., *Burwell v. Hobby Lobby*, 573 U.S. 682, 695–696 (2014).

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

Response: Theoretically, yes. As discussed above, courts may only evaluate whether an asserted religious belief is sincere held.

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

Response: While it is not for the courts to decide what religious views or interpretations are acceptable, and should only decide whether the religious belief is "an honest conviction," See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (quoting *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981)), the Supreme Court has suggested that the government can

inquire into the sincerity of such belief: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ." *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. at 715.

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

Response: I do not possess the knowledge or expertise to answer this question. Further, as a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on the official position of the Catholic church.

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

Response: The Supreme Court held in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), that the "ministerial exception" applied to the employment discrimination lawsuits brought by two Catholic teachers of religious institutions even though they were not "ministers" because their roles educating and guiding students in their faith were at the "core" of the school's mission, and therefore, the religious institutions were immune from the employment discrimination suits. It reaffirmed the Court's holding in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), that the freedom of religion clauses of the First Amendment guarantee churches and religions institutions to determine matters of faith, doctrine, and governance without intrusion by the government.

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

Response: The Supreme Court in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), held that the City's refusal to sign a contract with a Catholic foster care agency unless it agreed to certify same-sex couples to be foster parents was a violation of the Free Exercise Clause of the First Amendment. The Court determined that the contract's nondiscrimination provision was not "generally applicable" because the provision allowed the City to grant exceptions in its "sole discretion," and applying strict scrutiny, concluded that the City failed to meet this standard because it had offered "no compelling reason why it has a particular interest in denying an exception to [the religious agency] while making them available to others." The Court also held that, as a foster care agency, the Catholic agency was not a "public accommodation" and thus not

subject to a city ordinance prohibiting discrimination.

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

Response: Reaffirming its holdings in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana*, 140 S. Ct. 2246 (2020), the Supreme Court, applying strict scrutiny, held in *Carson v. Makin*, 142 S. Ct. 1987 (2022), that the "nonsectarian" requirement in Maine's tuition assistance program violated the Free Exercise Clause of the First Amendment because it excluded qualified private schools from otherwise available public benefits due solely to their religion, stating that "[a] State need not subsidize private education, but once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

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

Response: The Supreme Court in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), held that the Free Exercise and Free Speech Clauses of the First Amendment protected a high school football coach from discipline for kneeling at the fifty-yard line after games to quietly pray. The school district claimed that its disciplinary actions were necessary measures taken to avoid lawsuits based on violation of the Establishment Clause. The Court stated that it was "a mistaken view that it had a duty to ferret out and suppress religious observances even as it allow[ed] comparable secular speech," and that "[t]he Constitution neither mandates nor tolerates that kind of discrimination."

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

Response: The Supreme Court in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), vacated the state court's judgment and remanded the case for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). An Amish community claimed that the County's septic system mandate violated the Religious Land Use and Institutionalized Persons Act. Justice Gorsuch explained that RLUIPA triggers a strict scrutiny analysis where "the County must offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish." The government must offer a "compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making [exceptions] available to others." *Fulton v. Philadelphia*, 141 S. Ct. at 1882.

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of

the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: Response: 18 U.S.C. § 1507 makes it unlawful, among other things, to picket or parade in or near a building, courthouse, or residence occupied or used by a judge, juror, witness, or court officer "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing" the judge, juror, witness, or court officer, in the discharge of his duty. Conviction of this misdemeanor offense is punishable by a fine or up to one year of incarceration. I am not aware of Supreme Court precedent that has determined that 18 U.S.C. § 1507 is constitutional. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on how I would interpret the statute.

26. Would it be appropriate for the court to provide its employees trainings which include the following:

a. One race or sex is inherently superior to another race or sex;

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

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

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

Response: I am not familiar with how federal courts train their employees and I am not aware of any such training in the First Circuit or in the District of Massachusetts. The U.S. Judicial Conference is best positioned to assess what trainings federal court employees should receive.

27. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: I am not aware of any such training in the First Circuit or in the District of Massachusetts, and I do not know if I will have any say in providing these trainings. But if I do, I can commit that I will comply with all laws and regulations.

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

Response: Yes.

29. Is it appropriate to consider skin color or sex when making a political

appointment? Is it constitutional?

Response: If I am confirmed, in any case that came before me involving the issue of skin color or sex in political appointments, I will carefully evaluate the specific legal claim asserted and the facts in the record based on Supreme Court and First Circuit precedent. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on whether making such political appointments are appropriate or constitutional.

30. Is the criminal justice system systemically racist?

Response: This is a subject best left to policymakers and legislatures to determine. During my eight years as a state court judge, I have presided over thousands of criminal matters. But I have handled them one case at a time. I have treated all individuals fairly, impartially, and equally without regard to their race, gender, socio-economic status, or any other characteristic. If confirmed, I will continue doing the same.

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

Response: This is a subject best left to policymakers and legislators to determine. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on the size of the U.S. Supreme Court. If confirmed, I would fairly and faithfully apply any binding precedent from the Court, no matter how many justices are sitting on the Court at the time the opinion issued.

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

Response: No.

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

Response: The Supreme Court, in its trilogy of decisions in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), *McDonald v. Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), analyzed the text and original public meaning of the Second Amendment and held that the Second Amendment guarantees the individual right to keep and bear arms, applicable to the States through the Fourteenth Amendment, both inside and outside the home.

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

Response: The Supreme Court, in *New York State Rifle and Pistol v. Bruen*, 142 S. Ct. 2111, 2126 (2022), held that a firearm restriction violates the Second Amendment if the government is unable to demonstrate that its regulation restricting firearms is consistent with this Nation's historical tradition of firearm regulation.

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

Response: Yes. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: No. The Supreme Court, in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022), held that the "Second Amendment standard accords with how we protect other constitutional rights."

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

Response: No. The Supreme Court, in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111, 2126 (2022), held that the "Second Amendment standard accords with how we protect other constitutional rights."

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

Response: Article II of the Constitution establishes the Executive branch and states the role and responsibilities of the President. As a sitting state court judge and a federal judicial nominee, it is not appropriate for me to opine or comment further.

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

Response: Broadly speaking, I understand "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." Black's Law Dictionary (11th ed. 2019). A prosecutor can unilaterally elect to use their discretion. I am unsure what the question asks by "a substantive administrative rule change." To the extent that the above question asks whether prosecutors have the discretion not to pursue certain crimes, as a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on such a matter.

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

Response: Congress has authorized the death penalty as appropriate punishment for certain offenses under 18 U.S.C. § 3591 and only Congress has the power to propose legislation to amend or repeal it. While the President has the authority to "grant reprieves and pardons for offenses against the United States" in individual cases under Article II of the Constitution, I am not aware of any authority for the President to unilaterally abolish the death penalty.

41. You chose to become a member of the Board of Directors for the National Lawyers Guild. Part of the organization's preamble states, "Our aim is to bring together all those who regard adjustments to new conditions as more important than the veneration of precedent." If confirmed, will you ignore precedent in favor of adjustments to new conditions?

Response: I am not familiar with the statement. I was a member of the Board for a one-year term more than a decade ago. My involvement in the organization was limited to my interest in protecting the right of people to peacefully protest under the First Amendment and to educate peaceful protesters about their rights under the Fourth Amendment if they were stopped, searched, or arrested. These activities were part of my pro bono work when I was an attorney and an advocate. I have been a judge on the Boston Municipal Court since 2014 and my involvement with the organization ended when I took the bench. As a Boston Municipal Court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will continue doing the same.

42. You helped draft the Massachusetts Chapter of the National Lawyers Guild's "Stop and Search Clinic Brochure." In one section, you wrote, "when you are the person being confronted by an officer, you should use common sense and restraint. A police officer confronting you has a lot of power (legal and illegal) at that moment." What did you mean by "illegal" power?

Response: I was referring to scenarios where a police officer could conduct a personal search without the requisite reasonable suspicion or make an arrest without probable cause, and cautioning the person that it may not be wise to assert his or her rights in that moment, but suggesting instead to allow the courts to determine at a later time the respective rights. I have been a judge on the Boston Municipal Court since 2014. My involvement in these issues as an attorney and advocate for my former clients ended when I took the bench. As a Boston Municipal Court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will continue doing the same.

a. You additionally wrote, "As they say, they have a gun and a badge, and you don't." What do you mean by "as they say, they have a gun and a badge, and you don't"? Who is the "they" you reference in your statement? Are you referring to the police themselves?

Response: "As they say" was meant as in "As the saying goes." The second "they"

in "they have a gun and a badge" was in reference to police officers.

43. You have previously questioned the effectiveness of The Secure Communities initiative—which cross-references fingerprints from crime suspects with immigration records—as having too many problems to work effectively. You specifically argued "50 percent of those who have been deported were never arrested for violent or dangerous crimes." Doesn't that same statistic show that 50 percent of those deported were violent criminals?

Response: I believe the question is in regards to a newspaper article in which statements were attributed to me after I appeared before the Fitchburg Massachusetts Human Rights Commission in 2011. I do not recall the exact words that I used but my memory is that the statements were made in reference to concerns raised by chiefs of police with whom I had discussions regarding the Secure Communities program. One of the concerns the chiefs raised was that, contrary to the program's stated goal of removing dangerous criminal aliens, in practice, the majority of the deportations were for minor non-violent crimes which resulted in the breakup of families, which further eroded the trust of the communities they served. It was my understanding at the time that after discussions with Boston Police Commissioner Edward Davis, Boston Mayor Thomas Menino wrote a letter to the Department of Homeland Security urging it to amend the program to ensure that only those arrested for serious crimes are deported. I have been a judge on the Boston Municipal Court since 2014. My involvement in these policy issues as an attorney and advocate for my former clients ended when I took the bench. As a Boston Municipal Court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will continue doing the same.

44. Do you agree that we should deport illegal aliens that are convicted criminals?

Response: My involvement in policy issues as an attorney and advocate ended when I took the bench in 2014. As a Boston Municipal Court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will fairly and faithfully apply all binding Supreme Court and First Circuit precedent.

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

Response: The Supreme Court, in *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021), held that the Center for Disease Control exceeded its authority when it imposed a nationwide moratorium on evictions of tenants who live in particular counties during the COVID-19 pandemic and stated that Congress must speak clearly and provide explicit authorization to an agency when it seeks to exercise powers of "vast economic and political significance." *Id*. at 2489.

Senator Josh Hawley
Questions for the Record

Myong Joun
Nominee, District of Massachusetts

1. **Your Judiciary Committee questionnaire indicates that you have a history of involvement with the National Lawyers Guild.**

    a. **Are you currently a member of the board of directors, or otherwise affiliated with, the National Lawyers Guild?**

    Response: No. I have been a judge on the Boston Municipal Court since 2014 and my involvement with the organization ended when I took the bench. As a Boston Municipal Court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will continue doing the same.

    b. **If so, what led you to become involved with that organization, given its historic ties to radical left-wing groups?**

    Response: Respectfully, I am unsure what "historic ties to radical left-wing groups" refers to. My involvement in the organization was limited to my interest in protecting the right of people to peacefully protest under the First Amendment and to educate peaceful protesters about their rights under the Fourth Amendment if they were stopped, searched, or arrested. These activities were part of my pro bono work when I was an attorney and an advocate. I have not been involved with the organization since I became a judge on the Boston Municipal Court in 2014. As a state court judge, I faithfully apply the law to the cases that come before me and if confirmed as a federal district court judge, I will continue doing the same.

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

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

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

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

d. The enhancements for the number of images involved

Response: I am not familiar with Justice Jackson's sentencing practices. For subsections (a)-(d) above, if confirmed, in all criminal sentencing matters, I would apply the factors Congress has set forth in 18 U.S.C. § 3553(a) and the Federal Sentencing Guidelines, including any relevant enhancements, and all binding precedent of the Supreme Court and First Circuit.

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

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

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

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

Response: Policy decisions regarding the appropriate penalties for criminal offenses are best left to the legislative branch to address. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on legislative matters. If confirmed, in all criminal sentencing matters, I would apply the factors Congress has set forth in 18 U.S.C. § 3553(a) and the Federal Sentencing Guidelines, including any relevant enhancements, and all binding precedent of the Supreme Court and First Circuit.

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

    a. Do you agree with that philosophy?

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

Response: I am not familiar with the quote or its context. A judge has an obligation to follow the law and all binding precedent. I have done that as a state court judge for the past eight years and, if confirmed, I will continue to do the same by faithfully applying all binding Supreme Court and First Circuit precedent.

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

   Response: The Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* is binding precedent.

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

   Response: Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must abstain from cases seeking to enjoin certain pending state court proceedings absent narrow exceptions. In the First Circuit, the *Younger* abstention doctrine applies "when the requested relief would interfere (1) with an ongoing state judicial proceeding; (2) that implicates an important state interest; and (3) that provides an adequate opportunity for the federal plaintiff to advance his federal constitutional challenge." *Rossi v. Gemma*, 489 F.3d 26, 34-35 (1st Cir. 2007).

   The *Colorado River* abstention doctrine applies when the other doctrines of abstention may not apply, but abstention is nevertheless necessary for reasons of "wise judicial administration." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The First Circuit will consider its authority under an exceptional circumstances test balancing the non-exclusive list of factors drawn from *Colorado River* and its progeny: "(1) whether either court has assumed jurisdiction over a res; (2) the [geographical] inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) the adequacy of the state forum to protect the parties' interests; (7) the vexatious or contrived nature of the federal claim; and (8) respect for the principles underlying removal jurisdiction." *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 27-28 (1st Cir. 2010) (internal quotations omitted).

   Under the *Pullman* abstention doctrine, federal courts may abstain from hearing a case when a difficult and unsettled question of state law should be resolved before a substantial federal constitutional question can be decided. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). The First Circuit considers two factors in determining whether the *Pullman* abstention is appropriate: (1) whether there is substantial uncertainty over the meaning of the state law at issue; and (2) whether a state court's clarification of the law would obviate the need for a federal constitutional ruling. *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001).

   Under the *Burford* abstention doctrine, a federal court must abstain from reviewing certain decisions of state administrative agencies when there are difficult questions of state law bearing on policy problems of substantial public import or where the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Burford v. Sun Oil Co.*,

319 U.S. 315, 332 (1943). The First Circuit found that the *Burford* abstention doctrine applies narrowly and "rest[s] upon...the threat...that a federal court might, in the context of the state regulatory scheme, create a parallel, additional, federal 'regulatory review' mechanism, the existence of which would significantly increase the difficulty of administering the state regulatory scheme." *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 75 (1st Cir. 2021) (quoting *Bath Mem'l Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988)).

Finally, under the *Rooker-Feldman* doctrine, which stems from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S 462 (1983), lower federal courts are precluded from exercising appellate jurisdiction over final state court judgments. *Lance v. Dennis*, 546 U.S. 459, 463 (2006). The First Circuit applies the *Rooker-Feldman* abstention doctrine where "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." *Federation de Maestros v. Junta de Relaciones del Trabajo*, 410 F.3d. 17, 23-24 (1st Cir. 2005) (quoting *Exxon Mobil Corp. v. Saudi Basic Induc. Corp.*, 544 U.S. 280, 291 (2005)).

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

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

Response: No.

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

Response: If confirmed as a federal district court judge, I will follow all Supreme Court and First Circuit precedent regarding the interpretation of particular constitutional provisions. For instance, the Supreme Court has established that the Second Amendment should be interpreted according to its original public meaning. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: Yes, but I would consider legislative history only as a last resort when there is no binding Supreme Court or First Circuit precedent, there are no analogous interpretations from another circuit as persuasive authority, and there remains ambiguity after applying the canons of statutory construction.

    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: I do not treat all legislative history the same. The Supreme Court has explained that official committee reports that are contemporaneous with a legislative enactment are "more authoritative than comments from the floor" and has expressed a preference for official committee reports over "the passing comments of one Member and casual statements from floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984). The Court has also cautioned consideration of "post-enactment legislative history," explaining that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). If confirmed, I would follow Supreme Court and the First Circuit precedent.

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

Response: If confirmed, I would follow all binding Supreme Court and First Circuit precedent in interpreting provisions of the United States Constitution. I would not consult the laws of foreign nations, with the very narrow exception of consulting English "common law in place at the Constitution's founding," which can be instructive in determining the Framers' understanding of certain constitutional provisions. E.g., *District of Columbia v. Heller*, 554 U.S. 570, 592-595 (2008) and *New York Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111, 2135-42 (2022) where the Supreme Court consulted historical English law when interpreting the Second Amendment.

10. 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 Eighth Amendment generally forbids "cruel and unusual" methods of capital punishment, but it has not been understood to guarantee a painless death. *Glossip v. Gross*, 567 U.S. 863, 869 (2015). A death row inmate who claims the state's proposed method of execution violates the Eighth Amendment's prohibition on cruel and unusual punishment must establish (1) a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and (2) that the state refused to adopt the method without a legitimate penological reason. *Bucklew v. Precythe* 139 S. Ct. 1112 (2019). To my knowledge, the First Circuit does not appear to have developed any additional standards beyond this general framework.

11. 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.

12. **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 not recognized a substantive due process right to DNA analysis of evidence to prove innocence. See *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009). To my knowledge, the First Circuit has not addressed whether such a right exists.

13. **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.

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

Response: The Supreme Court has directed that, under the Free Exercise Clause, federal courts should first determine whether the law that burdens the free exercise of religion are both neutral and generally applicable. See e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). If the law is not neutral or generally applicable, it is only constitutional if it survives strict scrutiny; in other words, the law must be narrowly tailored to meet a compelling government interest. See e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); *Church of the Lukumi Babalu Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, also trigger strict scrutiny under the Free Exercise Clause. See *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The First Circuit has generally followed the precedent set forth by the Supreme Court and recently held that a Maine law was both neutral and generally applicable, and therefore strict scrutiny was not applicable. *Does 1-6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021), cert. denied sub nom. *Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022).

15. 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: Claims alleging that federal government regulation discriminates against a religious group or religious belief would be evaluated under the standards set forth in Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA), *Church of the Lukumi Babalu Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Please see my response to Question 14. Other claims alleging denial of a public benefit for reasons related to religion would be evaluated under the standard set forth in *Carson v. Makin*, 142 S. Ct. 1987 (2022), *Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. 2246 (2020), and *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017). Under those cases, "disqualifying otherwise eligible recipients from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. at 2255 (internal quotation marks and citations omitted).

16. 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: Religious belief is "sincere," in that it is "sincerely based on a religious belief and not some other motivation." See, e.g., *Ramirez v. Collier*, 142 S. Ct. 1264, 1277–78 (2022). A court's "narrow function" in evaluating the sincerity of a religious belief is whether the asserted belief "reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas v. Review Bd. of Indian Employment Security Div.*, 450 U.S. 707, 716 (1981)). To my knowledge, the most recent First Circuit decision to address whether a person's religious belief is sincerely held followed the Supreme Court's precedent that religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others...." *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981)). The question of whether a particular claimant's religious belief is sincerely held would be a factual determination. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 270 F.3d at 56.

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

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

Response: The Supreme Court, in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), analyzed the text and original public meaning of the Second Amendment and held that the Second Amendment guarantees the individual right to keep and bear arms, stating that a "ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id*. at 635.

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.

18. 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: My understanding is that Justice Holmes disagreed with the majority opinion and was suggesting that the majority based its decision on their own policy preferences for a desired outcome which he further explained by the later passage where he wrote, "to embody a particular economic theory" which he stated was antithetical to the Constitution. I agree that judges should not inject their own policy preferences into court decisions.

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

Response: The Supreme Court effectively overturned *Lochner* by a number of subsequent decisions. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optimal of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on whether a decision of the Supreme Court was correctly decided. If confirmed, I would follow current binding Supreme Court and First Circuit precedent.

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

a. If so, what are they?

Response: No, I am not aware of any Supreme Court opinions that have not been formally overruled by the Supreme Court but that are no longer good law. If confirmed, I would faithfully apply all binding precedent of the Supreme Court and the First Circuit.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on whether I agree with a comment made by another judge. If confirmed, I would follow Supreme Court precedent regarding what constitutes a monopoly. See e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (citing to *Aluminum Co.* and concluding that 87% market share "leaves no doubt" that monopoly power exists); *American Tobacco Co v. United States*, 328 U.S. 781, 797 (1946) (concluding that over two-thirds of a domestic market share constituted a monopoly).

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

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

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 defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Whether a percentage of market share constitutes a monopoly depends on the specific facts and circumstances of a case. Although I am not aware of any Supreme Court or First Circuit precedent establishing a minimum percentage of market share needed to constitute a monopoly, the Court's holdings on sufficient market shares in particular cases are instructive. *Eastman Kodak Co. v. Image Technical Service*, 504 U.S. 451, 481 (1992) (greater than 66% is sufficient) (citing

American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946)); *United States v. Grinnell Corp*, 384 U.S. 563, 571 (1966) (87%); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (75%).

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

Response: The Supreme Court has articulated that "there is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, the Court has recognized limited areas in which "federal common law" may apply, in cases or controversies with Article III standing, in the absence of a statute. These areas could include "admiralty disputes and certain controversies between the States," in which "federal judges may appropriately craft the rule of decision" where it is "necessary to protect unique federal interests." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

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

Response: The scope of the state constitutional right is how it had been interpreted by the state's highest court. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Even if the provision is identical to the federal constitution, the first place to look for the scope of the state constitutional right is the precedent of the relevant state courts.

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

Response: Please see my response to Question 22.

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

Response: Generally, yes. The exception is the Supremacy Clause, which grounds preemption doctrine. Unless one of the preemption doctrines apply, a state may provide greater, but not less protection, under their state's constitution than is provided by the federal constitution. See *Florida v. Powell*, 559 U.S. 50, 59 (2010).

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

Response: As a sitting state court judge and as a federal judicial nominee, it generally would not be appropriate for me to opine or comment on whether any binding Supreme Court precedent was correctly decided. However, because *Brown v. Board of Education* is a case that is so firmly rooted in American jurisprudence that it is not likely to come before me as a judge, I am comfortable in stating that it was decided

correctly. If confirmed, I will apply all binding Supreme Court and the First Circuit precedent.

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

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

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

Response: Federal Rule of Civil Procedure 65 establishes procedures for the issuance of injunctive relief. However, I am not aware of any direct or explicit authority in this rule or in any federal statute for courts to issue nationwide injunctions, and to my knowledge, the Supreme Court has not squarely addressed the issue. If confirmed, and presented with this question, I would review carefully the facts of the case and law of each case and all applicable rules and binding Supreme Court and First Circuit precedent to determine the proper scope of any injunction to be issued.

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

Response: Please see response to Question 24 above.

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

Response: I understand federalism to be a system of dual sovereignty. Under this principle of government, power and authority is allocated between the federal government and the states. The Constitution provides specific enumerated powers to the federal government, while the states are afforded all other rights that are not delegated to the federal government in the Constitution or prohibited by it. The Supremacy Clause of the United States Constitution, however, provides that the Constitution, federal law, and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI. Additionally, the Due Process Clause of the Fourteenth Amendment provides that certain constitutional rights are incorporated so that they apply to the states. Federalism permits the states to provide broader protection to its citizens than those afforded by the United States Constitution.

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

Response: Please see my response to Question 6 above.

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

Response: The advantages and disadvantages of awarding damages versus injunctive relief is fact and case dependent. An award of damages, generally, compensates for past harms while injunctive relief, generally, seeks to prevent a future harm. Damages and injunctive relief have different requirements to prove entitlement to relief. If I am confirmed, I will carefully evaluate the relief requested in every case that comes before me based on the facts and evidence in the record and apply the Supreme Court and First Circuit precedent.

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

Response: The Supreme Court recently reiterated that certain substantive rights, though not enumerated in the Constitution, nevertheless enjoy due process protection where those rights are "deeply rooted in [our] history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal quotations omitted)). The substantive rights recognized by the Court include, but not limited to: the right to marry a person of a different race, *Loving v. Virginia*, 377 U.S. 1 (1967); the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015); the right to engage in private sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003); the right to purchase and use contraceptives, *Griswold v. Connecticut*, 318 U.S. 479 (1965); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to custody of one's own children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to direct the teaching and upbringing of one's own children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); and the right to keep one's family together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

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

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

Response: The First Amendment expressly protects the fundamental right to the free exercise of religion and subjects government actions to strict scrutiny if those actions discriminate against religious organizations or religious individuals in ways that are not neutral and generally applicable.

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

Response: The right to free exercise of religion includes the freedom to worship. The Supreme Court has held that "[t]he Free Exercise Clause embraces a freedom of conscience and worship . . . ." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). And recently, the Court upheld the freedom to worship in the public sphere. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

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

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

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

Response: Please see my response above to Questions 16 above.

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

Response: The Religious Freedom Restoration Act (RFRA) was designed by Congress to provide very broad protection for religious liberty. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). By its terms, the RFRA is applicable "to all Federal law, and the implementation of that law, whether statutory or otherwise," unless "such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3; see also *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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: I am not familiar with this quote by Justice Scalia or the context in which he said it, but he seems to be saying that if a judge makes decisions based on the law by scrupulously applying the law to the facts of a case, as a judge is obligated to do, there will be times when the judge will reach results that will not comport with the judge's own personal views yet the law warrants it.

32. 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: To the best of my recollection, I have not taken the position that a federal or state statute was unconstitutional.

33. 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.

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

Response: America is a great country. It was an honor to defend the ideals and freedoms of our nation during my service in the United States Army and the Massachusetts Army National Guard. My mother immigrated to America with her three small children because she believed in the promise of its possibilities and my nomination is a testament to America's promise. During my eight years as a state court judge, I have treated all individuals fairly, impartially, and equally without regard to their race, gender, socio-economic status, or any other characteristic. If confirmed as a federal district court judge, I will continue doing the same.

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

Response: Yes.

36. How did you handle the situation?

Response: In my previous role as a practicing attorney, I took my obligations very seriously. I put my personal views aside and I represented my client and the litigation position zealously within the bounds of the law and the rules of professional conduct. And I did it to the best of my ability.

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

Response: Yes.

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

Response: I do not believe any single Federalist Paper has shaped my views of the law more than any of the others.

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

Response: The Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), declined to express a "view about if and when prenatal life is entitled to any of the rights enjoyed after birth." My understanding is that the Court left this question to the people and to their elected representatives. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on this issue. If confirmed, I would faithfully apply Supreme Court and First Circuit precedent.

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

Response: Yes, I have testified under oath on three other occasions as follows:

The first time was in 2008. I was called as a fact witness to testify at a deposition in the matter of *American National Fire Insurance Company v. York County*, Docket No. 06-200-GZS, United States District Court for the District of Maine. I had been co-counsel in a separate matter of *Nilsen et al. v. York County*, Civil Action No. 02-212-P-H, United States District Court for the District of Maine, a civil rights class action challenging the county's practice of strip-searching arrestees without reasonable suspicion. My duties included analyzing the class data, and after settlement, leading the class administration tasks from notice to final distribution of the settlement funds. After the *Nilsen* case concluded, ANFIC, a sub-company of Great American Insurance Companies that had insured York County for law enforcement liability, sued York County for reimbursement. I was deposed as a witness regarding the settlement amount, class size, and distribution of settlement funds. The testimony is not available.

The second time was on November 12, 2014 when I appeared to testify at a confirmation hearing before the Massachusetts Governor's Council, also known as the Executive Council, after I was nominated to the Boston Municipal Court by then-Governor Deval Patrick. An audio recording of the testimony is available online at https://sites.google.com/patrickmccabegovernorscouncil.com/boston-municipal-court/boston-municipal-court/2014/myong-j-joun?authuser=0.

Lastly, on May 10, 2022, I testified at a deposition in a civil personal injury matter. In November 2021, I was named a defendant in a civil motor vehicle negligence action. The case is *Michelle Cherry v. Myong Joun & Sean Kane*, Suffolk Superior Court, C.A. No. 2184CV02512. The testimony is not available.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

b. Amazon?

c. Google?

d. Facebook?

e. Twitter?

Response to all subparts: To the best of my knowledge, I do not. I have investments through a SEP-IRA, Massachusetts Deferred Compensation SMART Plan, and the Massachusetts Retirement Pension Plan. I do not manage those investments and do not know what specific shares are held.

43. 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: I have never authored or edited a brief that was filed in court without my name on the brief as an attorney. However, it is likely that as a paralegal while I was in law school, I provided legal research and some minor editing of briefs that were filed without my name on the brief. I do not recall any specifics.

44. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: I do not recall ever making or confessing a material error before a court. There have certainly been instances over my 15-year career as a trial attorney in which, in the give and take of argument and trial, I have acknowledged non-substantive errors in law or in fact. I have also argued legal and factual positions that courts have rejected, though I always made them in good faith.

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

Response: My understanding is that as a federal judicial nominee, I swore an oath prior to testifying before the Senate Judiciary Committee to tell the truth and answer all questions truthfully and to the best of my knowledge and ability. I have done so. Further, Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, provides that a judge "should not make public comment on the merits of a matter pending or impending in any court." It is the duty of any nominee to testify truthfully and in accordance with Canon 3(A)(6).

Questions from Senator Thom Tillis
for Myong Jin Joun
Nominee to be United States District Judge for the District of Massachusetts

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

   Response: Yes.

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

   Response: Judicial activism is defined as "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." (Black's Law Dictionary, 11th ed. 2019). Judicial activism is not appropriate. As a sitting state court judge for eight years, I have applied the law to the facts in every case before me without regard to my personal views. If I am fortunate enough to be confirmed, I would do the same as a federal district court judge.

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

   Response: Impartiality is an expectation for a judge.

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

   Response: No. Judges should apply the law to the facts of the case and should not strive for any particular outcome.

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

   Response: Yes, sometimes faithfully interpreting the law can result in what one could consider to be an "undesirable outcome" by the judge or by members of the public. I reconcile that with the belief that the legitimacy of the judicial branch depends on public confidence that judges will apply the law fairly and impartially without regard for their personal views or preferred outcomes.

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

   Response: No.

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

Response: If confirmed, I will continue to do what I have been doing as a state court judge for the past eight years, which is to fairly and impartially apply the law and binding precedent to the facts of a case. In any matter with an issue relating to an individual's Second Amendment rights, I will follow binding precedents include *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 Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

   Response: I will evaluate the facts and evidence in the record of the case and follow binding Supreme Court and First Circuit precedent regarding the Second Amendment, including *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), and any precedential caselaw regarding pandemic restrictions, including *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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

   Response: The process I follow in any lawsuit is to carefully study the facts of the case and the applicable constitutional or statutory text and legal precedents at issue. Qualified Immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). I would apply the two-part inquiry to determine: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the officer violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the answer to either part is in the negative, the court must grant qualified immunity to law enforcement.

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

    Response: Please see response to Question 9 above. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on this topic. If confirmed, I will fairly and faithfully apply Supreme Court and the First Circuit precedent on the issue of qualified immunity.

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

Response: Please see response to Question 9 above. The question of the amount and type of immunity protections for law enforcement is a matter best for policymakers and legislators. If confirmed, my role as a judge would be to apply Supreme Court and the First Circuit precedent on the issue of qualified immunity without regard for my personal views about its policy value.

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

Response: As a sitting state judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on the current state of the Supreme Court's jurisprudence on a particular issue. If a patent eligibility issue comes before me, I will review the Patent Act, 35 U.S.C. § 101, and apply binding Supreme Court precedent including *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012).

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

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

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

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

d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and

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

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

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

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

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

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

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

What about the space applications of superconductivity that benefit from this effect?

Response to all the subparts: As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on hypothetical cases involving issues which may come before me in the future. If a patent eligibility issue comes before me, I will review the Patent Act, 35 U.S.C. § 101, and apply binding Supreme Court precedent including *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014) and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012).

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

    Response: Please see my response to Questions 12 and 13 above.

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

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

       Response: In my eight years as a state court judge, and 15 years of practice as a trial attorney before that, I have handled thousands of criminal and civil cases. However, I have not had occasion to handle cases in copyright law.

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

       Response: In my eight years as a state court judge, and 15 years of practice as a trial attorney before that, I have handled thousands of criminal and civil cases. However, I have not had occasion to handle cases involving the Digital Millennium Copyright Act.

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

       Response: In my eight years as a state court judge, and 15 years of practice as a trial attorney before that, I have handled thousands of criminal and civil cases. However, I have not had occasion to handle cases involving intermediary liability for online service provides that host unlawful content posted by users.

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

Response: I have experience litigating First Amendment and free speech issues in the context of a defense to certain crimes in criminal cases. I also have experience in these issues in the context of civil rights cases. For example, I have brought claims of retaliation for free speech. However, I do not have any experience otherwise addressing free speech and intellectual property issues, including copyright.

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

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

Response: If interpreting a statute, I would look to find and apply Supreme Court and First Circuit precedent. If there was no Supreme Court or First Circuit precedent on point, then I would look to the text of the statute. If the text is clear, my analysis would stop there. If the text is ambiguous, I would continue my analysis to see if any other Circuit Court has interpreted the statute and has provided persuasive authority. If there is no guidance or interpretation found in any of the above stated areas, I would look to legislative history to see if there is direction contained in the history (i.e. legislative committee reports) on statutory interpretation.

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

Response: The Supreme Court and First Circuit precedent would govern what deference the court should give to the expert federal agency. See e.g., *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020); *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1520 (1st Cir. 1996).

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

Response: As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on this issue. If confirmed, and presented with this issue, I will work diligently to determine the applicable Supreme Court and First Circuit precedent and apply it fairly and impartially to the specific facts before me.

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

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

Response: Judges must faithfully apply all currently binding statutory law and Supreme Court and Circuit precedent as it is written. If confirmed, that is what I will do. Whether laws like the DMCA should be updated is a question for policymakers and legislators to consider.

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

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

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

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

Response: I am not familiar with this issue. I have not personally seen issues involving "judge shopping" or "forum shopping" for a particular division of a court. The United States District Court for the District of Massachusetts has three divisions: the Eastern Division in Boston, the Central Division in Worcester, and the Western Division in Springfield. Civil actions for which venue is proper in the district are directed to be brought in the proper geographical division. See 28 U.S.C. § 1391 et seq. There is no mechanism for parties to request that cases be heard by a

particular division when the case is filed. Once filed, cases are randomly assigned by the clerk's office to a judge within the division by neutral criteria.

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

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

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

Response: Please see my response to Question 18(a) above. I am not personally familiar with the practice of "forum selling." I do not believe that judges should engage in the described behavior.

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

Response: Yes, I commit to following the Code of Conduct for United States Judges (Jud. Conf. 2019) and not engage in any conduct that would potentially violate an ethical duty as a judge.

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

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

Response: This is a question for policymakers or the U.S. Judicial Conference. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on a hypothetical or on the action or inaction of a judge.

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

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

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

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

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

Response: These are questions for policymakers or the U.S. Judicial Conference. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on these issues.

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

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

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

Response: These are questions for policymakers or the U.S. Judicial Conference. As a sitting state court judge and as a federal judicial nominee, it would not be appropriate for me to opine or comment on these issues.