Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Julia Eleanor Kobick
Nominee to be United States District Judge, District of Massachusetts

1. **In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, you authored an amicus brief on behalf of Massachusetts arguing that there should be no religious or moral exemptions to the contraception mandate for employers, including religious organizations. Could you please explain why you argued that the contraception mandate was necessary as applied to nuns?**

   Response: In my capacity as Assistant Attorney General for the Commonwealth of Massachusetts, I co-authored an amicus brief on behalf of Massachusetts, 19 other states, and the District of Columbia in support of the respondents in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The brief supported Pennsylvania and New Jersey's arguments that the religious and moral exemption rules promulgated by the federal agencies exceeded the scope of the agencies' authority under the Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4), and did not satisfy the procedural requirements of the Administrative Procedure Act. The Supreme Court disagreed, holding that the rules were within the scope of the agencies' authority under the Affordable Care Act and comported with the Administrative Procedure Act. If confirmed, I would fully and faithfully apply the Court's decision and holding in *Little Sisters*.

2. **Who should respond to a domestic violence call where there is an allegation that the aggressor is armed—the police or a social worker?**

   Response: The question whether a police officer or social worker should respond to a domestic violence call where there is an allegation that the aggressor is armed is a question for policy makers. Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that question.

3. **Is it appropriate for protestors to ignore social distancing mandates and gathering limitations to protest racial injustice?**

   Response: In accordance with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on whether it is appropriate for protesters to ignore social distancing mandates and gathering limitations to protest racial injustice. If any case were to come before me concerning social distancing mandates, gathering limitations, and/or the First Amendment, I would impartially and faithfully apply all relevant Supreme Court and First Circuit precedent.

4. **Is it appropriate for the government to use law enforcement to enforce social distancing mandates and gathering limitations for individuals attempting to practice their religion in a church, synagogue, mosque or any other place of religious worship?**

Response: In accordance with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on this question. If any case were to come before me on the lawfulness of such restrictions, as applied to religious exercise, I would impartially and faithfully apply all relevant Supreme Court and First Circuit precedent, including the Supreme Court's decisions in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

5. **Is it legal for police to stop and frisk someone based on a reasonable suspicion of involvement in criminal activity?**

   Response: In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that a police officer may, consistent with the Fourth Amendment, stop and frisk a person when the officer has "a reasonable, articulable suspicion of [the] individual's involvement in some criminal activity." *United States v. Dion*, 859 F.3d 114, 124 (1st Cir. 2017). Any "action undertaken with respect to the stop 'must be reasonably related in scope to the stop itself unless the police have a basis for expanding their investigation.'" *Id.* (quoting *United States v. Ruidíaz*, 529 F.3d 25, 28-29 (1st Cir. 2008)).

6. **If confirmed, do you intend to allow your prior advocacy for gun control influence your decisions concerning guns, *Heller*, in particular?**

   Response: If confirmed, I would fully and faithfully apply all relevant Supreme Court and First Circuit precedent concerning the Second Amendment, including the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). As with any legal issue, I would impartially apply the law to the facts of the case, and my prior work as an Assistant Attorney General would have no influence on my decisions.

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

   Response: The Constitution is a written document whose text does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has long affirmed that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed). The Court has accordingly adopted different tests to apply the Constitution's provisions to modern-day facts and circumstances. If confirmed, in assessing any constitutional claim that might come before me, I would adhere to Supreme Court and First Circuit precedent on the constitutional provision at issue.

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

Response: The Supreme Court has noted that the distinction between questions of law and questions of fact can be "vexing." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). The Federal Rules of Evidence recognize two types of facts: adjudicative facts and legislative facts. *See* Fed. R. Evid. 201 (Advisory Committee's note to subd. (a)). Adjudicative facts are "simply the facts of the particular case." *Id.* They are established through documentary or testimonial evidence and are typically found by a jury. *Id.* Legislative facts "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* Legislative facts are typically subject to judicial notice. *Id.* Under First Circuit precedent, "[w]hether a fact is adjudicative or legislative depends not on the nature of the fact . . . but rather on the use made of it (*i.e.*, whether it is a fact germane to what happened in the case or a fact useful in formulating common law policy or interpreting a statute) and the same fact can play either role depending on context." *United States v. Bello*, 194 F.3d 18, 22 (1st Cir. 1999). Questions of law are resolved by a judge.

9. **Please discuss your criminal federal legal experience, including the number of felony cases that you have personally handled, how many misdemeanor cases you have personally handled, how many times you have argued before the court in a criminal matter and how many criminal jury trials you have participated in as lead/co-counsel?**

   Response: My professional practice has primarily been in civil litigation. However, as Deputy State Solicitor, I often review appellate briefs concerning Massachusetts criminal law and procedure and consult on cases involving Massachusetts criminal law. In addition, a number of the civil cases I have handled have involved substantive issues of criminal law or have turned on an understanding of a criminal prosecution. My federal civil cases have also required reference to and objections under the Federal Rules of Evidence, which apply in federal criminal cases. As a law clerk at all three levels of the federal judiciary, I assisted my judges in handing their criminal dockets, including assisting Judge Saylor in overseeing federal criminal trials, sentencing hearings, change of plea hearings, hearings on motions to suppress, and other criminal proceedings. If confirmed, I would ensure that I am well versed in the substance and procedure of federal criminal law.

10. **Please discuss your familiarity with the Federal Rules of Criminal Procedure and the United States Sentencing Commission's Advisory Sentencing Guidelines. Specifically:**
    a. **How often have you cited to either of these tomes during the course of your work?**
    b. **How often have you had an opportunity to work within these constructs during the course of your career?**

    Response: My professional practice has primarily been in civil litigation. While I am familiar with the Federal Rules of Criminal Procedure and the United States Sentencing

Commission's Advisory Sentencing Guidelines, and I worked with the Rules and Guidelines while serving for three years as a law clerk, I have not, to my recollection, had occasion to cite to either compilation during my work as Assistant Attorney General or as Deputy State Solicitor. If confirmed, I would ensure that I am well versed in the Rules and the Guidelines before presiding over any criminal proceeding.

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

Response: I am not familiar with the definition of "social equity." Black's Law Dictionary defines "equity" as "fairness; impartiality; even-handed dealing." Black's Law Dictionary 619 (9th ed. 2004). Judicial decisions should be fair and impartial.

12. **What is implicit bias?**

Response: I generally understand the concept of implicit bias to refer to a form of bias or cognitive heuristic that occurs unconsciously and automatically, and that can affect judgments, decisions, and behaviors.

13. **Is the federal judiciary affected by implicit bias?**

Response: I understand the concept of implicit bias to refer to biases or judgments that operate below the level of an individual's conscious awareness. The question whether an institution, like the federal judiciary, is affected by implicit bias is a systemic question most appropriate for policy makers to consider. If confirmed, I would work to ensure that my decisions are free from bias, including by diligently reviewing the record, carefully considering arguments, writing thoroughly reasoned decisions, engaging with colleagues and parties with the spirit of open-mindedness, and adhering to procedural requirements and precedent. And I would strive to treat all who come into my courtroom equally and fairly, as individuals.

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

Response: I understand the research on implicit bias to demonstrate that all people, myself included, have implicit biases that operate below the level of conscious awareness. If confirmed, I would work to ensure that my decisions are free from bias, including by diligently reviewing the record, carefully considering arguments, writing thoroughly reasoned decisions, engaging with colleagues and parties with the spirit of open-mindedness, and adhering to procedural requirements and precedent. And I would strive to treat all who come into my courtroom equally and fairly, as individuals.

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

Response: The First Amendment protects the right to criticize public officials. *See New York Times v. Sullivan*, 376 U.S. 254, 269-71 (1964). The speech rights safeguarded by the First Amendment reflect America's "national commitment to the principle that debate

on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. At the same time, the Supreme Court has recognized that "the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy," and that "it is of the utmost importance that the administration of justice be absolutely fair and orderly." *Cox v. Louisiana*, 379 U.S. 559, 562 (1965).

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

Response: The question whether the Supreme Court should be expanded is a question for policy makers. It would not be appropriate for me, as a judicial nominee, to comment on the size of the Supreme Court. If I were confirmed, I would be bound by Supreme Court precedent, and I would fully and faithfully apply that precedent.

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

Response: If confirmed, I would apply the factors set forth in 18 U.S.C. § 3553(a) whenever I sentence a defendant. That statute requires the court to consider, among other things, "the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2). Each of these factors would guide my approach to sentencing.

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

Response: Law enforcement officials are entitled to qualified immunity from individual-capacity claims for damages so long as "'their conduct [did] 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)). "Whether qualified immunity can be invoked depends on the 'objective legal reasonableness' of the official's act." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Harlow*, 457 U.S. at 819). Each assertion of qualified immunity must be analyzed individually and "depends very much on the facts of each case." *Brousseau v. Haugen*, 543 U.S. 194, 201 (2004).

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

Response: The allocation of funds to police departments and support services is a matter for policy makers to consider. In accordance with the Code of Conduct for United States

Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that issue.

20. **Do you believe legal gun purchases have caused the violent crime spike?**

    Response: The question whether legal gun purchases have caused a violent crime spike is a matter for policy makers to consider. In accordance with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that issue.

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

    Response: I am not familiar with all of the Supreme Court decisions from the last 50 years. However, in my view, the role of an Article III judge is to fairly and impartially resolve the case or controversy before her. I would approach each case cognizant of the limits on judicial power, with an open mind, and with humility. In every case, I would consult the relevant precedent from the Supreme Court and First Circuit. I would carefully review the factual record, the parties' written submissions, and the parties' arguments. I would engage with the parties respectfully and work diligently to determine how the law applies to the facts of the case. In writing decisions, I would strive to explain my reasoning clearly, so that the parties and the public understand why the law requires a particular outcome.

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

    Response: I am not familiar with all of the First Circuit decisions from the last 50 years. Please see my response to Question 21, which describes my judicial philosophy.

23. **Please state the governing law for self-defense in Massachusetts and the First Circuit.**

    Response: Under Massachusetts law, when "a defendant asserts that he or she acted in self-defense, the trier of fact must consider whether the defendant had 'a reasonable ground to believe' that he or she 'was in imminent danger of death or serious bodily harm,' from which the only way to save him- or herself was by using deadly force; whether, after availing him- or herself 'of all proper means to avoid physical combat,' resort to deadly force was necessary; and whether the amount of force used by the defendant 'was reasonably necessary in all the circumstances of the case.'" *Commonwealth v. Williams*, 481 Mass. 799, 805, 119 N.E.3d 1171, 1178 (2019) (quoting *Commonwealth v. Glacken*, 451 Mass. 163, 167, 883 N.E.2d 1228, 1232 (2008)); *accord Fortini v. Murphy*, 257 F.3d 39, 49 n.7 (1st Cir. 2001).

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

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. That said, because the constitutionality of *de jure* racial segregation in public schools is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. That said, because the constitutionality of laws prohibiting interracial marriage is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Loving v. Virginia* was correctly decided.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *Griswold v. Connecticut* is binding precedent, and I would apply it fully and faithfully.

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

Response: The Supreme Court's decision in *Roe v. Wade* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

Response: The Supreme Court's decision in *Planned Parenthood v. Casey* was overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *Gonzales v. Carhart* is binding precedent, and I would apply it fully and faithfully.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *District of Columbia v. Heller* is binding precedent, and I would apply it fully and faithfully.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *McDonald v. City of Chicago* is binding precedent, and I would apply it fully and faithfully.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is binding precedent, and I would apply it fully and faithfully.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* is binding precedent, and I would apply it fully and faithfully.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I would apply it fully and faithfully.

25. **How do you understand the difference, if any, between freedom of religion and freedom of worship?**

Response: I do not understand the Supreme Court to have drawn a distinction between the freedom of religion and the freedom of worship for purposes of the Free Exercise Clause of the First Amendment. The Supreme Court has described the right protected by

the Free Exercise Clause as both the "free exercise of religion" and the "freedom of worship." *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022) ("The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988))); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (explaining that the "freedom of worship" is a fundamental right made applicable to the States by the Fourteenth Amendment (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940))). Government regulations that burden religious exercise and are not "neutral and generally applicable" trigger strict scrutiny under the Free Exercise Clause. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

26. **Do you believe that the federal government should decriminalize possession of any drugs?**

Response: The question whether the federal government should decriminalize possession of any drug is a question for policy makers. In accordance with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that question.

27. **Do you agree that the First Amendment is more often a tool of the powerful than the oppressed?**

Response: If confirmed, my personal views regarding the First Amendment would play no role in my judicial decision-making. If an issue concerning the First Amendment were to arise, I would be bound by, and would adhere to, the relevant Supreme Court and First Circuit precedent.

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

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court clarified the methodology applicable to the review of Second Amendment claims. First, a court must assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If so, "the Constitution presumptively protects that conduct." *Id.* The government then bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* To make that showing, the government must identify an historical analogue that is "relevantly similar" to the challenged regulation. *Id.* at 2132. If confirmed, I would apply this methodology in any Second Amendment case.

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: Before I submitted my application to the Massachusetts Advisory Committee on Judicial Nominations, I spoke with Christopher Kang about the application process in Massachusetts. After I was nominated, I received an email from Christopher Kang congratulating me on the nomination. I have not spoken with anyone else from Demand Justice.

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: I have not been in contact with anyone from the Alliance for Justice. Please see my response to Question 29(c) to the extent this question refers to contact with anyone associated with Demand Justice.

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: I am not aware of the organizations identified in this question and have not interacted with any of them.

    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 Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: No.

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

Response: No.

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. **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: Senator Elizabeth Warren and Senator Edward Markey convened an Advisory Committee on Massachusetts Judicial Nominations to screen and interview candidates for the U.S. District Court for the District of Massachusetts. I submitted my initial application to the Advisory Committee on January 20, 2021, and I was interviewed on February 4, 2021. On March 31, 2022, after the Advisory Committee announced it was soliciting additional applications, I re-submitted my application materials. I interviewed again with the Advisory Committee on April 14, 2022.

On April 25, 2022, I interviewed with Senator Warren and Senator Markey and four members of their staff. I then interviewed with attorneys from the White House Counsel's Office on May 2, 2022. Since May 10, 2022, I have been in contact with attorneys from the Office of Legal Policy of the Department of Justice. I was nominated to be a United States District Judge on August 1, 2022.

35. **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: Please see my response to Question 29(c).

36. **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.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I interviewed with attorneys from the White House Counsel's Office on May 2, 2022. Since May 10, 2022, I have been in communication with attorneys who work in the Office of Legal Policy at the Department of Justice and the White House Counsel's Office.

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

Response: I was sent these questions by the Office of Legal Policy of the Department of Justice on December 7, 2022. I began researching and responding to the questions immediately thereafter. The Office of Legal Policy provided me with limited feedback before I finalized my answers. The answers are all my own.

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

Questions for the Record for Julia Kobick, nominated to be 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: Yes. Congress has passed a number of statutes, like Title VII of the Civil Rights Act of 1964, that prohibit discrimination on the basis of race. The Supreme Court has also long held, for purposes of the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment, that race-based classifications are subject to strict scrutiny, and therefore must be narrowly tailored to a compelling government interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

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: Should any case come before me concerning unenumerated rights in the Constitution, either a right that has been identified by the Supreme Court or one that a party contends should be identified, I would follow the test set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Under that test, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.* at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)." *Washington*, 521 U.S. at 720-21.

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: The role of an Article III judge is to fairly and impartially resolve the case or controversy before her. I would approach each case cognizant of the limits on judicial power, with an open mind, and with humility. In every case, I would consult the relevant precedent from the Supreme Court and First Circuit. I would carefully review the factual record, the parties' written submissions, and the parties' arguments. I would engage with the parties respectfully and work diligently to determine how the law applies to the facts of the case. In writing decisions, I would strive to explain my reasoning clearly, so that the parties and the public understand why the law requires a particular outcome.

Although I am not familiar with the judicial philosophies of all of the Justices on the Warren, Burger, Rehnquist, and Roberts Courts, I had the great fortune to serve as a law clerk to Justice Ruth Bader Ginsburg from 2012 to 2013. During that year, I admired how the Justices on the Court engaged with their colleagues respectfully and worked every day to uphold the rule of law. I would strive to bring those attributes to my work as a judge.

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

Response: Black's Law Dictionary defines "originalism" as the "theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it." Black's Law Dictionary 1210 (9th ed. 2004). I would not characterize my approach to

constitutional interpretation with any particular label. Should a matter of constitutional interpretation come before me, I would research and apply relevant Supreme Court and First Circuit precedent. For some constitutional provisions—for example, the Establishment Clause of the First Amendment, the Second Amendment, and the Confrontation Clause of the Sixth Amendment—the Supreme Court has instructed courts to examine the original public meaning of the provision. *See, e.g.*, *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022) (Establishment Clause); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (Confrontation Clause). I would adhere to the test and methodology prescribed by the Supreme Court and First Circuit for each constitutional provision.

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

Response: I generally understand "living constitutionalism" to refer to idea that the meaning of the Constitution can change over time, absent amendment through the process prescribed by Article V. I would not characterize my approach to constitutional interpretation with any particular label. The Supreme Court has long affirmed that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed). The Court has accordingly adopted different tests to apply the Constitution's provisions to modern-day facts and circumstances. If confirmed, in assessing any constitutional claim that might come before me, I would adhere to Supreme Court and First Circuit precedent on the constitutional provision at issue, including the precedent on the methodology of constitutional interpretation.

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

Response: If a constitutional issue of first impression were to come before me, and if there were no Supreme Court or First Circuit precedent on point, I would begin by examining the text of the constitutional provision. I would also seek guidance from Supreme Court and First Circuit precedent construing the particular constitutional provision in related contexts or construing analogous constitutional provisions. In some circumstances, the Supreme Court has looked to the original public meaning of the constitutional provision. *See, e.g.*, *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022) (Establishment Clause); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (Confrontation Clause). In other circumstances, the Supreme Court has looked to "evolving standards of decency," *Graham v. Florida*, 560 U.S. 48, 58 (2010) (Eighth Amendment), or "contemporary community standards," *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574 (2002) (First Amendment), to inform the constitutional analysis. In all cases, I would strive to decide the matter using a methodology consistent with Supreme Court and First Circuit precedent.

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: Yes. The Supreme Court has held that for some constitutional provisions, the public's current understanding is a relevant consideration. For example, the Supreme Court has looked to "evolving standards of decency that mark the progress of a maturing society" in assessing whether a form of punishment is "cruel and unusual" under the Eighth Amendment, *Graham v. Florida*, 560 U.S. 48, 58 (2010), and to "contemporary community standards" in determining whether speech is obscene and therefore outside the purview of the First Amendment, *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574 (2002). If confirmed, I would fully and faithfully adhere to Supreme Court and First Circuit precedent in all cases, including the methodological approach prescribed by that precedent.

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

Response: The Constitution is a written document whose text does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has long affirmed that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed). The Court has accordingly adopted different tests to apply the Constitution's provisions to modern-day facts and circumstances. If confirmed, in assessing any constitutional claim that might come before me, I would adhere to Supreme Court and First Circuit precedent on the constitutional provision at issue.

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

   a. **Was it correctly decided?**

   Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I would apply it fully and faithfully.

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

   a. **Was it correctly decided?**

   Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. The Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* is binding precedent, and I would apply it fully and faithfully.

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

a. **Was it correctly decided?**

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. That said, because the constitutionality of *de jure* racial segregation in public schools is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: Congress created a rebuttable presumption in favor of pretrial detention for persons with certain prior convictions, including convictions for certain crimes of violence, crimes for which the maximum penalty is life imprisonment, and other specified offenses. *See* 18 U.S.C. § 3142(e)(2). Congress also created a rebuttable presumption in favor of pretrial detention when the judge finds that there is probable cause to believe that the person committed certain drug offenses for which the maximum penalty is ten years or more, certain firearms offenses, certain offenses involving minor victims, offenses involving slavery and human trafficking, and other specified offenses. *See id.* § 3142(e)(3).

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

Response: I am not aware of Supreme Court or First Circuit precedent explaining the policy rationale for the rebuttable presumptions created by 18 U.S.C. § 3142(e). If confirmed, I would apply the statute as written and would adhere to any relevant Supreme Court or First Circuit precedent.

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 Free Exercise Clause of the First Amendment protects against discrimination on the basis of religion, and it limits what the government may impose on, or require of, private institutions and small businesses operated by observant owners. Unless government action that burdens religion is "neutral and of general applicability," the government must establish that its law or policy advances a compelling government interest and is narrowly tailored to that interest. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (per curiam); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993). Only if the law or policy survives that "most rigorous of scrutiny" is the action constitutional. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546.

In addition, the Supreme Court has held that the Religious Freedom Restoration Act protects the religious exercise of religious organizations and small businesses operated by observant owners. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014). Under that Act, the federal government may not "substantially burden a person's exercise of religion" unless it can demonstrate that the substantial burden furthers a compelling government interest through the least restrictive means. 42 U.S.C. § 2000bb-1.

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

Response: Please see my response to Question 13.

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 religious-entity applicants in *Roman Catholic Diocese* were entitled to a preliminary injunction of the executive order pending appeal and disposition of any petition for a writ of certiorari, because they established a likelihood of success on the merits on their Free Exercise claim, they demonstrated that they would suffer irreparable harm absent injunctive relief, and they demonstrated that the public interest would not be harmed if injunctive relief were awarded. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). With respect to the likelihood of success on the merits, the Court first concluded that the challenged capacity restrictions were likely not neutral because they "single[d] out houses of worship for especially harsh treatment." *Id. at* 66. And because the restrictions were not neutral and of general applicability, they were subject to strict scrutiny. *Id.* at 67. The Court held that the capacity restrictions were not likely to survive that rigorous standard of review because there were less restrictive alternative policies available that could have prevented the spread of COVID-19. *Id.*

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

Response: In *Tandon v. Newsom*, the Supreme Court granted the application for injunctive relief pending appeal or disposition of any petition for a writ of certiorari. 141 S. Ct. 1294 (2021) (per curiam). The Court enjoined state restrictions imposed on private gatherings during the COVID-19 pandemic, concluding that the restrictions were not neutral and generally applicable because they treated comparable secular activity more favorably than at-home religious gatherings, and therefore triggered strict scrutiny under the Free Exercise Clause. *Id.* at 1296-97. The Court held that the applicants were likely to succeed on the merits of their Free Exercise claim and that the other equitable factors warranted an injunction pending appeal. *Id.* at 1297.

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court considered whether the Colorado Civil Rights Commission's application of

the Colorado Anti-Discrimination Act to a bakery comported with the Free Exercise Clause of the First Amendment. 138 S. Ct. 1719 (2018). The Colorado Civil Rights Commission had determined that the refusal of the petitioner, a bakery business, to provide wedding cakes to same-sex couples on the basis of religious beliefs violated the Act, which prohibits discrimination in places of public accommodation on the basis of protected characteristics, including sexual orientation. *Id.* at 1726. The Supreme Court held that the Colorado Civil Rights Commission's consideration of the case exhibited hostility to religion and therefore violated the state's duty under the Free Exercise Clause "not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731.

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

Response: The Supreme Court has explained that "'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)). So long as a person's religious beliefs are sincere, they are protected, even if those beliefs are not based on teachings of the faith tradition to which they belong. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014); *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829, 834 (1989).

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

Response: Please see my response to Question 19.

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

Response: Please see my response to Question 19.

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

Response: I am not familiar with the official positions of the Catholic Church, nor, as a judicial nominee, would it be appropriate for me to comment on the positions of a religious institution.

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: *Our Lady of Guadalupe School v. Morrissey-Berru* concerned the ministerial exception, rooted in the Free Exercise and Establishment Clauses of the First Amendment, to laws governing the employment relationship between certain employees and religious institutions. 140 S. Ct. 2049, 2055 (2020). To determine whether the ministerial exception applies to an employment discrimination claim brought by an employee of a religious institution, the Court explained, "a variety of factors may be important." *Id.* at 2063. Those factors may include the employee's title, the role of the employee in elucidating tenets of

the faith, and the substance of the employee's work. *Id.* at 2064 ("What matters, at bottom, is what an employee does."). Applying those factors to the cases at hand, the Supreme Court concluded that the employees, both elementary school teachers at Catholic schools, "performed vital religious duties," and therefore could not assert employment discrimination claims against their religious employers. *Id.* at 2066-69.

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

Response: In *Fulton v. City of Philadelphia*, the City of Philadelphia had stopped referring children to Catholic Social Services, a private foster care agency, because, due to its religious beliefs about same-sex marriage, the agency would not certify same-sex couples to be foster parents. 141 S. Ct. 1868, 1874 (2021). Catholic Social Services brought suit, contending that the City's policy violated its rights under the Free Exercise Clause. *Id.* at 1876. The Supreme Court held that the City's refusal to contract with Catholic Social Services burdened the organization's religious beliefs and did not constitute a generally applicable policy. *Id.* at 1878-81. The policy was, therefore, subject to strict scrutiny, and it failed that rigorous standard of review because the City's asserted governmental interests could not justify denying Catholic Social Services an exemption from the City's non-discrimination policies. *Id.* at 1882.

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

Response: In *Carson v. Makin*, the Supreme Court held that Maine's tuition assistance program, under which parents living in districts without a public high school could direct state-funded subsidies to secular private schools, but not to religious private schools, violated the Free Exercise Clause of the First Amendment. 142 S. Ct. 1987 (2022). The Court reaffirmed the principle that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* at 1996. And it held that Maine's tuition assistance program, which disqualified private schools based on their religious character, ran afoul of that principle and could not satisfy strict scrutiny. *Id.* at 1997-98.

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

Response: After the plaintiff in *Kennedy v. Bremerton School District*, a high school football coach employed by a public school district, prayed quietly after three football games, the school district put him on paid administrative leave and barred him from further participation in football activities. 142 S. Ct. 2407, 2418-19 (2022). The plaintiff contended that the school district's action violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. *Id.* at 2419. The Supreme Court agreed. It first concluded, for purposes of the Free Exercise claim, that the school district's action was not in accordance with a neutral or generally applicable policy because it targeted the plaintiff's conduct based on its religious character. *Id.* at 2422-23. It next concluded, for purposes of the free speech claim, that the plaintiff's prayers constituted private speech, not speech

attributable to the government. *Id.* at 2424-25. The Court thus applied heightened scrutiny to both claims. *Id.* at 2526. Rejecting the school district's argument that its discipline of the plaintiff was necessary to avoid an Establishment Clause violation, the Court held that the school district had failed to meet its burden to justify infringement of the plaintiff's First Amendment rights. *Id.* at 2432.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court granted the petition for a writ of certiorari, vacated the judgment, and remanded for further consideration in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Justice Gorsuch's concurrence expressed his view that the lower courts had not properly applied the strict scrutiny test required by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a). *See Mast*, 141 S. Ct. at 2432-34 (Gorsuch, J., concurring). In particular, he argued that the lower courts had not given proper weight to alternatives to requiring the Amish petitioners to install modern-day septic systems on their farms. *Id.* at 2433.

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

Response: Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to comment on how to interpret a statute that might come before me in litigation. If confirmed, I would fully and faithfully apply all relevant Supreme Court and First Circuit precedent concerning 18 U.S.C. § 1507, including the Supreme Court's decision in *Cox v. Louisiana*, 379 U.S. 559 (1965).

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 to all subparts: I am not familiar with the trainings conducted by the First Circuit, the District of Massachusetts, or the U.S. Judicial Conference, and I do not think it appropriate for me to comment, in the abstract, on what might be covered in any particular training. If confirmed, and if I am involved in planning any court trainings, I commit that the trainings will comply with applicable law and regulations.

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 trainings conducted by the First Circuit or the District of Massachusetts, and I do not know whether I will be involved in planning any such trainings. But if I am involved, I commit that the trainings will comply with any applicable law 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: The Constitution authorizes the President to make political appointments. U.S. Const., art. II, § 2, cl. 2. I am not aware of any Supreme Court or First Circuit precedent concerning the factors that the President may or may not consider when making such appointments. If confirmed, I would adhere to any binding precedent from the Supreme Court or First Circuit on this question.

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

Response: Whether the criminal justice system is systemically racist is an important question for policy makers. If confirmed as a judge, my charge would be to impartially handle the individual cases that come before me in accordance with the law. In my courtroom, everyone would be treated equally and fairly, regardless of their race.

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: The question whether the Supreme Court should be expanded or contracted is a question for policy makers. It would not be appropriate for me, as a judicial nominee, to comment on the size of the Supreme Court. If I were confirmed, I would be bound by Supreme Court precedent, and I would fully and faithfully apply that precedent.

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 described in detail the original public meaning of the Second Amendment in *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 Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). If confirmed, I would adhere to those decisions and any other Supreme Court and First Circuit precedent on the Second Amendment.

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

Response: In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court clarified the methodology applicable to the review of any Second Amendment claim. First, a court must assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If so, "the Constitution presumptively protects that conduct." *Id.* The government then bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* To make that showing, the government must identify an historical analogue that is "relevantly similar" to the challenged regulation. *Id.* at 2132. If confirmed, I would apply this methodology in any Second Amendment case.

The Court's decisions in *Bruen*, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), also invalidated certain restrictions on the right to keep and bear arms. In *Heller* and *McDonald*, the Court held that the government may not prohibit law-abiding, responsible citizens from possessing firearms for self-defense within their homes. In *Bruen*, the Court held that the Second Amendment applies outside the home, and that New York's "proper purpose" licensing provision was incompatible with the Second Amendment. If confirmed, I would fully and faithfully apply these holdings.

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms.

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

Response: No. As the Supreme Court stated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Second Amendment "standard accords with how we protect other constitutional rights." 142 S. Ct. 2111, 2130 (2022).

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

Response: No. As the Supreme Court stated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Second Amendment "standard accords with how we protect other constitutional rights." 142 S. Ct. 2111, 2130 (2022).

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

Response: If confirmed, I would fully and faithfully apply any Supreme Court or First Circuit precedent on this question. In general, Article II of the Constitution establishes the executive branch of government and outlines the duties and responsibilities of the President. The Supreme Court has explained that "because it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive

officers will 'assist the supreme Magistrate in discharging the duties of his trust.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). The Court has also "recognized on several occasions over many years that an agency's decision not to prosecute or enforce [federal law], whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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

Response: Black's Law Dictionary defines "prosecutorial discretion" as a "prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Black's Law Dictionary 534 (9th ed. 2004). As a general matter, I understand a substantive administrative rule as one that has the force and effect of law, and as distinct from interpretive rules, which "merely 'advise the public of the agency's construction of the statutes and rules which it administers.'" *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019) (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015)). Insofar as this question is asking whether the administrative law distinction between substantive and interpretive rules has bearing on the scope of prosecutorial discretion, it would be inappropriate for me to comment, but I would adhere to any Supreme Court and First Circuit precedent on that topic.

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

Response: By statute, Congress has authorized the death penalty for certain offenses, *see* 18 U.S.C. § 3591, and has prescribed procedures that must be observed and factors that must be considered before a sentence of death is imposed, *id.* §§ 3592–3594. The President cannot unilaterally change statutes; it would require an act of Congress to alter the framework set forth in the Federal Death Penalty Act.

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

Response: This case concerned a nationwide moratorium on evictions promulgated by the Centers for Disease Control and Prevention ("CDC") during the COVID-19 pandemic. *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam). The District Court had stayed its judgment vacating the moratorium pending appeal. *Id.* The Supreme Court granted the application to vacate the stay, concluding that the applicants were likely to succeed on the merits of their claim that the moratorium exceeded the authority delegated to the CDC under 42 U.S.C. § 264(a), and that the equities of the case counseled in favor of vacating the stay. *Id.* at 2488-89. The Court emphasized that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

42. **You authored an amicus brief in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*. In that brief, you argued allowing any exemptions to the Affordable Care Act's contraception mandate flouted the intent of the law. Yet the Supreme Court ruled 7-2 in favor of the Little Sisters of the Poor, allowing them to continue serving the elderly**

poor and dying without threat of millions of dollars in fines.

a. **Do religious people have to choose between engaging in public life or their sincerely held religious beliefs?**

Response: The Supreme Court held in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), that the religious and moral exemption rules promulgated by the federal agencies were within the scope of the agencies' authority under the Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4), and that the rules comported with the procedural requirements of the Administrative Procedure Act. If confirmed, I would fully and faithfully apply the Court's decision and holding in *Little Sisters*.

b. **Justice Alito concurred and explained his view that the Religious Freedom Restoration Act compels an exemption to those who otherwise would be forced to violate a sincerely held religious belief. Do you agree with him?**

Response: The Religious Freedom Restoration Act prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless it can demonstrate that the substantial burden furthers a compelling government interest through the least restrictive means. 42 U.S.C. § 2000bb-1. I am aware that the issue addressed in this question is being litigated in the courts, so I do not believe it appropriate for me to comment on it. If confirmed, I would adhere to all Supreme Court and First Circuit precedent on the Religious Freedom Restoration Act, including, for example, the Supreme Court's decision *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

c. **If no, then what does the Religious Freedom Restoration Act protect if not sincerely held religious beliefs?**

Response: Please see my response to Question 42(b).

43. **In *Caetano v. Commonwealth of Massachusetts*, you argued in your Brief in Opposition on petition for writ of certiorari to the Supreme Court that stun guns do not qualify for Second Amendment protection. You argued that stun guns were too "modern" to qualify for Second Amendment protection because stun guns were not commonly used when the Second Amendment was ratified.**

a. **Was Justice Alito correct when he pointed out that the Supreme Court addressed your argument in *Heller* and determined it to be bordering on frivolous?**

Response: Respectfully, I would like to clarify the posture of this case before the U.S. Supreme Court and my involvement in the case. Justice Alito's concurrence described the Massachusetts Supreme Judicial Court's statement that "a stun gun 'is not the type of weapon that is eligible for Second Amendment protection' because it was 'not in common use at the time of [the Second Amendment's] enactment'" as inconsistent with *Heller*, which had "rejected as 'bordering on the frivolous' the argument 'that only those arms in existence in the 18th century are protected by the Second Amendment.'" *Caetano v. Massachusetts*, 577 U.S. 411, 414 (2016) (per curiam) (Alito, J., concurring in the judgment) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), and *Commonwealth v. Caetano*, 470 Mass. 774, 781, 26 N.E.3d 688, 693

(2015)).

I was not counsel for the Commonwealth when the case was briefed and argued in the Massachusetts Supreme Judicial Court, and I did not advance the argument adopted by that Court. When the defendant filed a petition for a writ of certiorari with the U.S. Supreme Court, the Attorney General's Office took over from the Middlesex District Attorney's Office representation for the Commonwealth, and I was assigned to co-author the brief in opposition. In arguing that the Supreme Court should deny the petition, the brief in opposition contended that "[t]he Second Amendment is not limited to the precise models of weaponry in existence at the time of the founding, but neither does it protect novel weapons or weapons with features that bear scant resemblance to weapons that were common at the time of ratification." Brief in Opposition at 8. And it contended that stun guns "are a wholly distinct sort of weapon, one that has no 18th-century analogues." *Id.* at 9. Without referencing that argument, the U.S. Supreme Court summarily reversed the Massachusetts Supreme Judicial Court's decision, explaining that the lower court's reasoning was inconsistent with *Heller*. *Caetano*, 577 U.S. at 411-12.

If confirmed, and should any case concerning the Second Amendment come before me, I would adhere fully and faithfully to the binding precedent of the Supreme Court and the First Circuit. In particular, in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court clarified the methodology applicable to the review of any Second Amendment claim. First, a court must assess whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If so, "the Constitution presumptively protects that conduct." *Id.* The government then bears the burden of "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearms regulation." *Id.* To make that showing, the government must identify an historical analogue that is "relevantly similar" to the challenged regulation. *Id.* at 2132.

b. **Is the Second Amendment a "second class right"?**

Response: No.

44. **During the pandemic, Governor Charlie Baker deemed gun stores "nonessential." You defended Governor Baker's order by stating, "Closure of some of these institutions, like bookstores and schools, may implicate constitutional rights, but the health and welfare of the Massachusetts citizenry depend on these temporary closures."**

a. **Do American citizens lose protection of their constitutional rights during a pandemic?**

Response: No.

b. **What constitutional rights may the government violate or implicate during a pandemic?**

Response: In accordance with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to comment in the abstract on this question. Should any case come before me concerning the lawfulness of pandemic-related policies, I would impartially and faithfully apply all relevant Supreme Court and First Circuit precedent, including the Supreme Court's decisions in *Tandon v.*

Newsom, 141 S. Ct. 1294 (2021) (per curiam), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), and the First Circuit's decision in *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021). In any case concerning Second Amendment rights, I would likewise impartially and faithfully apply all relevant Supreme Court and First Circuit precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

c. **Does the health and welfare of citizenry override the First Amendment during a pandemic?**

Response: Please see my response to Question 44(b).

d. **Does the health and welfare of citizenry override the Second Amendment during a pandemic?**

Response: Please see my response to Question 44(b).

45. **According to your SJQ, you served for a year on the Government Bureau's Racial Equity Working Group.**

a. **What is racial equity?**

Response: I am not aware of a consensus definition for this term. Black's Law Dictionary defines "equity" as "fairness; impartiality; even-handed dealing." Black's Law Dictionary 619 (9th ed. 2004). Racial equity would include fair, impartial, and even-handed treatment of people of all races.

b. **What role do courts have in racial equity?**

Response: Questions concerning the fair, impartial, and even-handed treatment of people of all races are important matters for policy makers and legislatures. The role of a court, however, is to fairly and impartially adjudicate individual cases, with individual litigants and individual claims and defenses, in accordance with the law and with binding precedent. If confirmed, I commit to discharging that duty to the best of my abilities, and to treating everyone of all races equally and fairly.

c. **How do we measure racial equity?**

Response: How racial equity should be measured is an important question for policy makers. If confirmed as a judge, my charge would be to impartially handle the individual cases that come before me in accordance with the law. In my courtroom, everyone of all races would be treated equally and fairly.

d. **How would we determine the end of measures for racial equity?**

Response: This is an important question for policy makers. If confirmed as a judge, my charge would be to impartially handle the individual cases that come before me in accordance with the law. In my courtroom, everyone of all races would be treated equally and fairly.

e. **Would it be complete equality of outcome among all racial groups?**

Response: This is an important question for policy makers. If confirmed as a judge, my charge would be to impartially handle the individual cases that come before me in accordance with the law. In my courtroom, everyone of all races would be treated equally and fairly.

Senator Ben Sasse
Questions for the Record for Julia E. Kobick
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 30, 2022

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **How would you describe your judicial philosophy?**

   Response: The role of an Article III judge is to fairly and impartially resolve the case or controversy before her. I would approach each case cognizant of the limits on judicial power, with an open mind, and with humility. In every case, I would consult the relevant precedent from the Supreme Court and First Circuit. I would carefully review the factual record, the parties' written submissions, and the parties' arguments. I would engage with the parties respectfully and work diligently to determine how the law applies to the facts of the case. In writing decisions, I would strive to explain my reasoning clearly, so that the parties and the public understand why the law requires a particular outcome.

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

   Response: I would not characterize my approach to constitutional interpretation with any particular label. Should a matter of constitutional interpretation come before me, I would research and apply relevant Supreme Court and First Circuit precedent. For some constitutional provisions—for example, the Establishment Clause of the First Amendment, the Second Amendment, and the Confrontation Clause of the Sixth Amendment—the Supreme Court has instructed courts to examine the original public meaning of the provision. *See, e.g.*, *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022) (Establishment Clause); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (Confrontation Clause). I would adhere to the test and methodology prescribed by the Supreme Court and First Circuit for each constitutional provision.

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

   Response: I would not characterize my approach to constitutional and statutory interpretation with any particular label. In any case of constitutional or statutory construction, I would begin by researching whether the Supreme Court or First Circuit has construed the provision at issue and, if so, I would adhere to that construction. Absent binding precedent, I would begin by examining the text of the provision. If the meaning of the provision is clear, I would apply it as written. *See, e.g.*, *Hardt v. Reliance Standard*

Life Ins. Co., 560 U.S. 242, 251 (2010) (in any statutory interpretation case, "we begin by analyzing the statutory language" and "must enforce plain and unambiguous statutory language according to its terms").

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

   Response: The Constitution is a written document whose text does not change unless it is amended in accordance with the procedures set forth in Article V. The Supreme Court has long affirmed that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis removed). The Court has accordingly adopted different tests to apply the Constitution's provisions to modern-day facts and circumstances. If confirmed, in assessing any constitutional claim that might come before me, I would adhere to Supreme Court and First Circuit precedent on the constitutional provision at issue.

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

   Response: I admire many of the Justices on the Supreme Court and have learned much from observing the care and seriousness of purpose that they bring to each case. Although I do not expect that my approach would mirror the jurisprudence of any one Supreme Court Justice, I had the great fortune to serve as a law clerk to Justice Ruth Bader Ginsburg from 2012 to 2013. During that year, I admired how the Justices on the Court engaged with their colleagues respectfully and worked every day to uphold the rule of law. I would strive to bring those attributes to my work as a judge.

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

   Response: Under the "law of the circuit rule," once a court of appeals has decided a legal issue in a panel decision, that "ruling usually binds later panels too—even where the succeeding panel disagrees with the prior one." *United States v. Guerrero*, 19 F.4th 547, 552 (1st Cir. 2021). An exception to that rule exists when the prior panel decision has been overruled by the Supreme Court, by an en banc decision of the court, or by a legislative enactment. *Id.* The court of appeals may also overrule its precedent "when Supreme Court precedent 'that postdates the original decision, although not directly controlling,' provides a clear and convincing basis to believe that the earlier panel would have decided the issue differently." *Id.* at 552-53 (quoting *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010)).

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

Response: Please see my response to Question 7.

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

Response: In any case of statutory construction, I would begin by researching whether the Supreme Court or First Circuit has construed the statute and, if so, I would adhere to that construction. Absent binding precedent, I would begin by examining the text of the statute. *See Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text."). If the meaning of the statute is clear, I would apply it as written. If the statute is ambiguous, I would consider pertinent canons of statutory construction, look to the overall structure of the statute and any related provisions, and consult legislative history to resolve the ambiguity. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

10. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: In sentencing a defendant, I would apply the factors set forth in 18 U.S.C. § 3553(a) and consult the Sentencing Guidelines. One factor a judge must consider in imposing sentence is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The Sentencing Guidelines also instruct that a defendant's race and national origin "are not relevant in the determination of a sentence." U.S. Sentencing Guidelines Manual § 5H1.10 (policy statement) (2021).

Senator Josh Hawley
Questions for the Record

Julia Kobick
Nominee, District of Massachusetts

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

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

    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 to all subparts: The Supreme Court has held that the Sentencing Guidelines are advisory rather than mandatory, *United States v. Booker*, 543 U.S. 220, 245 (2005), but must be calculated and considered before imposing a sentence, *Molina-Martinez v. United States*, 578 U.S. 189, 193 (2016). Because each defendant's case must be considered individually, it would be inappropriate to comment on whether particular sentencing enhancements should or should not apply in the abstract. If confirmed, I would apply the factors set forth in 18 U.S.C. § 3553(a) and carefully consider the Sentencing Guidelines before sentencing any defendant.

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

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

    Response: The question whether penalties for distribution, receipt, and possession of child pornography should be aligned is a question for policy makers. Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that question. If confirmed, I would apply the relevant statutes and the factors set forth in 18 U.S.C. § 3553(a) in sentencing any defendant convicted of child pornography offenses.

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

Response: Please see my response to Question 2(a).

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: Because each defendant's case must be considered individually, it would be inappropriate to comment on how, in the abstract, I might sentence any particular defendant. If confirmed, I would apply the factors set forth in 18 U.S.C. § 3553(a) and carefully consider the Sentencing Guidelines before sentencing any defendant.

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

a. Do you agree with that philosophy?

Response: I am not familiar with the context for that quotation. I believe that a judge has a duty to set aside any personal views she may hold, approach each case from a position of neutrality, and fairly and impartially apply the law to the circumstances of each case.

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

Response: Please see my response to Question 3(a).

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is binding precedent, and I would apply it fully and faithfully.

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

Response: There are multiple abstention doctrines recognized by the Supreme Court and the First Circuit. While I describe below those doctrines that I understand to be most commonly invoked, I would, if confirmed, adhere to Supreme Court and First Circuit precedent on any question of abstention that might come before me.

Under the *Younger* abstention doctrine, "federal courts should refrain from issuing injunctions that interfere with ongoing state-court litigation, or, in some cases, with state administrative proceedings." *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27, 31 (1st Cir. 2004). While this doctrine "initially applied to protect state criminal prosecutions against interference," it "has been extended to 'coercive' civil cases involving the state and to comparable state administrative proceedings that are quasi-judicial in character and implicate important state interests." *Id.*

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

Under the *Colorado River* abstention doctrine, "the pendency of a similar action in state court may merit federal abstention based on 'considerations of wise judicial administration' that counsel against duplicative lawsuits." *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 27 (1st Cir. 2010) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The First Circuit applies a "non-exclusive list of factors" to determine whether abstention is appropriate. *Id.* Those factors include: "(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." *Id.* at 27-28 (citing *Rio Grande Cmty. Health Ctr. v. Rullan*, 397 F.3d 56, 71-72 (1st Cir. 2005)).

The *Burford* abstention doctrine "counsels abstention in situations where a federal suit will interfere with a state administrative agency's resolution of difficult and consequential questions of state law or policy." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 26 n.9 (1st Cir. 2011) (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)).

The *Thibodaux* abstention doctrine may apply in "cases raising issues 'intimately involved with [the States'] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (quoting *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

Finally, under the *Rooker-Feldman* doctrine, "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006). The doctrine "is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

6. **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: In my capacity as Assistant Attorney General, I co-authored two amicus briefs on behalf of Massachusetts and other states in *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), *vacated and remanded*, *DeOtte v. Nevada*, 20 F.4th 1055 (5th Cir. 2021), a case alleging that the contraceptive mandate of the Affordable Care Act infringed the rights of a class of employers under the Religious Freedom Restoration Act. The amicus briefs supported the state of Nevada's motion to intervene in the case.

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

Response: Should a matter of constitutional interpretation come before me, I would research and apply relevant Supreme Court and First Circuit precedent. For some constitutional provisions—for example, the Establishment Clause of the First Amendment, the Second Amendment, and the Confrontation Clause of the Sixth Amendment—the Supreme Court has instructed courts to examine the original public meaning of the provision. *See, e.g.*, *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022) (Establishment Clause); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (Confrontation Clause). I would adhere to the test and methodology prescribed by the Supreme Court and First Circuit for each constitutional provision.

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

Response: In any case of statutory construction, I would begin by researching whether the Supreme Court or First Circuit has construed the statute and, if so, I would adhere to that construction. Absent binding precedent, I would begin by examining the text of the statute. *See Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text."). If the meaning of the statute is clear, I would apply it as written. If the statute is ambiguous, I would consider pertinent canons of statutory construction, look to the overall structure of the statute and any related provisions, and consult legislative history to resolve the ambiguity. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

    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: Some forms of legislative history are more probative than others. For example, the Supreme Court has explained that while pre-enactment legislative history is "persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it," *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 242 (2011), post-enactment legislative history has "scant" probative value, *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010).

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

Response: The Supreme Court often consults English common law when interpreting provisions of the U.S. Constitution. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249-51 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 592-93 (2008). Otherwise, because the Constitution is a domestic document, the law of foreign nations generally has no bearing on its construction. If confirmed, I would look to Supreme Court and First Circuit precedent in any case of constitutional interpretation.

9. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?

Response: To prevail on a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment, a death row inmate must "establish that the State's method of execution presents a 'substantial risk of serious harm'—severe pain over and above death itself," and "'identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved." *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)).

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

Response: Yes.

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

Response: To the best of my knowledge, no.

12. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?

Response: No.

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

Response: The Free Exercise Clause of the First Amendment protects against discrimination on the basis of religion. Unless government action that burdens religion is "neutral and of general applicability," the government must establish that its law or policy advances a compelling government interest and is narrowly tailored to that interest. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (per curiam); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877-78 (2021); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993). Only if the law or policy survives that "most rigorous of scrutiny" is the action constitutional. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546.

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

Response: Please see my response to Question 13. In addition, the Religious Land Use and Institutionalized Persons Act limits the ability of state governments to impose certain land use regulations in "a manner that imposes a substantial burden on the religious exercise of a person," or to "impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government can demonstrate that its regulation furthers a compelling interest through the least restrictive means. 42 U.S.C. §§ 2000cc(a), 2000cc-1(a); *see Cutter v. Wilkinson*, 544 U.S. 709, 715-16 (2005).

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

Response: In evaluating whether a person's religious beliefs are held sincerely, a court's "'narrow function . . . is to determine' whether the [person's] asserted religious belief reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014) (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 716 (1981)). "It is not for the Court to say that the religious beliefs of the plaintiffs are

mistaken or unreasonable." *Id.*

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

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms, and that the government may not prohibit law-abiding, responsible citizens from possessing firearms for self-defense within their homes.

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

Response: No.

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

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

Response: I understand Justice Holmes to have made that statement in support of his broader point that the "Constitution is not intended to embody a particular economic theory," and that constitutional interpretation should not depend on individual justices' economic policy preferences. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, but I understand *Lochner*'s holding and reasoning to have been repudiated by the Supreme Court in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and subsequent cases.

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

a. If so, what are they?

Response: If confirmed, I would be bound to faithfully apply all Supreme Court precedent that has not been formally overruled or expressly repudiated by the Court.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: I do not have a view on the quotation from Judge Learned Hand. If confirmed, I would adhere to all Supreme Court and First Circuit precedent as to what constitutes a monopoly. In *United States v. Grinnell Corp.*, for example, the Supreme Court explained that there was "no doubt" that 87% of the market constituted monopoly power for purposes of Section 2 of the Sherman Anti-Trust Act. 384 U.S. 563, 571 (1966). And in *United States v. E. I. du Pont de Nemours & Co.*, the Court thought "it may be assumed" that the defendant, which had 75% market share, did have monopoly power. 351 U.S. 377, 379, 391 (1956).

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

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

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

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

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

Response: Black's Law Dictionary defines "federal common law" as the "body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." Black's Law Dictionary 313 (9th ed. 2004). Relatedly, Black's Law Dictionary defines "*general* federal common law" as, in the period before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938),

"the judge-made law developed by federal courts in deciding disputes in diversity-of-citizenship cases." *Id.* The Supreme Court held in *Erie* that "[t]here is no federal general common law," 304 U.S. at 78; instead, federal courts apply substantive state law when exercising diversity jurisdiction.

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

Response: As a general matter, the interpretation of a right protected by a state constitution is a matter in the first instance for each state's highest court. Federal courts typically adhere to state court constructions of state law. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law," and federal courts "are bound by their constructions except in extreme circumstances"). I would therefore look to state court precedent to determine the scope of a right protected by a state constitution.

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

Response: In the abstract, the fact that two texts use identical wording is often relevant to how the texts are construed. But the Supreme Court has also explained "that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S. 528, 537 (2015).

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

Response: Pursuant to the Supremacy Clause, the federal Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, § 2. The provisions of the federal Constitution therefore do bind the states, notwithstanding any provision of state constitutional law. Whether a provision of a state constitution guarantees greater protections than that afforded by the federal constitution is a question for each state's highest court.

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

Response: It is generally not appropriate for me, as a judicial nominee, to comment on whether a Supreme Court decision was correctly or incorrectly decided, when it is possible that a related issue may come before the courts. That said, because the constitutionality of *de jure* racial segregation in public schools is one of the very few issues not likely to be relitigated, I am comfortable stating that I believe *Brown v. Board of Education* was correctly decided.

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

Response: Injunctive relief is an equitable form of relief, issued in accordance with a court's inherent equitable authority and Federal Rule of Civil Procedure 65. Under the Administrative Procedure Act, Congress also authorized federal courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2). The question whether these sources of authority empower federal courts to issue nationwide injunctions is a question currently subject to litigation and debate in the courts. If confirmed, I would adhere to all Supreme Court and First Circuit precedent on the permissible scope of injunctive relief, including the Supreme Court's instruction that "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Please see my response to Question 23.

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

Response: Our Founders enshrined in the Constitution a system of dual sovereignty, whereby power is divided between the federal government and the states, and under which "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X; *see Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). This federalist structure protects liberty by ensuring a diffusion of power between the state and federal governments. Subject to the Supremacy Clause of Article VI, it also enables the states to operate as "laboratories of democracy," able to devise different solutions to novel legal and policy problems. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015).

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

Response: Please see my response to Question 5.

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

Response: The question whether damages or injunctive relief is appropriate in any particular case depends on the facts of the case and the relief requested in the complaint. In general, damages are intended to compensate a party for past harm, while injunctive relief is intended to prevent ongoing or future harm.

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

Response: The Supreme Court has construed the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments to "provid[e] heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Those fundamental rights must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (internal quotation marks and citations omitted). Among those fundamental rights protected by the due process clause are the "rights to marry, to have children, to direct the education of one's children, to marital privacy, to use contraception, [and] to bodily integrity." *Id.* at 720 (citations omitted).

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

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

Response: The Free Exercise Clause of the First Amendment protects against discrimination on the basis of religion. In general, unless government action that burdens religion is "neutral and of general applicability," the government must establish that the law or policy advances a compelling government interest and is narrowly tailored to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993). Only if the law or policy survives that "most rigorous of scrutiny" is the action constitutional. *Id.*

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

Response: I do not understand the Supreme Court to have drawn a distinction between the freedom of religion and the freedom of worship for purposes of the Free Exercise Clause. The Supreme Court has described the right protected by the Free Exercise Clause as both the "free exercise of religion" and the "freedom of worship." *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022) ("The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988))); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (explaining that the "freedom of worship" is a fundamental right made applicable to the States by the Fourteenth Amendment (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940))). Government regulations that burden religious exercise and are not "neutral and generally applicable" trigger strict scrutiny under the Free Exercise Clause. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

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

Response: Please see my response to Question 29(a).

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

Response: Please see my response to Question 15.

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

Response: By its terms, the Religious Freedom Restoration Act ("RFRA") provides that it "applies to all Federal law, and the implementation of that law," and that "[f]ederal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference" to RFRA. 42 U.S.C. §§ 2000bb-3(a), (b).

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

Response: No.

30. Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I understand this statement to refer to the principle that a judge must set aside any personal views and apply the law fairly and impartially in every case. When a judge follows that approach, she may not personally agree with the outcome of every decision she makes, but she is honoring her oath to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453.

31. 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 only once taken the position that a federal or state statute was unconstitutional. In *Wesson v. Town of Salisbury*, 13 F. Supp. 3d 171 (D. Mass. 2014), the plaintiffs asserted an as-applied Second Amendment challenge to Mass. Gen. Laws c. 140, §§ 131(d)(i)(E) and 131A. I represented the Commonwealth of Massachusetts, which intervened as a defendant. After carefully considering the plaintiffs' claims, co-counsel and I concluded, on behalf of the Commonwealth, that, as applied, the statutes were not defensible or constitutional. We therefore filed a brief informing the Court that the Commonwealth would not oppose entry of judgment against it on the plaintiffs' as-applied Second Amendment challenge to the statutes.

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

Response: I have not deleted any postings that I made to my long-private Facebook account or any other social media account. But, in advance of my nomination, I reviewed my Facebook account and noticed that old private messages sent to me by others appeared on my Facebook page. I deleted those messages to protect the privacy of the individuals who had sent the messages.

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

Response: I feel grateful every day to be an American citizen, and I believe deeply in America's founding ideals of equality, liberty, and justice under the law. If confirmed as a judge, my charge would be to impartially handle the individual cases that come before me, including those involving claims of racial discrimination, in accordance with the law. In my courtroom, everyone of all races would be treated equally and fairly.

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

Response: Yes.

35. How did you handle the situation?

Response: I always understood that, under canons of professional ethics, I owed a duty to my client to provide zealous representation within the bounds of the law. I strived to offer my best counsel to my clients and was honored to represent my clients in court.

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

Response: Yes.

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

Response: I have, over the years, consulted the Federalist Papers in handling cases on behalf of the Commonwealth and for personal interest. Although I am not sure that any one particular Federalist Paper has shaped my view of the law more than any other, Federalist No. 78, which describes the nature of judicial power and provides a rationale for judicial review, would be highly relevant to my work as a judge, if confirmed.

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

Response: Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that question. If confirmed, I would apply the law fairly and impartially and apply any binding Supreme Court and First Circuit precedent on this question.

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

Response: To the best of my recollection, no.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

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

Response: One of my primary responsibilities in my current role as Deputy State Solicitor, and in my prior role as supervisor to other Assistant Attorneys General, is to review briefs filed on behalf of the Commonwealth and its agencies and officials in state and federal court. I have, accordingly, edited or contributed to

many briefs filed without my name appearing in the counsel block. I do not have a list of all such briefs, and do not have access to all of the information I would need to compile such a list, but I estimate that there are several hundred briefs that would fall into this category.

43. Have you ever confessed error to a court?

Response: To the best of my recollection, I have not confessed error to a court.

a. If so, please describe the circumstances.

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

Response: Before testifying before the Senate Judiciary Committee, I swore an oath to testify truthfully and to the best of my ability, consistent with my professional and ethical obligations under Code of Conduct for United States Judges, which applies to judicial nominees. I have honored that oath in providing my testimony to the Committee.

Questions from Senator Thom Tillis
for Julia E. Kobick
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: Black's Law Dictionary defines "judicial activism" as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Black's Law Dictionary 922 (9th ed. 2004). Judicial activism is not appropriate.

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

   Response: Impartiality is an expectation of and a requirement for every judge. The judicial oath requires judges to swear to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." 28 U.S.C. § 453. If confirmed, I would abide by that oath.

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

   Response: No.

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

   Response: I anticipate that the faithful application of the law will, at times, result in outcomes perceived by some as undesirable. Nevertheless, a judge must, in every case, set aside personal views and fairly and impartially apply the law. If confirmed, I would swear to "faithfully and impartially discharge" my duties, and I would do so to the best of my abilities. 28 U.S.C. § 453.

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

   Response: No.

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

Response: If confirmed, I would fully and faithfully apply all Supreme Court and First Circuit precedent concerning the Second Amendment, including the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), and *New York State Rifle & Pistol Ass'n, Inc. 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: Americans retain constitutional rights during times of emergency, including pandemics. Should any case come before me concerning the lawfulness of pandemic-related policies, I would impartially and faithfully apply all relevant Supreme Court and First Circuit precedent, including the Supreme Court's decisions in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), and the First Circuit's decision in *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021). In any case concerning Second Amendment rights, I would likewise impartially and faithfully apply all relevant Supreme Court and First Circuit precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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

Response: Law enforcement officers and other government officials are entitled to qualified immunity from individual-capacity claims for damages so long as "'their conduct [did] 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)). "Whether qualified immunity can be invoked depends on the 'objective legal reasonableness' of the official's act." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Harlow*, 457 U.S. at 819). Each assertion of qualified immunity must be analyzed individually and "depends very much on the facts of each case." *Brousseau v. Haugen*, 543 U.S. 194, 201 (2004). If confirmed, I would examine the facts of each case in which qualified immunity was raised, and I would assess whether the law enforcement officer or government official (1) "violated a statutory or constitutional right," and (2) whether "the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). If the answer to either question is no, the officer or official is entitled to qualified immunity.

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

Response: The question whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question for policy makers. Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that question. If confirmed, I would fully and faithfully apply all relevant Supreme Court and First Circuit precedent concerning qualified immunity.

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

Response: The proper scope of qualified immunity protections is a question for policy makers. Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that topic. If confirmed, I would fully and faithfully apply all relevant Supreme Court and First Circuit precedent concerning qualified immunity.

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

Response: I have not handled cases concerning patent eligibility or studied the Supreme Court's jurisprudence in this area. In general, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on the merits of the Supreme Court's decisions on patent eligibility. If confirmed, I would carefully research the provision of the Patent Act that defines patentable subject matter, 35 U.S.C. § 101, and the Supreme Court's decisions interpreting that statute. For example, the Court has long held, under an implicit exception to Section 101, that "[l]aws of nature, natural phenomena, and abstract ideas are not patentable." *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013). And the Court has adopted a framework for assessing patent eligibility under Section 101. *See Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217-18 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 77-80 (2012). I would be bound to adhere to the Supreme Court's decisions, and I would do so to the best of my ability.

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

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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?

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if

the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this

hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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

Response: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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: Consistent with Canon 3 of the Code of Conduct for United States Judges, as a judicial nominee, I must respectfully refrain from commenting on this hypothetical case, because sharing views on a hypothetical case could suggest prejudgment of an issue that might come before me.

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 responses to Questions 12 and 13.

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: My career has primarily focused on civil litigation, and in particular on constitutional and administrative law. I have not had occasion to handle cases concerning copyright law.

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

Response: I have not had occasion to handle cases concerning 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: My career has primarily focused on civil litigation, and in particular on constitutional and administrative law. Although I reviewed the amicus brief filed on behalf of Massachusetts and 25 other states and the District of Columbia in *Gonzalez v. Google LLC*, No. 21-1333, a case pending in the Supreme Court that concerns Section 230 of the Communications Decency Act, I have not otherwise had occasion to handle cases concerning intermediary liability for online service providers.

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, in my capacity as Assistant Attorney General, defended Massachusetts's statutes or government actions against First Amendment speech claims. I have not, however, had occasion to handle cases dealing with copyright or other intellectual property issues.

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

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

Response: In any case of statutory construction, I would begin by researching whether the Supreme Court or First Circuit has construed the statute and, if so, I would adhere to that construction. Absent binding precedent, I would begin by examining the text of the statute. *See Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text."). If the meaning of the statute is clear, I would apply it as written. If the statute is ambiguous, I would consider pertinent canons of statutory construction, look to the overall structure of the statute and any related provisions, and consult legislative history to resolve the ambiguity. *See, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

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: When Congress has charged a federal agency with implementing a statute, and that agency construes ambiguity in the statute through an action, usually rulemaking or formal adjudication, that carries the force of law, courts owe deference to the agency's reasonable construction of ambiguity in the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). When the agency construes the statute through an action that does not carry the force of law, the agency's construction "may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citations and internal quotation marks omitted); *see also Doe v. Leavitt*, 552 F.3d 75, 79 (1st Cir. 2009).

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: Consistent with the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to share personal views, if any, on that question. If confirmed, I would fully and faithfully apply all relevant Supreme Court and First Circuit precedent concerning copyright infringement.

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: The question whether laws like the Digital Millennium Copyright Act properly address the state of the internet today is a question for policy makers. If confirmed, and if any question concerning the Digital Millennium Copyright Act were to come before me, I would research whether the Supreme Court or First Circuit has construed the relevant portion of the statute. If so, I would adhere to binding precedent. If not, I would examine the plain text of the statute and, if clear, apply the statute as written. If the statute is ambiguous, I would consider pertinent canons of statutory construction, look to the overall structure of the statute, and consult legislative history to resolve the ambiguity.

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: In general, the question whether "judge shopping" or "forum shopping" is a problem in litigation is for policy makers to decide. If confirmed, I would fully and faithfully apply the venue rules and binding precedent in any case that comes before me. Among those rules is Local Rule 40.1 of the United States District Court for the District of Massachusetts, under which cases are assigned in accordance with neutral criteria. I am also aware that some Supreme Court precedent addresses forum shopping; for example, in determining whether a rule is substantive or procedural for purposes of the *Erie* doctrine, the Court has adopted a functional test based on the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

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

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

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

Response: I am not familiar with the term "forum selling." But I do not believe it is appropriate for a judge to take affirmative steps to attract a particular type of case or litigant. A judge has a duty to fairly and impartially preside over all cases and litigants that come before the court.

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

Response: If confirmed, I would not take affirmative steps to attract a particular type of case or litigant. A judge has a duty to fairly and impartially preside over all cases and litigants that come before the court.

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: I am not familiar with the circumstances described in this question. As a judicial nominee, I do not believe it appropriate for me to comment on matters concerning another federal judge or on cases handled by another federal judge or court of appeals. Nevertheless, as a general matter, every judge has a duty to adhere to the binding precedent of a higher court.

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).

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?

Response: Respectfully, this question is one for policy makers and for the Judicial Conference of the United States. As a judicial nominee, I do not think it appropriate for me to comment. If confirmed, I would fully and faithfully apply the venue rules and binding precedent in any case that comes before me.

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

Response: Please see my answer to Question 20.

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: Please see my answer to Question 20.

21. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and

the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.

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

Response: I am not familiar with the circumstances described in this question. As a judicial nominee, I do not believe it appropriate for me to comment on matters concerning another federal judge or on cases handled by another federal judge or court of appeals.

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

Response: Please see my response to Question 21(a).