Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Michael Delaney
Nominee to be United States Circuit Judge for the First Circuit
February 22, 2023

1. **During your hearing, you received a number of questions regarding your representation of St. Paul's School in a civil lawsuit filed against the school in 2016.**

   a. **Can you give an overview of your legal practice with respect to your representation of educational institutions?**

   Response: Approximately one-third of my legal practice involves representing educational institutions. I have represented public universities, private colleges and independent schools. Some of my private secondary school clients offer traditional curricula, and others offer highly specialized services for students who require non-traditional learning environments based on unique learning needs. Many offer residential life programs, and others are day schools.

   I provide legal advice to heads of school and boards of trustees on governance issues and fiduciary responsibilities; institutional compliance with mandatory reporting laws; responses to and investigations of faculty misconduct; faculty training on mandatory reporting laws, inappropriate boundary crossings and promoting student safety and wellness; review of school policies, procedures and systemic responses to faculty and student misconduct; government investigations and Title IX compliance; and some litigation.

   I am a member of an Education Law Practice Group at my firm consisting of 23 attorneys. We collaborate to provide a wide range of legal services to schools and colleges, including COVID-19 risk management advice, contract drafting, environmental law services, privacy and data security, litigation services, endowment and charitable trust advice, tax planning, immigration law, investigations, executive compensation negotiations, trademark services, employment law, student and faculty training, review of school policies and procedures manuals, health care law for student health centers, and compliance with mandatory reporting laws and Title IX.

   b. **Can you elaborate on your hearing responses about your representation of St. Paul's School and the arguments you made in that case?**

   Response: On May 30, 2014, Owen Labrie sexually assaulted Ms. Prout, and the State filed criminal charges against Labrie in July 2014. At the time of the sexual assault, I did not personally represent the school, and I had no prior relationship with school administrators. I did not begin representing the school personally until almost one year later in April 2015. My law firm had worked previously with the school for many decades, and in 2015, I was asked to assist the school

because prosecutors had contacted the school to obtain educational and health records in support of the prosecution of Labrie. The criminal trial was scheduled in August 2015. I began to serve as a liaison for the school with the prosecutor's office to respond to requests for school records and information needed to prosecute the case.

There were two court proceedings related to this matter. First, there was a criminal prosecution in the case of *State v. Owen Labrie*, tried to jury verdict in August 2015. The jury convicted Labrie of sexually assaulting Ms. Prout following the jury trial. Because the school was not a party to the criminal case, my involvement in the criminal trial was limited. On the school's behalf, I assisted the judge, prosecutor and defense counsel to coordinate a so-called jury view, or jury trip, to the school at the beginning of the trial. That was my only role in connection with the trial. I also observed the jury trial from the public seating in the back of the courtroom, but I did not participate in the jury trial.

Second, after the criminal trial in June 2016, the Prout family brought a civil action against the school in federal court for not protecting Ms. Prout from being sexually assaulted by Labrie. I filed an answer to the complaint on behalf of the school. I will discuss the Prouts' motion related to using pseudonyms in subsection (c) below. No depositions of any parties or witnesses were conducted in the civil case, and the parties resolved the case through a confidential settlement agreement.

I want to acknowledge that these were incredibly difficult and challenging cases, particularly for Ms. Prout. The criminal trial took place under a national media spotlight, and the small courthouse was packed daily with journalists, broadcasters, students and faculty. While I had limited involvement in the criminal case, I was part of a team of advocates for the school responding to the civil claims advanced by the Prout family.

c. The plaintiffs in the lawsuit filed a motion to proceed under pseudonyms. On behalf of the school, you filed a brief responding to the plaintiffs' motion. Please explain the arguments made in the brief.

Response: Thank you for the opportunity to address the motion I filed on behalf of my client, St. Paul's School.

I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial, her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms

can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

On June 1, 2016, when the Prout family filed the civil lawsuit, they simultaneously filed a motion for leave to proceed under pseudonyms. The Court granted that motion provisionally on June 23, 2016, and it provided the school with an opportunity to respond. In short, the Court had already granted the Prout family's request to proceed anonymously shortly after the Complaint was initially filed and before the school had responded.

The school filed its response on August 11, 2016. In its response, the school acknowledged the Prout family's interest in remaining anonymous at pretrial stages, and the school conditionally agreed to the Prout family's continued use of pseudonyms in accordance with the Court's earlier order. The brief specifically stated: "The school acknowledges that J.D. has an interest in remaining anonymous and does not object to her so proceeding at this time, provided that [certain] conditions are agreed to or ordered."

Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press – in our democracy, and there are established professional conduct rules for lawyers that place limits on what lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the

pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

For additional context concerning why the school requested this condition, I note that the law firm retained by the Prouts had recently been admonished in a published opinion by the federal District Court for the District of Columbia for engaging in a similar media campaign while simultaneously seeking the use of a pseudonym for another client who was a sexual assault survivor. *See Doe v. Cabrera*, 307 F.R.D. 1, 9 (D.D.C. 2014) (The Court stated: "counsel for the plaintiff and other attorneys acting on her behalf should have known better than to publicize the case" and "should have remained silent about the case."). In the *Cabrera* case, Judge Walton presided, and he had authorized the sexual assault survivor to proceed using a pseudonym, but he simultaneously placed conditions on the law firm to require the case to be tried only in a court of law. In the *Prout* case, the school provided the federal court in New Hampshire with a copy of Judge Walton's order issued in the earlier *Cabrera* case, which granted the use of a pseudonym but required the law firm to cease "publiciz[ing] the case" outside of court.

The school asked the Court in New Hampshire to order the same relief that Judge Walton had ordered in the District of Columbia. The position the school advanced did not seek to compel the Prout family to give up anonymity at pretrial stages of the case.

In the school's response, the school did request permission to use Ms. Prout's real name in private settings during pretrial discovery stages of the case, and with jurors at any trial. First, the school asked for permission to use Ms. Prout's real name during pretrial depositions that take place in private settings. That request was made for the practical reason that most witnesses to the case were fellow students and school employees who already knew Ms. Prout by her real name, and many of them had already testified in the criminal trial using her real name. To be clear, the school's request to use Ms. Prout's real name in depositions would not have resulted in Ms. Prout's name becoming public because any written transcripts of depositions (no depositions were ever taken) would have been subject to a protective order allowing for confidentiality designations, and thus would not have been subject to public dissemination. As a result, the school's response contemplated that for all pretrial purposes, Ms. Prout's name would not become public. Second, the school asked to use real names before jurors at trial if the case ever proceeded to trial. That request was consistent with how other trial courts had handled the use of pseudonyms at public trials. *See e.g.*, *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (prejudice from use of pseudonym may increase during trial stage); *E.E.O.C. v. Spoa, LLC*, 2013 WL 5634337, at *3 (D. Md. October 15, 2013) (finding that during ultimate trial "grant of anonymity would implicitly influence the jury"); *Guerilla Girls, Inc. v. Katz*, 224 F.R.D. 571, 575 (S.D.N.Y 2004) (discussing problems with conducting a trial using pseudonyms). And several years after the Prout case settled, the First

Circuit issued an opinion that did in fact distinguish between the use of pseudonyms in pretrial phases and during a trial itself. *See Doe v. MIT*, 46 F.4th 61, 73 (2022) (citing authority "explaining why pseudonymity was appropriate in pretrial states of sexual assault litigation but not during trial").

After the school filed its response, the judge never had the opportunity to consider the briefings. Before the judge considered the court submissions, the Prouts filed an amended complaint using real names, despite the Court's existing order authorizing the family to proceed anonymously.

I do not believe my role as an advocate for the school in this case would compromise by ability to be a fair and impartial judge. Throughout my career, I have focused on advocacy on behalf of victims of crime. Early in my career, I represented a class of victims subjected to unlawful full strip searches after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain. In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. When I served as Attorney General for New Hampshire, I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

If confirmed as a circuit judge, I appreciate that my role would be very different. I would no longer serve as an advocate, but instead, would be called upon to fairly and impartially apply the law to the facts presented in each case, and ensure that the arguments made by all litigants in criminal and civil cases were heard and considered. But I believe my experiences working with and on behalf of survivors would inform my judicial temperament, and I would ensure that the interests of all parties to a case were fully taken into consideration.

d. In a letter to the Committee, Chessy Prout—a former student at St. Paul's School who was one of the plaintiffs in the 2016 civil lawsuit—alleged that you engaged in witness tampering during the 2015 criminal trial of Owen Labrie, the student convicted of sexually assaulting Ms. Prout. Please address the allegation with respect to witness tampering.

Response: I want to state in the strongest possible terms that I did not engage in any witness tampering during the criminal trial in *State v. Owen LaBrie*, nor have I ever engaged in any witness tampering or interference during my nearly 30-year legal career. Throughout my career, I have always abided by the highest ethical standards as an attorney, a former chief law enforcement officer of the State, and a former constitutional officer. Witness tampering or witness interference would violate state and federal laws, and would be inconsistent with my duty as an officer of the court. It did not happen.

More specifically, I understand the allegation raised is that I and the former Director, founder and 26-year veteran of the State's Office of Victim/Witness Assistance met with some of Owen LaBrie's high school friends during the trial and convinced them to alter their witness testimony. Again, that did not happen. I did not know any of the student witnesses who testified at trial. I did not hold any meetings or communicate with them about the trial or their testimony before, during or after the trial. I did not have access to any of their prior testimony or statements given to the prosecutors or police before the criminal trial. I first heard their testimony while seated in the public viewing section at the back of the courtroom, as I watched each student witness take the stand and testify to the jury.

Senator Lindsey Graham, Ranking Member
Questions for the Record
Mr. Michael A. Delaney
Nominee to be United States Circuit Judge for the First Circuit

1. **During your hearing, Senator Blackburn asked you about your role in representing St. Paul's School during Owen Labrie's criminal trial. You stated that you did not meet with the students who were witnesses at the trial. In her letter to the committee, Chessy Prout wrote: "The day of the students' scheduled testimony, I walked into the Merrimack Courthouse through the back doors with a bailiff to avoid the news cameras at the front of the courthouse (I was a minor and Jane Doe in the case.) In a conference room on the first floor by the back door entrance I saw my former classmates, those who were scheduled to testify and some who were mere spectators, speaking with Michael Delaney. My father, Alexander Prout, and the director of public affairs for the New Hampshire Coalition Against Domestic and Sexual Violence, Amanda Grady Sexton, also witnessed the group assembled in the conference room." Are you disputing the accuracy of Ms. Prout's account?**

   Response: I would like to make clear that I have a great deal of respect for Ms. Prout and her family. I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial, her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

   I want to state in the strongest possible terms that I did not engage in any witness tampering during the criminal trial in *State v. Owen LaBrie*, nor have I ever engaged in any witness tampering or interference during my nearly 30 year legal career. Throughout my career, I have always abided by the highest ethical standards as an attorney, a former chief law enforcement officer of the State, and a former constitutional officer. Witness tampering or witness interference would violate state and federal laws, and would be inconsistent with my duty as an officer of the court. It did not happen.

   More specifically, I understand the allegation raised is that I and the former Director, founder and 26-year veteran of the State's Office of Victim/Witness Assistance met with some of Owen LaBrie's high school friends during the trial and convinced them to alter their witness testimony. Again, that did not happen. I did not know any of the student

witnesses who testified at trial. I did not hold any meetings or communicate with them about the trial or their testimony before, during or after the trial. I did not have access to any of their prior testimony or statements given to the prosecutors or police before the criminal trial. I first heard their testimony while seated in the public viewing section at the back of the courtroom, as I watched each student witness take the stand and testify to the jury.

2. **When you were asked about your representation of St. Paul's School during Owen Labrie's criminal trial, you stated that you "observed the trial on behalf of the school." You also testified that you "did not know the witnesses."**

   Response: I was asked if I engaged in witness tampering by meeting with unidentified St. Paul's students before the trial and told them what to say on the stand, and I confirmed that I did not do that, and I did not know any of the students who testified as witnesses at trial. I also attempted to give further context as to why any such actions – in addition to being illegal under state and federal law – would have made no sense in the context of that case. My client was not a party to that lawsuit, and had no stake in the testimony of any witness.

   a. **In New Hampshire Superior Court, how soon before trial is the prosecution's witness list required to be disclosed, and how soon before trial is the defendant's witness list required to be disclosed?**

      Response: Witness lists are generally exchanged 20 days prior to the pretrial conference unless the parties agree or the judge orders otherwise.

   b. **As the school's attorney, did you not review the witness lists when they became available?**

      Response: I do not recall eight years later if or when I reviewed the witness lists in connection with the criminal prosecution or civil case.

   c. **Did anyone serve as a witness coordinator for the school during the criminal trial?**

      Response: The prosecutor's office coordinates the State's witnesses in a criminal trial, and the defense counsel coordinates the defense witnesses. The school did not "coordinate" witnesses. This case was extremely challenging - to be clear it was most challenging for the Prouts - but also for the many families with young students required to testify at a trial. There was a large, national media presence stationed both inside and outside of the small courthouse. Yet the prosecutor's office simply lacked the resources to provide staffing to greet the families arriving outside the courthouse and escort them through the media presence and into the courtroom where the trial was taking place. Understandably, the prosecutor's office dedicated all of its available advocacy resources to support Ms. Prout and her family during the trial. But that left many young witnesses without a point of

contact at the courthouse. So, the school worked with the prosecutor's office and made arrangements for the school to retain a witness liaison to assist the families of certain students who were subpoenaed to testify. The liaison had 26 years of experience serving as the former Director of the State's Victim/Witness Assistance Program, and she greeted the families of lay witnesses arriving outside the courthouse. She helped them navigate through the crowd of media, escorted them into the courthouse, and connected them to the prosecutor's staff. The school did not authorize this liaison to provide any services to Owen Labrie or any of his male friends. But there were other student witnesses not affiliated with Owen Labrie who had to testify at trial, and the liaison assisted them upon arrival.

3. **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: Black's Law Dictionary defines "fact" in relevant part as "a circumstance, fact or event as it actually takes place or took place, or a physical object as it actually exists." On appeal, findings of fact shall not be set aside unless clearly erroneous. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985); *see also* Fed. R. Civ. P. 52(a)(6). Where the case raises mixed questions of law and fact, the First Circuit employs a "'degree-of-deference continuum,' providing 'non-deferential plenary review for law-dominated questions' and 'deferential review for fact-dominated questions.'" *Doe v. Portland Public Schools*, 30 F.3d 85, 90 (1st Cir. 2022).

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

Response: As Chief Justice Roberts stated in his 2022 Year-End Report for the Federal Judiciary, "Judicial opinions speak for themselves, and there is no obligation in our free country to agree with them" . . . "The law requires every judge to swear an oath to perform his or her work without fear or favor, but we must support judges by ensuring their safety. A judicial system cannot and should not live in fear."

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

Response: The statute 18 U.S.C. 3553(a) requires judges to take all of these factors into account and does not indicate that one is more important than any other. That statute is the best expression of Congress' views as to how judges should proceed at sentencing. The First Circuit has explained the "[s]entencing is much more of an art than a science. A sentencing court is under a mandate to consider a myriad of relevant factors, but weighing those factors is largely within the court's informed discretion." *United States v. Clogston*, 662 F.3d 588, 593 (1st Cir. 2011). A sentencing court must consider all

relevant sentencing factors under 18 U.S.C. § 3553(a), but it need not do so mechanically. *Clogston*, 662 F.3d at 592.

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

   Response: Qualified immunity does not apply in situations where the officer's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Morse v. Cloutier*, 869 F.3d 16, 22-23 (1st Cir. 2017). The judicial inquiry focuses on whether the right at issue was clearly established at the time of the officers alleged misconduct. *Cloutier*, 869 F.3d at 23. Examples would include violations of clearly established law surrounding a wrongful arrest, an unlawful search or seizure, or suborned perjury.

7. **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 would not identify any one Supreme Court decision as typical of my judicial philosophy. I characterize my judicial philosophy as embodying the core judicial traits common to the many trial and appellate judges whom I have admired and before whom I have practiced for nearly 30 years. I would strive to complete the hard work necessary to understand the record, approach oral arguments with focused attention and open-mindedness to all parties, demonstrate the humility to carefully reason and explain rulings in detailed and understandable decisions, work cooperatively with other judges in the First Circuit to render decisions and carefully consider the views of my colleagues, show a strong respect for precedent, and reflect fairness, justice and impartiality in all decision-making.

8. **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 would not identify any one First Circuit decision as typical of my judicial philosophy. I characterize my judicial philosophy as embodying the core judicial traits common to the many trial and appellate judges whom I have admired and before whom I have practiced for nearly 30 years. I would strive to complete the hard work necessary to understand the record, approach oral arguments with focused attention and open-mindedness to all parties, demonstrate the humility to carefully reason and explain rulings in detailed and understandable decisions, work cooperatively with other judges in the First Circuit to render decisions, show a strong respect for precedent, and reflect fairness, justice and impartiality in all decision-making.

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

   Response: I understand 18 U.S.C. § 1507 to proscribe the following conduct:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

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

Response: A state statute modeled after 18 U.S.C. § 1507 was found to be constitutional on its face in *Cox v. Louisiana*, 379 U.S. 599 (1965). Whether 18 U.S.C. § 1507 is facially constitutional is a matter that could come before me if I were confirmed to serve as a Circuit judge. As such, it would be inappropriate for me to opine on the facial validity of the statute.

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

Response: In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court identified fighting words as a well-defined and narrowly limited class of speech "which by their very utterance inflict injury or tend to incite an immediate breach of peace." With reference to *Chaplinsky*, the Supreme Court has also defined the term as "expressive conduct that falls within a small class of 'fighting words'" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." S*ee Texas v. Johnson*, 491 U.S. 397, 398 (1989) (quoting *Chaplinsky*, 315 U.S. at 574).

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

Response: "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (citations omitted). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that threatened violence will occur." *Id.* (internal quotations omitted).

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

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

Response: Yes. As a judicial nominee, it is generally inappropriate for me to comment on whether the Supreme Court correctly decided a case. However, the issues litigated in *Brown v. Board of Education* are highly unlikely to be re-litigated in future cases. For that reason, I believe that this case is an exception to the general rule restricting me from providing an opinion concerning a Supreme Court decision. I believe the Court correctly decided *Brown*.

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

Response: Yes. As a judicial nominee, it is generally inappropriate for me to comment on whether the Supreme Court correctly decided a case. However, the issues litigated in *Loving v. Virginia* are highly unlikely to be re-litigated in future cases. For that reason, I believe that this case is an exception to the general rule restricting me from providing an opinion concerning a Supreme Court decision. I believe the Court correctly decided *Loving v. Virginia*.

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

Response: *Griswold v. Connecticut* is binding precedent of the Supreme Court. If confirmed, I will apply *Griswold v. Connecticut* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court overruled *Roe v. Wade*.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court overruled *Planned Parenthood v. Casey*.

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

Response: *Gonzales v. Carhart* is binding precedent of the Supreme Court. If confirmed, I will apply *Gonzales v. Carhart* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

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

Response: *District of Columbia v. Heller* is binding precedent of the Supreme Court. If confirmed, I will apply *District of Columbia v. Heller* as precedent in

cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

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

Response: *McDonald v. City of Chicago* is binding precedent of the Supreme Court. If confirmed, I will apply *McDonald v. City of Chicago* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

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

Response: *Hosanna-Tabor* is binding precedent of the Supreme Court. If confirmed, I will apply *Hosanna-Tabor* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

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

Response: *Bruen* is binding precedent of the Supreme Court. If confirmed, I will apply *Bruen* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

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

Response: *Dobbs* is binding precedent of the Supreme Court. If confirmed, I will apply *Dobbs* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

14. 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 Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that "the Second and Fourteenth Amendments protect the right of an ordinary, law abiding citizen to possess a handgun in the home for self-defense." (citing *District of Columbia v Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010)). The Supreme Court also held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.*

The government must demonstrate that a firearm regulation "is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

15. 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: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

18. 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.

19. 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.

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

Response: In February 2022, I applied to be a United States Circuit Judge for the First Circuit. On February 7, 2022, I interviewed with staff of Senators Jeanne Shaheen and Maggie Hassan. On February 24, 2022, I met with officials for the White House Counsel's Office. On March 1, 2022, I met with Senators Jeanne Shaheen and Maggie Hassan. Since then, I have been in touch with officials from the Office of Legal Policy at the Department of Justice and staff members for Senators Jeanne Shaheen and Maggie Hassan. On January 18, 2023, the President announced his intention to nominate me.

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

Response: No.

22. 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.

23. 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.

24. 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.

25. 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.

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

Response: Please see my response to No. 20 above. I have communicated with Department of Justice and White House officials since January 18th related to my nomination and in preparation for my hearing. I was also in touch with Department of Justice officials related to responses to these questions for the record as detailed in response to No. 27 below.

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

Response: On February 22, 2023, the Office of Legal Policy sent me these questions. I read the questions, conducted research about litigated matters, reviewed judicial decisions, and drafted answers. I sent a draft of my answers to the Office of Legal Policy which provided feedback. After considering that feedback, I finalized my answers to these questions.

U.S. Senate Committee on the Judiciary
Hearing on Nominations

Senator Dianne Feinstein
Questions for the Record
Michael Delaney, Nominee to the U.S. Court of Appeals for the First Circuit
Submitted February 22, 2023

1. **In your current work in private practice, you represent educational institutions in investigations and litigation related to misconduct experienced by students.**

   Response: Before answering the specific questions below, I provide an overview of my education law practice. Approximately one-third of my legal practice involves representing educational institutions. I have represented public universities, private colleges and independent schools. Some of my private secondary school clients offer traditional curricula, and others offer highly specialized services for students who require non-traditional learning environments based on unique learning needs. Many offer residential life programs, and others are day schools.

   I provide legal advice to heads of school and boards of trustees on governance issues and fiduciary responsibilities; institutional compliance with mandatory reporting laws; responses to and investigations of faculty misconduct; faculty training on mandatory reporting laws, inappropriate boundary crossings and promoting student safety and wellness; review of school policies, procedures and systemic responses to faculty and student misconduct; government investigations and Title IX compliance; and some litigation.

   I am a member of an Education Law Practice Group at my firm consisting of 23 attorneys. We collaborate to provide a wide range of legal services to schools and colleges, including COVID-19 risk management advice, contract drafting, environmental law services, privacy and data security, litigation services, endowment and charitable trust advice, tax planning, immigration law, investigations, executive compensation negotiations, trademark services, employment law, student and faculty training, review of school policies and procedures manuals, health care law for student health centers, and compliance with mandatory reporting laws and Title IX.

   a. **Please list the total number of post-secondary educational institutions (including public and private universities and colleges) that you have represented in responding to instances of misconduct experienced by students.**

      Response: 3

      i. **How many of these representations involved instances of sexual misconduct experienced by a student?**

         Response: 3

ii. Without identifying any specific institution or individual, please provide a brief summary of the relevant facts and allegations involved in each representation identified in (i).

Response: Most of the matters responsive to this question involve confidential matters that did not involve a court proceeding. In that regard, they are subject to my ethical duty to protect client confidences. *See* New Hampshire Rules of Professional Conduct 1.6 (Confidentiality of Information), Rule 1.8 (b) (Using Information to Disadvantage Clients) and Rule 1.9 (Duties to Former Clients). My ethical obligations to protect client confidences informs my approach to providing responses below.

Institution 1 (Public Matter): I led an independent, external investigation for the institution following the criminal misconduct of an athletic coach who was using his phone to make video recordings of naked student athletes in the showers after sporting events. The coach was arrested and pled guilty to his criminal conduct. I played no role in his criminal prosecution. Following his conviction, the institution retained me to complete a comprehensive review of its systems, policies and procedures designed to protect students from sexual misconduct. I interviewed administrators, coaches, faculty and the victimized athletes. I reviewed the institution's policies, procedures and services in many areas to include: student reporting of sexual misconduct, with specific focus on available services and technology for anonymous reporting of student complaints or concerns; training programs for students, faculty, coaches and staff on bystander intervention techniques and sexual misconduct awareness, prevention and reporting; sexual and gender-based misconduct policies and procedures; procedures for background checks during hiring; Title IX hearings process and related compliance issues; internal and external mandatory reporting procedures; trauma-informed services available for victimized students; and administration/board of trustees governance over these institutional systems to drive clear behavioral expectations for all community members. I provided my findings and recommendations to the institution.

Institution 2 (Public Matter): I led two separate, independent and external investigations for the institution into complaints of sexual harassment by an athletic coach and a staff member. The first investigation addressed a student complaint of harassment by a coach. The second case involved multiple complaints of harassment and/or past sexual misconduct by a non-faculty staff member. The institution retained me to complete an independent and comprehensive review of its systems, policies and procedures designed to protect students from this type of misconduct. I interviewed administrators, coaches, faculty and the victimized students. I reviewed the institution's policies, procedures and services in many areas to include: student reporting of sexual misconduct, with specific focus on available services and

technology for anonymous reporting of student complaints or concerns; training programs for students, faculty, coaches and staff on bystander intervention techniques and sexual misconduct awareness, prevention and reporting; sexual and gender-based misconduct policies and procedures; procedures for background checks during hiring; Title IX hearings process and related compliance issues; internal and external mandatory reporting procedures; trauma-informed services available for victimized students; and administration/board of trustees governance over these institutional systems to drive clear behavioral expectations for all community members. I provided my findings and recommendations to the institution.

Institution 3 (Confidential Proceeding): I offered assistance to an institution responding to a subpoena in a confidential proceeding.

iii. **In any representation identified in (a), did a minor survivor of misconduct seek to proceed by pseudonym or other similar protective measure in any related legal proceeding? If yes, please list the name of the case and provide a brief summary of the allegations involved.**

Response: No.

iv. **In any representation identified in (iii), did you seek—through a legal motion, negotiation, or other means—to have the minor's name made public or otherwise shared with any non-party to the case, for any portion of the legal proceedings? If yes, please provide a brief summary of the allegations involved in the case and the rationale for seeking disclosure of the minor's name.**

Response: No.

b. **Please list the total number of primary or secondary educational institutions (both public and private) that you have represented in responding to instances of misconduct experienced by students.**

Response: Approximately 25, with only 1 involving litigated matters.

i. **How many of these representations involved instances of sexual misconduct experienced by a student?**

Response: Approximately 25, with only 1 involving litigated matters.

ii. **Without identifying any specific institution or individual, please provide a brief summary of the relevant facts and allegations involved in each representation identified in (i).**

Response: 12 institutions (Confidential Matters): Federal and state law requires the mandatory reporting of allegations of potential criminal offenses occurring on campus. Most reports involve circumstances where an affected student or third party has reported sexual misconduct, bullying or harassment by another student. I provide legal advice to school clients to help them comply with external mandatary reporting obligations to child protection agencies, law enforcement, and notification to parents of involved students. I also provide legal advice to administrators who oversee counseling and support services for impacted students and handle related student discipline proceedings.

5 institutions (Confidential Matters): I have been retained by other law firms who also represent schools to conduct external, independent investigations of faculty misconduct complaints. The matters typically relate to sexual harassment or boundary crossings, but not sexual assaults. When I conduct investigations as an external investigator, I interview administrators, faculty, students and parents. In relation to these matters, I have also authored investigative reports addressing whether faculty members violated school policies prohibiting sexual misconduct and harassment. Schools use such reports to make decisions about faculty discharge and/or discipline.

3 institutions (Confidential Matters): I represent schools in non-litigated matters after parents have retained legal counsel and made demands or claims against schools following the dismissal of their child from the school based on the child's sexual misconduct or inappropriate behavior towards another student.

1 institution (Public Matter): I represented a school after the State initiated criminal charges against a former student for sexually assaulting another student on campus. I assisted the school in responding to a subpoena issued by the prosecutors to obtain school records needed to prosecute the case. The prosecutors nol prossed (dismissed) the case shortly before trial. I was not involved in the decision to dismiss the case, as the school was not a party to the criminal charges.

1 institution: (Public Matter): I represented a school after the State charged a former student with sexually assaulting another student on campus. I assisted the school in responding to requests for information made by the prosecutors to obtain school records needed to prosecute the case. I observed the criminal trial and assisted the court by coordinating a jury view at the school during the trial. I defended the school in civil litigation after the survivor's family sued the school for failing to prevent the sexual assault. (Confidential Matters): I represented the school in a confidential proceeding and negotiated confidential settlement agreements in non-litigated matters.

1 institution (Confidential Matter): I represent schools in non-litigated matters when former students disclose past sexual abuse. I may be involved in advising the school how to respond to the matter and in retaining an external investigator to review the matter.

1 institution (Public Matter): I represented a school in an administrative inquiry by a child protection agency after the school had failed to immediately report an on-campus sexual assault of one student by another student that led to a criminal prosecution. The child protection agency required the school to submit a corrective action plan to strengthen school reporting systems and enhance training of faculty and staff on mandatory reporting laws. I assisted the school to create and implement the corrective action plan approved by the child protection agency.

1 institution (Confidential Matter): I am retained to conduct internal investigations for school clients when an alumnus reports past sexual abuse by a former faculty member. When that occurs, I may be asked to interview a victim of sexual assault and former faculty members, and review school records. I also assist schools in identifying trauma-informed counseling services that can be made available to alumni who suffered from past sexual misconduct.

I have completed a diligent and thorough review of my representation of schools to answer this question. There may be other limited representations that I have not been able to identify based on my review of records.

iii. In any representation identified in (b), did a minor survivor of misconduct seek to proceed by pseudonym or other similar protective measure in any related legal proceeding? If yes, please list the name of the case and provide a brief summary of the allegations involved.

Response: Other than Ms. Prout, no.

iv. In any representation identified in (iii), did you seek—through a legal motion, negotiation, or other means—to have the minor's name made public or otherwise shared with any non-party to the case, for any portion of the legal proceedings? If yes, please provide a brief summary of the allegations involved in the case and the rationale for seeking disclosure of the minor's name.

Response: Thank you for the opportunity to address the motion I filed on behalf of my client, St. Paul's School.

I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial,

her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

On June 1, 2016, when the Prout family filed the civil lawsuit, they simultaneously filed a motion for leave to proceed under pseudonyms. The Court granted that motion provisionally on June 23, 2016, and it provided the school with an opportunity to respond. In short, the Court had already granted the Prout family's request to proceed anonymously shortly after the Complaint was initially filed and before the school had responded.

The school filed its response on August 11, 2016. In its response, the school acknowledged the Prout family's interest in remaining anonymous at pretrial stages, and the school conditionally agreed to the Prout family's continued use of pseudonyms in accordance with the Court's earlier order. The brief specifically stated: "The school acknowledges that J.D. has an interest in remaining anonymous and does not object to her so proceeding at this time, provided that [certain] conditions are agreed to or ordered."

Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press – in our democracy, and there are established professional conduct rules for lawyers that place

limits on what lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

For additional context concerning why the school requested this condition, I note that the law firm retained by the Prouts had recently been admonished in a published opinion by the federal District Court for the District of Columbia for engaging in a similar media campaign while simultaneously seeking the use of a pseudonym for another client who was a sexual assault survivor. *See Doe v. Cabrera*, 307 F.R.D. 1, 9 (D.D.C. 2014) (The Court stated: "counsel for the plaintiff and other attorneys acting on her behalf should have known better than to publicize the case" and "should have remained silent about the case."). In the *Cabrera* case, Judge Walton presided, and he had authorized the sexual assault survivor to proceed using a pseudonym, but he simultaneously placed conditions on the law firm to require the case to be tried only in a court of law. In the *Prout* case, the school provided the federal court in New Hampshire with a copy of Judge Walton's order issued in the earlier *Cabrera* case, which granted the use of a pseudonym but required the law firm to cease "publiciz[ing] the case" outside of court.

The school asked the Court in New Hampshire to order the same relief that Judge Walton had ordered in the District of Columbia. The position the school advanced did not seek to compel the Prout family to give up anonymity at pretrial stages of the case.

In the school's response, the school did request permission to use Ms. Prout's real name in private settings during pretrial discovery stages of the case, and with jurors at any trial. First, the school asked for permission to use Ms. Prout's real name during pretrial depositions that take place in private settings. That request was made for the practical reason that most witnesses to the case were fellow students and school employees who already knew Ms. Prout by her real name, and many of them had already testified in the criminal trial using her real name. To be clear, the school's request to use Ms. Prout's real name in depositions would not have resulted in Ms. Prout's name becoming public because any written transcripts of depositions (no depositions were ever taken) would have been subject to a protective order allowing for confidentiality designations, and thus would not have been subject to public dissemination. As a result, the school's response contemplated that for all pretrial purposes, Ms. Prout's name would not become public. Second, the school asked to use real names before jurors at trial if the case ever proceeded

to trial. That request was consistent with how other trial courts had handled the use of pseudonyms at public trials. *See e.g.*, *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (prejudice from use of pseudonym may increase during trial stage); *E.E.O.C. v. Spoa, LLC*, 2013 WL 5634337, at *3 (D. Md. October 15, 2013) (finding that during ultimate trial "grant of anonymity would implicitly influence the jury"); Guerilla *Girls, Inc. v. Katz*, 224 F.R.D. 571, 575 (S.D.N.Y 2004) (discussing problems with conducting a trial using pseudonyms). And several years after the Prout case settled, the First Circuit issued an opinion that did in fact distinguish between the use of pseudonyms in pretrial phases and during a trial itself. *See Doe v. MIT*, 46 F.4th 61, 73 (2022) (citing authority "explaining why pseudonymity was appropriate in pretrial states of sexual assault litigation but not during trial").

After the school filed its response, the judge never had the opportunity to consider the briefings. Before the judge considered the court submissions, the Prouts filed an amended complaint using real names, despite the Court's existing order authorizing the family to proceed anonymously.

I do not believe my role as an advocate for the school in this case would compromise by ability to be a fair and impartial judge. Throughout my career, I have focused on advocacy on behalf of victims of crime. Early in my career, I represented a class of victims subjected to unlawful full strip searches after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain. In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. When I served as Attorney General for New Hampshire, I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels

and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

If confirmed as a circuit judge, I appreciate that my role would be very different. I would no longer serve as an advocate, but instead, would be called upon to fairly and impartially apply the law to the facts presented in each case, and ensure that the arguments made by all litigants in criminal and civil cases were heard and considered. But I believe my experiences working with and on behalf of survivors would inform my judicial temperament, and I would ensure that the interests of all parties to a case were fully taken into consideration.

c. Please list the total number of youth-serving organizations (other than the educational institutions identified in (a) and (b)) that you have represented in responding to instances of misconduct experienced by minors.

i. How many of these representations involved instances of sexual misconduct experienced by a minor?

Response: 5

ii. Without identifying any specific organization or individual, please provide a brief summary of the relevant facts and allegations involved in each representation identified in (i).

Response: Organization 1 (Public Matter): I served as an independent, external investigator for a summer camp to investigate a former camper's disclosure of a past sexual assault by a former camp counselor. I interviewed the survivor and former camp counselors, and I reviewed camp records. I wrote a report detailing my factual findings and conclusions. I also assisted the camp in coordinating support services for the survivor, and reporting the past abuse to law enforcement authorities.

Organization 2 (Public Matter): I served as an independent, external investigator for a summer camp to investigate several former camper's disclosure of past sexual abuse by two former camp counselors during the 1980's. I interviewed survivors and former camp counselors, and I reviewed camp records. I wrote a report detailing my factual findings and conclusions. I also assisted the camp in coordinating support services for the survivors, and reporting the abuse to law enforcement authorities.

Organization 3 (Public Matters): I represented a national youth organization in a civil lawsuit filed by one adult survivor who had been sexually assaulted during his childhood by a volunteer youth leader. I represented the same organization in another civil lawsuit filed by a group of survivors who had been sexually assaulted during their childhood by another volunteer youth leader.

Organization 4 (Confidential Matter): I am retained to assist youth organizations when volunteers are arrested for sexual misconduct unrelated to the youth organization's programs. I am retained to help youth organizations review such matters, ensure proper responses to ensure student safety, and assist with terminating the volunteer from the program.

Organization 5 (Confidential Matter): I have represented a child care agency in a confidential proceeding.

iii. **In any representation identified in (c), did a minor survivor of misconduct seek to proceed by pseudonym or other similar protective measure in any related legal proceeding? If yes, please list the name of the case and provide a brief summary of the allegations involved.**

Response: No.

iv. **In any representation identified in (iii), did you seek—through a legal motion, negotiation, or other means—to have the minor's name made public or otherwise shared with any non-party to the case, for any portion of the legal proceedings? If yes, please provide a brief summary of the allegations involved in the case and the rationale for seeking disclosure of the minor's name.**

Response: No.

d. **In relation to any representation identified in (a), (b), or (c), did you or your client employ a crisis communications team or other communications professional related to the case? If yes, please identify:**

Response: Most of the matters responsive to this question involve confidential matters that did not involve a court proceeding. In that regard, they are subject to my ethical duty to protect client confidences. New Hampshire Rules of Professional Conduct 1.6 (Confidentiality of Information), Rule 1.8(b) (Using Information to Disadvantage Clients) and Rule 1.9 (Duties to Former Clients). I also do not know in each case whether my clients may have obtained communications professionals without my knowledge.

i. **The number of such representations in which a crisis communications team or other communications professional was employed.**

Response: It is a matter of public record that St. Paul's School engaged communications professionals. I do not know each occasion when my other clients retained communications professionals. New Hampshire Rules of Professional Conduct 1.6, 1.8(b), and 1.9, as well as the attorney-client privilege, otherwise restrict me from answering this question.

ii. The number of such representations identified in (i) that involved allegations of sexual misconduct committed against a minor.

Response: It is a matter of public record that St. Paul's School engaged communications professionals. I do not know each occasion when my other clients retained communications professionals. New Hampshire Rules of Professional Conduct 1.6, 1.8(b), and 1.9, as well as the attorney-client privilege, otherwise restrict me from answering this question.

iii. The number of such representations identified in (i) in which the crisis communications team or other communications professional was employed to respond to an already-filed civil litigation or criminal case.

Response: It is a matter of public record that St. Paul's School engaged communications professionals. I do not know each occasion when my other clients retained communications professionals. New Hampshire Rules of Professional Conduct 1.6, 1.8(b), and 1.9, as well as the attorney-client privilege, otherwise restrict me from answering this question.

iv. The number of such representations identified in (i) in which the crisis communications team or other communications professional was employed as part of an internal investigation or otherwise prior to the filing of any civil litigation or criminal case.

Response: It is a matter of public record that St. Paul's School engaged communications professionals. I do not know each occasion when my other clients retained communications professionals. New Hampshire Rules of Professional Conduct 1.6, 1.8(b), and 1.9, as well as the attorney-client privilege, otherwise restrict me from answering this question.

2. During your service with the New Hampshire Attorney General's office (including your service as the Attorney General and Deputy Attorney General), were you involved in any cases involving:

a. Allegations of sexual misconduct committed against a minor?

i. If yes, please provide a list of cases with which you were involved, including your role within that case and a brief description of the allegations involved.

Response: I do not recall being involved in any cases involving sexual misconduct against a minor. Those cases are handled by local county attorney's offices, not the Attorney General's Office.

b. A New Hampshire-based primary, secondary, post-secondary, or other type of educational institution?

i. If yes, please provide a list of cases with which you were involved, including your role within that case and a brief description of the allegations involved.

Response: In 2001, I prosecuted the cases of *State v. Tulloch and Parker*, No. 01-S-199, 01-S-200, 01-S-711-12, 01-S-117 (Grafton County Superior Court). Tulloch and Parker murdered two Dartmouth College Professors, Half and Suzanna Zantop. In 2011, as Attorney General, I oversaw the homicide investigation and prosecution of *State v. Mazzaglia* (Strafford County Superior Court). Mazzaglia raped and murdered 19-year-old Elizabeth "Lizzie" Marriott, a student at the University of New Hampshire. In each case, portions of the investigations occurred on the college campuses. In addition to the criminal matters identified above, the Charitable Trusts Unit of the Attorney General's Office provides regulatory oversight of nonprofit organizations, including those educational institutions that are nonprofit organizations.

3. During your service with the New Hampshire Attorney General's office (including your service as the Attorney General and Deputy Attorney General), were you involved in any cases in which a minor sought to proceed in the case using a pseudonym or other similar protective measure?

Response: Not to my knowledge.

a. If you were involved in any such matters identified in (3), did you or any other representative from the New Hampshire Attorney General's office oppose the minor's effort to proceed using a pseudonym or other similar protective measure?

Response: Not to my knowledge.

i. If yes, please provide a brief summary of the allegations involved in the case and the rationale for seeking disclosure of the minor's name.

Response: Please see my answer to No. 3(a) above.

ii. In any of these matters, did the case involve allegations of sexual misconduct committed against a minor?

Response: Please see my answer to No. 3(a) above.

b. If you were involved in any such matters identified in (3), did you or any other representative from the New Hampshire Attorney General's office affirmatively support the minor's effort to proceed using a pseudonym or other similar protective measure?

Response: Please see my answer to No. 3(a) above.

i. If yes, please provide a brief summary of the allegations involved in the case and the rationale for supporting anonymity for the minor.

Response: Please see my answer to No. 3(a) above.

ii. In any of these matters, did the case involve allegations of sexual misconduct committed against a minor?

Response: Please see my answer to No. 3(a) above.

c. If you were involved in any such matters identified in (3), did the court allow the use of a pseudonym or other similar protective measure?

Response: Please see my answer to No. 3(a) above.

i. In any of these matters, did the case involve allegations of sexual misconduct committed against a minor?

Response: Please see my answer to No. 3(a) above.

4. Related to your representation of St. Paul's School, did you have any involvement in the criminal case against Owen Labrie, which was discussed during your confirmation hearing?

a. Please describe your involvement with that criminal case.

Response: On May 30, 2014, Owen Labrie sexually assaulted Ms. Prout, and the State filed criminal charges against Labrie in July 2014. At the time of the sexual assault, I did not personally represent the school, and I had no prior relationship with school administrators. I did not begin representing the school personally until almost one year later in April 2015. My law firm had worked previously with the school for many decades, and in 2015, I was asked to assist the school because prosecutors had contacted the school to obtain educational and health records in support of the prosecution of Labrie. The criminal trial was scheduled in August 2015. I began to serve as a liaison for the school with the prosecutor's office to respond to requests for school records and information needed to prosecute the case.

In the case of *State v. Owen Labrie*, tried to jury verdict in August 2015, the jury convicted Labrie of sexually assaulting Ms. Prout following the jury trial. Because the school was not a party to the criminal case, my involvement in the criminal trial was limited. On the school's behalf, I assisted the judge, prosecutor and defense counsel to coordinate a so-called jury view, or jury trip, to the school at the beginning of the trial. That was my only role in connection with the trial. I also observed the jury trial from the public seating in the back of the courtroom, but I did not participate in the jury trial.

b. Did the victim proceed using a pseudonym for the entirety of that criminal case?

Response: No. The victim did not use a pseudonym at trial. The victim was identified by her real name throughout the course of the criminal trial. Please refer to the case file and written transcripts in the matter of *State v. Owen Labrie*, Docket No. 14-CR-617 (Merrimack, New Hampshire Superior Court).

i. Do you believe there was any prejudicial impact on any party during discovery or other pre-trial proceedings due to the use of a pseudonym by the victim? If yes, please explain.

Response: Please see my answer to No. 4(b) above.

ii. Do you believe there was any prejudicial impact on any party at trial due to the use of a pseudonym by the victim? If yes, please explain.

Response: Please see my answer to No. 4(b) above.

iii. Was there any signal of bias against any party by either the judge or the jury during the pendency of the case due to the use of a pseudonym by the victim? If yes, please explain.

Response: Please see my answer to No. 4(b) above.

c. Was there any time during the pendency of the criminal case in which the victim's name was provided, either publicly or to a subset of interested parties under some form of protective order?

Response: I do not understand what protective order this question may be addressing. On November 13, 2014, nine months before the criminal trial, the Court granted a protective order designating as confidential certain information about the victim's pretrial statements to law enforcement and other personal records, with access limited to the prosecutor and defense counsel. As a nonparty to the criminal case, the school did not have access to the information subject to that protective order. On August 19 and 20, 2015, the Court issued Orders addressing recordings of the proceedings by

news media and others. There are also many sealed Orders issued by the court in the case file. The school and public cannot access the sealed Orders.

i. **If yes, please describe the circumstances of such disclosure.**

Response: Please see my answer to No. 4(c) above.

d. **In your involvement in the criminal case, was there any information necessary to your representation of your client that you were unable to obtain because of the victim's use of a pseudonym?**

Response: Please see my answer to No. 4(b) above. The victim did not use a pseudonym at the criminal trial.

i. **If yes, please explain.**

Please see my answer to No. 4(b) above.

e. **Were you aware of the identity of the victim at the time of the trial in the criminal case?**

Response: Yes. Please see my answer to No. 4(b) above.

f. **At what point during your representation of St. Paul's School did you learn the identity of the victim?**

Response: In April 2015, the prosecutor contacted the school seeking records from the school to prepare the State's case against Owen Labrie. The school retained me at that time to assist in responding to the prosecutor's request for information. I learned the victim's identity at that time.

i. **How did you learn the identity of the victim?**

Response: Please see my answer to No. 4(f) above.

5. **In your representation of St. Paul's School related to both the civil case (D.N.H. Case No 1:16-cv-00225) and the criminal case discussed in the prior question, did you consult with any of the following individuals at any point in the legal proceedings?**

a. **A victim's advocate.**

Response: I am prohibited by the attorney-client privilege and ethical rules from answering this question. I have an ethical duty to protect client confidences. *See* New Hampshire Rules of Professional Conduct 1.6 (Confidentiality of Information), Rule 1.8 (b) (Using Information to Disadvantage Clients) and Rule 1.9 (Duties to Former Clients).

i. **If yes, please identify: the qualifications of such individual, and at what point in the legal proceedings such individual was consulted.**

Response: Please see my answer to No. 5(a) above.

ii. **Did any individual identified in (i) provide advice or other information related to the use of pseudonyms for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

iii. **Did any individual identified in (i) provide advice or other information related to the prevention of retraumatization for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

b. **A psychologist with expertise in child abuse, sexual misconduct, or other forms of trauma experienced by minors.**

Response: Please see my answer to No. 5(a) above.

i. **If yes, please identify: the qualifications of such individual, and at what point in the legal proceedings such individual was consulted.**

Response: Please see my answer to No. 5(a) above.

ii. **Did any individual identified in (i) provide advice or other information related to the use of pseudonyms for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

iii. **Did any individual identified in (i) provide advice or other information related to the prevention of retraumatization for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

c. **A social worker with expertise in child abuse, sexual misconduct, or other forms of trauma experienced by minors.**

Response: Please see my answer to No. 5(a) above.

i. **If yes, please identify: the qualifications of such individual, and at what point in the legal proceedings such individual was consulted.**

Response: Please see my answer to No. 5(a) above.

ii. **Did any individual identified in (i) provide advice or other information related to the use of pseudonyms for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

iii. **Did any individual identified in (i) provide advice or other information related to the prevention of retraumatization for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

d. **Any other individual with significant experience handling issues child abuse, sexual misconduct, or other forms of trauma experienced by minors.**

i. **If yes, please identify: the qualifications of such individual, and at what point in the legal proceedings such individual was consulted.**

Response: Please see my answer to No. 5(a) above.

ii. **Did any individual identified in (i) provide advice or other information related to the use of pseudonyms for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

iii. **Did any individual identified in (i) provide advice or other information related to the prevention of retraumatization for minors in a legal proceeding?**

Response: Please see my answer to No. 5(a) above.

6. **In the civil case against St. Paul's School (D.N.H. Case No 1:16-cv-00225), in your partial objection to plaintiffs' motion to use pseudonyms, you sought the imposition of three restrictions as a condition to your assent to the minor plaintiff's motion to proceed using pseudonyms (Dkt. 14 p.2-3).**

a. **The first restriction you requested the court to impose as a condition of allowing the minor plaintiff to proceed anonymously was: "The parties, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed."**

i. **Please provide a detailed explanation regarding why you believe this condition was necessary to achieve an unbiased outcome in this case.**

Response: I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial, her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

On June 1, 2016, when the Prout family filed the civil lawsuit, they simultaneously filed a motion for leave to proceed under pseudonyms. The Court granted that motion provisionally on June 23, 2016, and it provided the school with an opportunity to respond. In short, the Court had already granted the Prout family's request to proceed anonymously shortly after the Complaint was initially filed and before the school had responded.

The school filed its response on August 11, 2016. In its response, the school acknowledged the Prout family's interest in remaining anonymous at pretrial stages, and the school conditionally agreed to the Prout family's continued use of pseudonyms in accordance with the Court's earlier order. The brief specifically stated: "The school acknowledges that J.D. has an interest in remaining anonymous and does not object to her so proceeding at this time, provided that [certain] conditions are agreed to or ordered."

Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press – in our democracy, and there are established professional conduct rules for lawyers that place limits on what lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

For additional context concerning why the school requested this condition, I note that the law firm retained by the Prouts had recently been admonished in a published opinion by the federal District Court for the District of Columbia for engaging in a similar media campaign while simultaneously seeking the use of a pseudonym for another client who was a sexual assault survivor. *See Doe v. Cabrera*, 307 F.R.D. 1, 9 (D.D.C. 2014) (The Court stated: "counsel for the plaintiff and other attorneys acting on her behalf should have known better than to publicize the case" and "should have remained silent about the case."). In the *Cabrera* case, Judge Walton presided, and he had authorized the sexual assault survivor to proceed using a pseudonym, but he simultaneously placed conditions on the law firm to require the case to be tried only in a court of law. In the *Prout* case, the school provided the federal court in New Hampshire with a copy of Judge Walton's order issued in the earlier *Cabrera* case, which granted the use of a pseudonym but required the law firm to cease "publiciz[ing] the case" outside of court.

The school asked the Court in New Hampshire to order the same relief that Judge Walton had ordered in the District of Columbia. The position the school advanced did not seek to compel the Prout family to give up anonymity at pretrial stages of the case.

In the school's response, the school did request permission to use Ms. Prout's real name in private settings during pretrial discovery stages of the case, and with jurors at any trial. First, the school asked for permission to use Ms. Prout's real name during pretrial depositions that take place in private settings. That request was made for the practical reason that most witnesses to the case were fellow students and school employees who already knew Ms. Prout by her real name, and many of them had already testified in the criminal trial using her real name. To be clear, the school's request to use Ms. Prout's real name in depositions would not have resulted in Ms. Prout's name becoming public because any written transcripts of depositions (no depositions were ever taken) would have been subject to a protective order allowing for confidentiality designations, and thus would not have been subject to public dissemination. As a result, the school's response contemplated that for all pretrial purposes, Ms. Prout's name

would not become public. Second, the school asked to use real names before jurors at trial if the case ever proceeded to trial. That request was consistent with how other trial courts had handled the use of pseudonyms at public trials. *See e.g.*, *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (prejudice from use of pseudonym may increase during trial stage); *E.E.O.C. v. Spoa, LLC*, 2013 WL 5634337, at *3 (D. Md. October 15, 2013) (finding that during ultimate trial "grant of anonymity would implicitly influence the jury"); *Guerilla Girls, Inc. v. Katz*, 224 F.R.D. 571, 575 (S.D.N.Y 2004) (discussing problems with conducting a trial using pseudonyms). And several years after the Prout case settled, the First Circuit issued an opinion that did in fact distinguish between the use of pseudonyms in pretrial phases and during a trial itself. *See Doe v. MIT*, 46 F.4th 61, 73 (2022) (citing authority "explaining why pseudonymity was appropriate in pretrial states of sexual assault litigation but not during trial").

After the school filed its response, the judge never had the opportunity to consider the briefings. Before the judge considered the court submissions, the Prouts filed an amended complaint using real names, despite the Court's existing order authorizing the family to proceed anonymously.

I do not believe my role as an advocate for the school in this case would compromise by ability to be a fair and impartial judge. Throughout my career, I have focused on advocacy on behalf of victims of crime. Early in my career, I represented a class of victims subjected to unlawful full strip searches after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain. In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. When I served as Attorney General for New Hampshire, I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in

hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

If confirmed as a circuit judge, I appreciate that my role would be very different. I would no longer serve as an advocate, but instead, would be called upon to fairly and impartially apply the law to the facts presented in each case, and ensure that the arguments made by all litigants in criminal and civil cases were heard and considered. But I believe my experiences working with and on behalf of survivors would inform my judicial temperament, and I would ensure that the interests of all parties to a case were fully taken into consideration.

ii. At any point in your legal career, have you sought—through either negotiation or a motion or other legal filing in court—to impose a condition on a plaintiff proceeding using a pseudonym or other similar protective measure that was similar to the condition described in (a)? If yes, please provide the name and a brief summary of the allegations for any such case in which either: the plaintiff was a minor, or the allegations involved in the case involved sexual misconduct.

Response: No.

b. The second restriction you requested the court to impose as a condition of allowing the minor plaintiff to proceed anonymously was: "The School shall be entitled to identify Plaintiffs and J.D. during the discovery and fact investigation process to third parties and during depositions, and Plaintiffs shall bear the cost of redacting any documents filed with the Court bearing Plaintiffs' and J.D.'s names or personally identifiable information."

i. Please provide a detailed explanation regarding why you believe this condition was necessary to achieve an unbiased outcome in this case.

Response: Please see my answer to No. 6(a)(i) above.

ii. At any point in your legal career, have you sought—through either negotiation or a motion or other legal filing in court—to impose a condition on a plaintiff proceeding using a pseudonym or other similar protective measure that was similar to the condition described in (b)? If yes, please provide the name and a brief summary of the allegations for any such case in which either: the plaintiff was a minor, or the allegations involved in the case involved sexual misconduct.

Response: No.

iii. **At your confirmation hearing, in response to questioning from Senator Kennedy you stated that St. Paul's School "agreed to allow the family to proceed anonymously at all pre-trial phases of the case." Do you consider discovery, fact investigation, and depositions to be part of the pre-trial phase in a lawsuit?**

Response: During my confirmation hearing, I was referring to pretrial stages of the case taking place in a public courtroom. In the school's response, the school did request permission to use Ms. Prout's real name in private settings during pretrial discovery stages of the case. The school asked for permission to use Ms. Prout's real name during pretrial depositions that take place in private settings. That request was made for the practical reason that most witnesses to the case were fellow students and school employees who already knew Ms. Prout by her real name, and many of them had already testified in the criminal trial using her real name. To be clear, the school's request to use Ms. Prout's real name in depositions would not have resulted in Ms. Prout's name becoming public because any written transcripts of depositions (no depositions were ever taken) would have been subject to a protective order allowing for confidentiality designations, and thus would not have been subject to public dissemination. As a result, the school's response contemplated that for all pretrial purposes, Ms. Prout's name would not become public. I would also note that the parties did, in fact, enter into a standard protective order in the case so that written deposition transcripts could be treated as confidential, and I would note that no depositions were ever taken in this case.

c. **The third restriction you requested the court to impose as a condition of allowing the minor plaintiff to proceed anonymously was: "Plaintiffs and J.D. should not be allowed to proceed under pseudonyms at the trial of this matter."**

i. **Please provide a detailed explanation regarding why you believe this condition was necessary to achieve an unbiased outcome in this case.**

Response: Please see my answer to No. 6(a)(i) above.

ii. **At any point in your legal career, have you sought—through either negotiation or a motion or other legal filing in court—to impose a condition on a plaintiff proceeding using a pseudonym or other similar protective measure that was similar to the condition described in (c)? If yes, please provide the name and a brief summary of the allegations for any such case in which either: the plaintiff was a minor, or the allegations involved in the case involved sexual misconduct.**

Response: No.

7. **In the civil case against St. Paul's School (D.N.H. Case No 1:16-cv-00225), in your partial objection to plaintiffs' motion to use pseudonyms and accompanying memorandum of law, you described a "national media campaign attacking the character, credibility, and reputation of [St. Paul's] School while simultaneously extolling Plaintiffs' own character credibility, and reputation" (Dkt. 14 p.1).**

Response: The school's use of the words "character, credibility and reputation" was a reference to New Hampshire Professional Conduct Rule 3.6, which restricts lawyers from making prejudicial statements outside of the courtroom. The Rule states in relevant part:

(a) A lawyer who is participating. . .in the. . .litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of a public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement referred to in paragraph (a) will more likely than not have such an effect when it refers to a civil matter triable to a jury. . .and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party.

New Hampshire Rule of Professional Conduct 3.6

a. **Please provide a detailed description of the actions that you believe constituted a "national media campaign."**

Response: Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press – in our democracy, and there are established professional conduct rules for lawyers that place limits on what lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to

trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

For additional context concerning why the school requested this condition, I note that the law firm retained by the Prouts had recently been admonished in a published opinion by the federal District Court for the District of Columbia for engaging in a similar media campaign while simultaneously seeking the use of a pseudonym for another client who was a sexual assault survivor. *See Doe v. Cabrera*, 307 F.R.D. 1, 9 (D.D.C. 2014) (The Court stated: "counsel for the plaintiff and other attorneys acting on her behalf should have known better than to publicize the case" and "should have remained silent about the case."). In the *Cabrera* case, Judge Walton presided, and he had authorized the sexual assault survivor to proceed using a pseudonym, but he simultaneously placed conditions on the law firm to require the case to be tried only in a court of law. In the *Prout* case, the school provided the federal court in New Hampshire with a copy of Judge Walton's order issued in the earlier *Cabrera* case, which granted the use of a pseudonym but required the law firm to cease "publiciz[ing] the case" outside of court.

The school asked the Court in New Hampshire to order the same relief that Judge Walton had ordered in the District of Columbia. The position the school advanced did not seek to compel the Prout family to give up anonymity at pretrial stages of the case.

b. Please discuss the factual basis for the argument in your objection that such activity "potentially contaminat[es] the jury pool" (Dkt. 14 p.2).

Response: Please see my citation to New Hampshire Rule of Professional Conduct Rule 3.6 in response to No. 7 above.

c. Do you believe that, due to such activity identified in (a), there would have been no possibility of selecting an impartial jury in this case? If so, please explain the factual basis for such belief.

Response: Please see my citation to New Hampshire Rule of Professional Conduct Rule 3.6 in response to No. 7 above. Rule 3.6 establishes a presumption that certain types of out-of-court statements being made by lawyers participating in the case are "more likely than not" to have a material prejudicial effect on the proceeding. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

8. **In the civil case against St. Paul's School (D.N.H. Case No 1:16-cv-00225), in your partial objection to plaintiffs' motion to use pseudonyms and accompanying memorandum of law, you referenced and attached a number of news items related to the case (Dkt. 14). In your affidavit attached to that motion, you stated that you had "grave concerns about the prejudicial effect of this extensive media coverage on prospective jurors in this case" (Dkt. 14-4 p.7).**

    a. **Please explain the factual basis for the "grave concerns" identified in your affidavit.**

        Response: Please see my answer to No. 7 above.

    b. **You identified several news items in attachments to this motion (*See* Dkt. 14-8 *et al.*).**

        i. **Do you believe this news coverage was of such a significant nature that you would have been unable to effectively scrub the jury pool for individuals who had seen such news coverage? If yes, please explain.**

            Response: Please see my answer to No. 7 above.

        ii. **Were any of the statements made by plaintiffs or their representatives to the press that were included in these attachments to your response to plaintiffs' motion factually false? If so, please identify which statements were factually false.**

            Response: Please see my answer to No. 7 above.

    c. **Do you believe that news coverage of a case prevents a case from being decided impartially? If yes, please explain.**

        i. **If not, why do you believe the prejudicial effect in this particular case was different or unusual when compared to other cases that receive significant media attention?**

            Response: Please see my answer to No. 7 above.

    d. **In your motion, you stated that you had been unable to reach agreement with the plaintiffs as to the conditions necessary for you to assent to the plaintiff proceeding using pseudonyms (Dkt. 14 p.3). Please describe the efforts made to achieve consensus with the plaintiffs on this topic, including any relevant proposals made by either party.**

        Response: I am unable to discuss some aspects of the case because it resolved pursuant to a confidential settlement agreement involving confidential discussions, and I cannot address matters protected by the attorney client privilege. As soon as the

lawsuit was filed, the school, through its counsel, advanced immediate discussions with the lawyers for the plaintiffs to address the school's interest in ensuring that the court would be able to empanel an impartial jury that would not be unduly influenced by comments on national broadcast shows made by attorneys for the Prout family during the pendency of the suit against the school.

9. **At your confirmation hearing, on several occasions in response to questioning regarding the civil case against St. Paul's School, you stated that the school wanted the case to be "tried in a court of law and not in the media."**

   a. **Please explain what you meant by that statement.**

      Response: I meant that the lawyers would argue the case to the judge in a courtroom.

   b. **Do you believe that parties to a legal proceeding should never make any statements to the media regarding an ongoing lawsuit?**

      Response: No, many statements by lawyers to the media are permissible and advance the goals of free speech, freedom of the press and an open and accountable judicial system. However, the right to an impartial jury is fundamental to our system of justice under the Sixth Amendment. That is why lawyers have ethical restrictions on what statements they can make about parties to a case, as outlined in New Hampshire Professional Conduct Rule 3.6.

      i. **If no, under what conditions do you believe it is appropriate for parties to make statements to the media regarding an ongoing lawsuit?**

         Response: New Hampshire Professional Conduct Rule 3.6(c) states in relevant part: "a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the person involved; (2) information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; and (6) a warning of danger about the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to the individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (a) the identity, residence, occupation and family status of the victim and the accused; (b) if the accused has not been apprehended, information necessary to aid in the apprehension of that person; (c) the fact, time and place of arrest; and (d) the identity of investigating and arresting officers or agencies and the length of the investigation."

   c. **In your representations over the course of your legal career, have you ever personally made a statement to a news organization or other media outlet**

regarding an ongoing case or investigation in which you were serving as an attorney?

Response: Yes.

i. **If yes, please list each statement you made to a news organization regarding the case or investigation, and provide a brief summary of the parties and allegations involved in the case.**

Response: Please refer to Section 12(e) of my Senate Judiciary Questionnaire, where responsive information has already been provided to the Senate Judiciary Committee.

10. **At any point before or during the pendency of the criminal case against Owen Labrie or otherwise prior to the time of the filing of the initial complaint in the civil case against St. Paul's School (D.N.H. Case No 1:16-cv-00225), did any news report or other media item publicly name the identity of the minor victim?**

Response: I do not recall.

a. **If yes, please list the news reports or other media items in which the minor victim was publicly identified.**

Response: Please see my answer to No. 10 above.

b. **Prior to filing your partial objection to plaintiff's motion to use pseudonyms (Dkt. 14), did the minor victim in the case personally (not through an agent) make any direct comment in the press regarding:**

Response: Please see my answer to No. 10 above.

i. **The civil case against St. Paul's School?**

Response: Please see my answer to No. 10 above.

ii. **The criminal case against Owen Labrie?**

Response: Please see my answer to No. 10 above.

iii. **The assault she experienced underlying the cases in (i) and (ii)?**

Response: Please see my answer to No. 10 above.

11. **At your confirmation hearing, in response to questioning from Senator Hirono, you stated that "the importance of anonymity is multifaceted. First, using the name of a sexual assault victim has the potential to both either physically place that victim in**

danger or potentially result in serious psychological harm. There are also considerations that take into effect whether others similarly situated might not feel comfortable using the court system for fear that their names would be used."

a. **Please describe where, in your partial objection to plaintiffs' motion to use pseudonyms and accompanying memorandum of law in the civil case against St. Paul's School (D.N.H. Case No 1:16-cv-00225), you discussed:**

   i. **The potential physical harm to the plaintiff victim resulting from disclosure of her identity.**

   Response: As I indicated earlier, I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial, her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

   Throughout its brief, the school repeatedly acknowledged Ms. Prout's interest in use of a pseudonym. The brief stated: "The school acknowledges that J.D. has an interest in remaining anonymous and does not object to her so proceeding at this time, provided that [certain] conditions are agreed to or ordered." The brief also stated: "Thus, recognizing J.D.'s interest in remaining anonymous at this point in the proceedings, the School conditionally assents to the Plaintiffs motion, provided that Plaintiffs agree to the reasonable measures set forth herein." The brief noted "the School's acknowledgement that J.D. has an interest in remaining anonymous." The brief also stated: "To be clear, the [s]chool understands that J.D. has a significant desire in maintaining anonymity at this time." For this reason, the school stated in the motion that it would forego an analysis of the various factors to be weighed regarding the use of pseudonyms because it was acknowledging Ms. Prout's interest in proceeding anonymously.

   ii. **The potential psychological harm to the plaintiff victim resulting from disclosure of her identity.**

Response: Please see my answer to No. 11(a)(i) above.

iii. **The potential chilling effect on other similarly situated victims who might feel uncomfortable using the court system for fear that their names would be publicized, if the plaintiff victim were required to disclose her identity.**

Response: Please see my answer to No. 11(a)(i) above.

b. Please describe your understanding of:

i. **The types of potential physical harm to a minor victim of sexual assault that may arise from disclosure of their identity in public as a result of legal proceedings.**

Response: Sexual assault survivors risk potential physical harm from their attacker, from third parties, and in some cases, may be at risk for self-harm. Sexual assault survivors can experience serious physical responses and other adverse health effects from disclosure of sexual assault. Some survivors can develop harmful coping mechanisms that can affect them physically.

ii. **The types of potential psychological harm to a minor victim of sexual assault that may arise from disclosure of their identity in public as a result of legal proceedings.**

Response: Survivors experience post-traumatic stress disorder at very high rates, particularly women and youth. They are also at risk to develop a number of mental health issues that surface, including depression, flashbacks, eating and sleeping disorders, suicidal ideation, withdrawal from loved ones, distrust and fear of intimacy, among others. They can experience re-traumatization caused by disclosure of their identity. The Centers for Disease Control 2023 Youth Risk Behavior Survey focuses on how sexual violence impacts youth, with more significant adverse effects experienced by females.

iii. **Why there might be a potential chilling effect on the use of the court system by other similarly situated victims as a result of seeing the identity of a minor victim of sexual assault disclosed in public as a result of legal proceedings.**

Response: Some women may fear coming forward to seek justice if they believe their identities may be revealed in court.

12. Please describe the legal precedent in the First Circuit related to a minor victim of sexual misconduct proceeding using pseudonyms or other similar protective measure in litigation, specifically:

a. Please describe your understanding of such precedent as that precedent existed at the time of the filing of your partial objection to plaintiffs' motion to use pseudonyms in the civil case against St. Paul's School (D.N.H. Case No 1:16-cv-00225).

Response: At the time of the civil case, the First Circuit had not adopted a standard for review of motions for the use of pseudonyms. For that reason, the parties cited case law to the court from analogous jurisdictions that had developed standards.

b. Please describe your understanding of the holding related to the use of pseudonyms in the 2022 case from the First Circuit, *Doe v. Massachusetts Institute of Technology* (No. 22-1056).

Response: In *Doe v. MIT*, 46 F.4th 61 (1st Cir. 2022), the First Circuit adopted a "totality of the circumstances" standard to determine when the use of pseudonyms should be allowed. Under the standard, "district courts enjoy broad discretion to identify the relevant circumstances in each case and to strike the appropriate balance between the public and private interests." *Id.* at 70. The Court identified four general categories of "exceptional cases" in which party anonymity will ordinarily be warranted: (1) "when the would-be Doe reasonably fears that coming out of the shadows will cause him unusually severe harm (either physical or psychological)"; (2) when "identifying the would-be Doe would harm 'innocent non-parties'"; (3) when "anonymity is necessary to forestall a chilling effect on future litigants who may be similarly situated"; and (4) "suits bound up with a prior proceeding made confidential by law." *Id.* at 71-72 (citations omitted).

The First Circuit noted that "the balance between a party's need for anonymity and the interests weighing in favor of open judicial proceedings may change as the litigation progresses" and it cited to an analogous decision "explaining why pseudonymity was appropriate in pretrial stages of sexual assault litigation but not during trial." *Id.* at 73 (citations omitted). The Court also noted that there is "no per se rule barring the use of pseudonyms at trial." *Id.* at 74. The Court also ruled that lower court decisions denying a motion to use pseudonyms will be subject to the collateral order doctrine to ensure that an order denying a motion to proceed by pseudonym is immediately appealable. *Id.* at 65.

If confirmed to serve as a circuit court judge, I will faithfully follow this precedent and applicable Supreme Court precedent regarding the use of pseudonyms.

c. If the *Doe* case discussed in (b) had been decided prior to your litigation of the civil case against St. Paul's School, would you have filed the partial objection to plaintiff's motion to use pseudonyms in a similar form?

Response: I would have reviewed the standard with the school so that the school understood the applicable standard. I cannot speculate in hindsight regarding how the *Doe v. MIT* standard would have impacted the school's approach to the case because the standard did not exist at the time.

13. Please discuss what portion of the Federal Rules of Civil Procedure or other legal precedent provides for the filing of a response motion that is styled as a "conditional assent."

Response: Federal Rules of Civil Procedure 7 and 11 govern the filing of motions.

a. Please list all cases in which you have filed a response to a motion that was styled as a "partial objection and conditional assent" during your career as a lawyer. For all such cases, please list the case name and provide a brief summary of the allegations involved.

Response: I am unable to list all cases in which I have filed such a motion during my nearly 30-year legal career, as I do not have access to all of my case files during that time period. In my experience, filing partial objections or assenting to relief subject to conditions is commonplace in litigated matters.

b. At your confirmation hearing, Senator Cornyn asked about the conditional nature of your motion in the St. Paul's School civil case, stating: "If the court had not ruled on that portion of the motion with regard to try[ing] . . . the case [in] the media . . . would you have withdrawn your assent to proceeding anonymously?" You responded that your "expectation is it that if the school did not get the conditional relief that it wanted, given the age of the minor, [your] expectation is that the case would have proceeded with her using anonymous names."

i. Please describe the legal and factual basis for your stated expectation that the minor would have been allowed to proceed using pseudonyms if the conditional relief you sought was not adopted by the court.

Response: On June 1, 2016, when the Prout family filed the civil lawsuit, they simultaneously filed a motion for leave to proceed under pseudonyms. The Court granted that motion provisionally on June 23, 2016, and it provided the school with an opportunity to respond. In short, the Court had already granted the Prout family's request to proceed anonymously shortly after the Complaint was initially filed and before the school had responded.

The school filed its response on August 11, 2016. In its response, the school acknowledged the Prout family's interest in remaining anonymous at pretrial stages, and the school conditionally agreed to the Prout family's continued use of pseudonyms in accordance with the Court's earlier order. The brief specifically stated: "The school acknowledges that J.D. has an interest in

remaining anonymous and does not object to her so proceeding at this time provided that [certain] conditions are agreed to or ordered."

As stated above, the court had already granted the Prout family's request to proceed anonymously shortly after the complaint was initially filed and before the school had responded. Accordingly, and because the school had only sought conditional relief, the only way the Prout family would have lost the right to proceed using pseudonyms was if the Court *sua sponte* reversed its prior Order allowing the use pseudonyms, which relief neither party had requested.

ii. **Given this stated expectation that the minor would have been allowed to proceed using pseudonyms if the conditional relief you sought was not adopted by the court, please explain why you chose to file a "conditional assent" rather than simply assenting to the plaintiffs' motion.**

Response: Please see my answer to Nos. 6 & 7 above.

14. The Senate Judiciary Committee received a public letter from Ms. Chessy Prout regarding your nomination.

a. In this letter, Ms. Prout wrote: "When survivors of sexual harassment, assault, and abuse come forward to seek some semblance of justice, there is an army of attorneys with a tried and true playbook of tactics to discredit, pressure, and manipulate survivors and victims into silence."

i. Do you agree or disagree with this statement?

Response: No attorney should use tactics to discredit, pressure or manipulate survivors. Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press – in our democracy, and there are established professional conduct rules for lawyers that place limits on what

lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

ii. Please explain your thoughts on this statement.

Response: I believe that sexual assault cases are some of the most challenging cases in our justice system. I also believe that sexual assaults represent one of the most insidious problems in our society. I recognize that it is extremely difficult for survivors of sexual assault to seek redress in criminal and civil courts, including because of the risk of re-traumatization. Yet, our system of justice also depends on all parties to a proceeding advancing arguments to the court so that fair and impartial decisions can be rendered by judges. If confirmed to serve as a Circuit judge, I recognize that my role as a judge would be very different than the role I have played as an advocate for clients.

b. In the letter, Ms. Prout also stated that, prior to your filing of the motion styled "Defendant's Partial Objection and Conditional Assent to Plaintiffs' Motion for Leave to Proceed Under Pseudonyms," Ms. Prout had received "anonymous death and rape threats on the internet" related to her assault while at St. Paul's School and the ensuing litigation.

Response: I was generally aware of internet postings made around the time of the criminal trial. As I recall, those postings made in the Summer and Fall of 2015 were despicable and denigrating to Ms. Prout and her family. She and her family should not have had to endure those postings, which contain threats and vile language. I do not recall when I learned of any specific postings in relation to when the school's response was filed in August of 2016.

i. At the time you filed this motion, were you aware that Ms. Prout had received death and rape threats on the internet related to her assault while at St. Paul's School and the ensuing litigation? If yes, please explain the scope of your knowledge related to such threats.

Response: Please refer to my answer to No. 14(b).

ii. At the time you filed this motion, were you aware of any other threats faced by Ms. Prout related to her assault while at St. Paul's School and the ensuing litigation? If yes, please explain the scope of your knowledge related to such threats.

Response: Please refer to my answer to No. 14(b).

iii. **Prior to filing this motion, were you in contact with Ms. Prout, her family, or other representatives to ascertain whether she had received any threats to her safety or well-being or had other related reasons for seeking to proceed under pseudonyms?**

Response: My firm had many communications with Ms. Prout's lawyers in connection with the civil case. The contents of many of those discussions remain confidential because they occurred in confidential settings. Please refer to my answer to No. 14(b).

iv. **During your legal career, have you ever encountered any minor who was the victim of sexual misconduct or child abuse who had received death or rape threats as a result of their coming forward to report an instance of misconduct? If yes, please describe the facts and allegations involved in the case or investigation, your role in the case or investigation, the type of threat involved to the victim, and how you came to have knowledge of such threat to the victim.**

Response. Not to the best of my recollection.

15. **The Senate Judiciary Committee received a public letter regarding your nomination from Ms. Sandra Matheson, who previously served as Director of the New Hampshire Attorney General's Office of Victim/Witness Assistance.**

a. **In this letter, Ms. Matheson wrote of her collaboration with you during your time as Deputy Attorney General and Attorney General in New Hampshire. She said: "I worked with him to enhance the state's systemic response to violent crime and to create a trauma-informed multidisciplinary statewide initiative, through the development of legislation, standardized protocols, policies and professional training."**

i. **Please define what constitutes "trauma-informed" work with victims of crime.**

Response: I understand "trauma-informed" work to mean providing services to individuals who have experienced trauma that is informed by their traumatic experience, recognizes the presence of symptoms of trauma, and acknowledges the role that trauma has played in their lives.

ii. **Please describe your understanding of the tactics, responses, or tools an attorney can use in approaching a case to ensure that a response to crime victims is "trauma-informed."**

Response: I have received Title IX training on how lawyers can be mindful of trauma-informed approaches when interacting with survivors experiencing trauma caused by sexual violence. When I have represented a victim suffering from trauma, I have consulted regularly with trauma-informed mental health counselors to ensure that legal services and mental health services are coordinated. Lawsuits often exacerbate traumatic experiences for those suffering from trauma, and such suits carry a risk of re-traumatization. Regarding the lawyer-client relationship, I try to help clients experiencing trauma by actively engaging them in the legal case, allowing them to set boundaries for engagement and sharing information, understanding that processing information can be difficult for some, showing empathy when trauma impairs their self-expression, and building external supports for them outside of the case.

iii. How, in your service in the New Hampshire Attorney General's office, did you ensure that your advocacy as a lawyer was "trauma-informed"?

Response: I collaborated closely with advocates and professionals trained in trauma-informed services, and I convened state leaders with multi-disciplinary backgrounds to help strengthen the State's responses to domestic and sexual violence.

Throughout my career, I have focused on advocacy on behalf of victims of crime. Early in my career, I represented a class of victims subjected to unlawful full strip searches after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain. In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. When I served as Attorney General for New Hampshire, I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct

financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

iv. How, in your work in private practice, did you ensure that your advocacy as a lawyer was "trauma-informed"?

Response: See my response to No. 15(a)(ii) above.

v. Please describe your work related to the "trauma-informed multidisciplinary statewide initiative" referenced in Ms. Matheson's letter.

Response: I do not know whether Ms. Matheson was referencing a particular initiative, or discussing our overall collaborative efforts to advance policies and procedures to combat sexual violence. Some of the initiatives on which we collaborated include: I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

b. In this letter, Ms. Matheson also said that you "led the effort to create a statewide network of Child Advocacy Centers to strengthen the state's services and support for children victimized by child sexual abuse."

i. Please describe your work related to the statewide network of Child Advocacy Centers referenced in Ms. Matheson's letter.

Response: From 2009 to 2013, I worked closely with and served as a nonvoting board member for the Granite State Children's Alliance, which oversees the child advocacy centers in New Hampshire. Child advocacy centers provide multi-disciplinary services to child victims who need to be interviewed following sexual assaults and other crimes. At that time, due to the recession, several of the child advocacy centers in our State were struggling financially and risked closure. I helped lead an effort with the Granite State Children's Alliance Board of Directors to merge several of the centers to save them from closure. I also worked closely with the centers to advance best practices and quality assurance reviews of the services being provided. The Granite State Children's Alliance honored me with a Hands of Hope award "in recognition of exemplary service and dedication to providing quality services to child victims of crime."

c. In this letter, Ms. Matheson also said that your work "was critical to the creation of the state's first network of Sexual Assault Response Teams, designed to ensure a confidential, victim-centered approach to adult victims of sexual assault."

i. Please define what constitutes "victim-centered" work with survivors of sexual assault.

Response: I understand Ms. Matheson to be referencing a "victim-centered" approach that takes into account the individual needs of victims, tailors system responses accordingly, prioritizes the role of victim advocates in our courts and communities to ensure the availability of these critical services, seeks to incorporate victim input into criminal justice and policy decision-making, and engages directly with victims to listen, avoid re-traumatization, and properly focus on their safety, rights, well-being and expressed needs. More specifically, the Sexual Assault Response Teams initiative was a collaborative effort that I led to establish multi-disciplinary response teams to address sexual assault in rural communities, often challenged by geographical and socio-economic disadvantages in providing robust support services.

ii. Please describe your understanding of the tactics, responses, or tools an attorney can use in approaching a case to ensure that a response to survivors of sexual assault is "victim-centered."

Response: Please reference my responses to Nos. 15(a)(2) and 15(c)(i) above.

iii. **How, in your service in the New Hampshire Attorney General's office, did you ensure that your advocacy as a lawyer was "victim-centered"?**

Response: Please reference my response to 15(a)(2) and 15(c)(i) above.

iv. **How, in your work in private practice, did you ensure that your advocacy as a lawyer was "victim-centered"?**

Response: Please reference my response to 15(a)(2) above.

v. **Please describe your work related to the Sexual Assault Response Teams referenced in Ms. Matheson's letter.**

Response: Please reference my response to 15(a)(2) and 15(c)(i) above.

16. In the case of *Ayotte v. Planned Parenthood* (No. 04-1144), you were listed as a counsel for the petitioner in two briefs filed with the U.S. Supreme Court.

a. What was your role in that case?

Response: I served as Deputy Attorney General when the State filed its petition for writ of certiorari and appellate briefs. I was asked to serve in that role by then-Attorney General Kelly Ayotte. My job as the State's sole Deputy Attorney General was to help the Attorney General manage all of the Attorney General Office's responsibilities and functions. I did not write the petition or the briefs filed at the Supreme Court in *Ayotte v. Planned Parenthood*. I did not represent the State of New Hampshire at the oral argument before the Supreme Court. I had no role in the appeal before the First Court of Appeals, and I did not represent the State of New Hampshire in the underlying civil lawsuit filed in the United States District Court for the District of New Hampshire. When I served as Deputy Attorney General, it was generally my practice to have discussions with the Attorney General about cases in which the Office represented the State of New Hampshire, including this case. It was also generally my practice to have discussions with the attorneys assigned to write the briefs in those cases. However, given my extremely limited involvement in *Ayotte v. Planned Parenthood*, I cannot specifically recall any specific discussions regarding that case nineteen years after it was litigated.

b. Were you involved in the decision regarding whether to seek review by the U.S. Supreme Court in that case? If yes, please explain the scope of your involvement.

Response: No.

c. Did you write all or any portion of either brief in that case? If yes, please explain the scope of your involvement.

Response: No.

d. Were you involved in discussions regarding which arguments to present or how to structure the arguments in either brief? If yes, please explain the scope of your involvement.

Response: I did not participate directly in formulating arguments because I was not assigned to the underlying case being appealed, and I did not assist in drafting the brief. Although I cannot recall any specific discussions nineteen years later, I likely had discussions with the Attorney General about the brief because I served as the State's Deputy Attorney General at that time, and I likely had discussions with the attorneys who drafted the brief.

e. Did you provide substantive feedback on any draft of either brief prior to filing? If yes, please explain the scope of your involvement.

Response: I read final versions of the brief before it was filed. I do not recall whether I offered any substantive feedback.

f. Did you provide any technical or other feedback on any draft of either brief prior to filing? If yes, please explain the scope of your involvement.

Response: Please see my answers to Nos. 16(a), (d) and (e) above.

g. Did you read or otherwise review any draft of either brief prior to foiling? If yes, please explain the scope of your involvement.

Response: Please see my answers to Nos. 16(a), (d) and (e) above.

h. Please describe the process through which you were assigned or volunteered to participate in the filing of the two briefs in that case.

Response: I was not assigned to participate in the filing of the two briefs, nor did I volunteer to do so. Counsel of record for the State of New Hampshire in the case filed the briefs.

i. Did you personally consult with any representative from the office of the Governor of New Hampshire or any member of the New Hampshire Legislature (or their representative) regarding this case before the filing of either brief?

Response: Not that I recall.

17. During your time as the Deputy Attorney General of New Hampshire, were you listed as an attorney on all briefs and petitions filed with the U.S. Supreme Court by the New Hampshire Attorney General's office?

Response: No.

a. Please list all briefs and petitions that were filed with the U.S. Supreme Court by the New Hampshire Attorney General's office during the duration of your service as the Deputy Attorney General, even if you had no personal involvement in the brief or petition.

Response: The Attorney General on behalf of the State of New Hampshire was party to one case argued before the Supreme Court:

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006)

The State of New Hampshire joined other States as a signatory on the following amicus briefs filed with the Supreme Court:

Burke v. Wachovia Bank, N.A., 550 U.S. 913 (2007) (amicus brief of 40 states including New Hampshire in support of petitioner, 2005 WL 2988236) (cert. denied)

Bringham City v. Stuart, 547 U.S. 398 (2006) (amicus brief of 16 states including New Hampshire in support of petitioner, 2005 WL 3156822)

Beretta U.S.A. Corp. v. District of Columbia, 546 U.S. 928 (2005) (amicus brief of 12 states including New Hampshire in support of petitioners, 2005 WL 2034939) (cert. denied)

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (amicus brief of 40 states including New Hampshire in support of respondents, 2005 WL 2477361)

Central Virginia Community College v. Katz, 546 U.S. 359 (2006) (amicus brief of 49 states including New Hampshire in support of petitioners, 2005 WL 539741)

California v. Dynegy Inc., 544 U.S. 974 (2005) (amicus brief of 19 states including New Hampshire in support of petitioner, 2005 WL 669696) (cert. denied)

The State of New Hampshire filed the following briefs in support of petitions for writ of certiorari:

Ayotte v. Planned Parenthood, 546 U.S. 320 (2006) (petition for writ of certiorari, 2005 WL 474024)

Cattell v. White, 546 U.S. 972 (2005) (petition for writ of certiorari, 2005 WL 1527636) (cert. denied)

b. From the list in (a), please identify any briefs or petitions filed with the U.S. Supreme Court for which you were not listed as an attorney on the filing.

Response: *Burke v. Wachovia Bank, N.A.*, 550 U.S. 913 (2007) (amicus brief of 40 states including New Hampshire in support of petitioner, 2005 WL 2988236) (cert. denied)

Bringham City v. Stuart, 547 U.S. 398 (2006) (amicus brief of 16 states including New Hampshire in support of petitioner, 2005 WL 3156822)

Beretta U.S.A. Corp. v. District of Columbia, 546 U.S. 928 (2005) (amicus brief of 12 states including New Hampshire in support of petitioners, 2005 WL 2034939) (cert. denied)

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Cattell v. White, 546 U.S. 972 (2005) (petition for writ of certiorari, 2005 WL 1527636) (cert. denied)

c. From the list in (a), please identify any briefs or petitions filed with the U.S. Supreme Court for which you were listed as an attorney on the filing, and in which you were identified as the Deputy Attorney General.

Response: *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006) (petition for writ of certiorari, 2005 WL 474024)

18. During your time as the Deputy Attorney General of New Hampshire, please discuss the consultation and decision process used in the New Hampshire Attorney General's office to determine:

a. Whether to file a brief or petition with the U.S. Supreme Court on behalf of the office.

Response: For Supreme Court briefs, the Attorney General decided whether to file the brief, receiving input from the lawyers who handled the case being appealed. For the one petition for writ of certiorari in the criminal case, the Attorney General would have received input from the Chief of the Appellate Unit in the Criminal Bureau and the attorneys assigned to the case. I do not recall who in the office was assigned in

2004 as a liaison to the National Association of Attorneys regarding petitions for writs of certiorari supported or opposed by groups of States Attorneys General.

b. Which attorneys were listed on a brief or petition to the U.S. Supreme Court.

Response: For cases argued at the Supreme Court, the Attorney General, Deputy Attorney General, an Associate Attorney General and Assistant Attorneys General in the Civil Bureau were listed on the brief. For the petition for writ of certiorari filed by the State of New Hampshire in one criminal case, the Attorney General, a Senior Assistant Attorney General and an Assistant Attorney General in the Criminal Bureau were listed on the brief. For amicus briefs that were signed by the State of New Hampshire joining other States, the Attorney General was listed on the brief.

c. Which legal arguments were made in a brief or petition to the U.S. Supreme Court.

Response: For a brief, decisions about legal arguments were made by the attorneys assigned to write the brief, in consultation with the Attorney General. For a petition for writ of certiorari, decisions about legal arguments were made by the attorneys assigned to file the petition, in consultation with the Attorney General. For briefs filed by groups of States Attorneys General, decisions about legal arguments were made by attorneys in whatever State initially drafted the petition and solicited other State Attorneys General to join as signatories.

Senator Amy Klobuchar
Senate Judiciary Committee Nominations Hearing
Written Questions for Michael Delaney
February 15, 2023 Questions for the Record

1. **In 2016, you represented St. Paul's School in a civil suit arising out of a sexual assault incident involving a student. During the course of the litigation, you filed a motion with respect to the victim's request that she be allowed to use a pseudonym.**

   a. **Although the court did not end up ruling on the motion, what were the legal issues involved that the trial court would have considered?**

   Response: Thank you for the opportunity to address the motion I filed on behalf of my client, St. Paul's School.

   I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial, her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

   On June 1, 2016, when the Prout family filed the civil lawsuit, they simultaneously filed a motion for leave to proceed under pseudonyms. The Court granted that motion provisionally on June 23, 2016, and it provided the school with an opportunity to respond. In short, the Court had already granted the Prout family's request to proceed anonymously shortly after the Complaint was initially filed and before the school had responded.

   The school filed its response on August 11, 2016. In its response, the school acknowledged the Prout family's interest in remaining anonymous at pretrial stages, and the school conditionally agreed to the Prout family's continued use of pseudonyms in accordance with the Court's earlier order. The brief specifically stated: "The school acknowledges that J.D. has an interest in remaining anonymous and does not object to her so proceeding at this time, provided that [certain] conditions are agreed to or ordered."

   Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national

broadcast shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press – in our democracy, and there are established professional conduct rules for lawyers that place limits on what lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

For additional context concerning why the school requested this condition, I note that the law firm retained by the Prouts had recently been admonished in a published opinion by the federal District Court for the District of Columbia for engaging in a similar media campaign while simultaneously seeking the use of a pseudonym for another client who was a sexual assault survivor. *See Doe v. Cabrera*, 307 F.R.D. 1, 9 (D.D.C. 2014) (The Court stated: "counsel for the plaintiff and other attorneys acting on her behalf should have known better than to publicize the case" and "should have remained silent about the case."). In the *Cabrera* case, Judge Walton presided, and he had authorized the sexual assault survivor to proceed using a pseudonym, but he simultaneously placed conditions on the law firm to require the case to be tried only in a court of law. In the *Prout* case, the school provided the federal court in New Hampshire with a copy of Judge Walton's order issued in the earlier *Cabrera* case, which granted the use of a pseudonym but required the law firm to cease "publiciz[ing] the case" outside of court.

The school asked the Court in New Hampshire to order the same relief that Judge Walton had ordered in the District of Columbia. The position the school advanced did not seek to compel the Prout family to give up anonymity at pretrial stages of the case.

In the school's response, the school did request permission to use Ms. Prout's real name in private settings during pretrial discovery stages of the case, and with jurors at any trial. First, the school asked for permission to use Ms. Prout's real name during pretrial depositions that take place in private settings. That request was made for the practical reason that most witnesses to the case were fellow students and school employees who already knew Ms. Prout by her real name, and many of them had already testified in the criminal trial using her real name. To be clear, the school's request to use Ms. Prout's real name in depositions would not have resulted in Ms. Prout's name becoming public because any written transcripts of depositions (no depositions were ever taken) would have been subject to a protective order allowing for confidentiality designations, and thus would not have been subject to

public dissemination. As a result, the school's response contemplated that for all pretrial purposes, Ms. Prout's name would not become public. Second, the school asked to use real names before jurors at trial if the case ever proceeded to trial. That request was consistent with how other trial courts had handled the use of pseudonyms at public trials. *See e.g.*, *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (prejudice from use of pseudonym may increase during trial stage); *E.E.O.C. v. Spoa, LLC*, 2013 WL 5634337, at *3 (D. Md. October 15, 2013) (finding that during ultimate trial "grant of anonymity would implicitly influence the jury"); *Guerilla Girls, Inc. v. Katz*, 224 F.R.D. 571, 575 (S.D.N.Y 2004) (discussing problems with conducting a trial using pseudonyms). And several years after the Prout case settled, the First Circuit issued an opinion that did in fact distinguish between the use of pseudonyms in pretrial phases and during a trial itself. *See Doe v. MIT*, 46 F.4th 61, 73 (2022) (citing authority "explaining why pseudonymity was appropriate in pretrial states of sexual assault litigation but not during trial").

After the school filed its response, the judge never had the opportunity to consider the briefings. Before the judge considered the court submissions, the Prouts filed an amended complaint using real names, despite the Court's existing order authorizing the family to proceed anonymously.

I do not believe my role as an advocate for the school in this case would compromise by ability to be a fair and impartial judge. Throughout my career, I have focused on advocacy on behalf of victims of crime. Early in my career, I represented a class of victims subjected to unlawful full strip searches after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain. In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. When I served as Attorney General for New Hampshire, I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws

and regulations play a critical role in addressing the needs of victims and survivors.

If confirmed as a circuit judge, I appreciate that my role would be very different. I would no longer serve as an advocate, but instead, would be called upon to fairly and impartially apply the law to the facts presented in each case, and ensure that the arguments made by all litigants in criminal and civil cases were heard and considered. But I believe my experiences working with and on behalf of survivors would inform my judicial temperament, and I would ensure that the interests of all parties to a case were fully taken into consideration.

2. During the hearing, you briefly discussed a new precedent that was adopted by the First Circuit in 2022 on the issue of anonymity, which you noted you would be obliged to follow if you are confirmed.

a. How does the new First Circuit precedent instruct trial courts to consider requests for anonymity?

Response: In *Doe v. MIT*, 46 F.4th 61 (1st Cir. 2022), the First Circuit adopted a "totality of the circumstances" standard to determine when the use of pseudonyms should be allowed. Under the standard, "district courts enjoy broad discretion to identify the relevant circumstances in each case and to strike the appropriate balance between the public and private interests." *Id.* at 70. The Court identified four general categories of "exceptional cases" in which party anonymity will ordinarily be warranted: (1) "when the would-be Doe reasonably fears that coming out of the shadows will cause him unusually severe harm (either physical or psychological)"; (2) when "identifying the would-be Doe would harm 'innocent non-parties'"; (3) when "anonymity is necessary to forestall a chilling effect on future litigants who may be similarly situated"; and (4) "suits bound up with a prior proceeding made confidential by law." *Id.* at 71-72 (citations omitted).

The First Circuit noted that "the balance between a party's need for anonymity and the interests weighing in favor of open judicial proceedings may change as the litigation progresses" and it cited to an analogous decision "explaining why pseudonymity was appropriate in pretrial stages of sexual assault litigation but not during trial." *Id.* at 73 (citations omitted). The Court also noted that there is "no per se rule barring the use of pseudonyms at trial." *Id.* at 74. The Court also ruled that lower court decisions denying a motion to use pseudonyms will be subject to the collateral order doctrine to ensure that an order denying a motion to proceed by pseudonym is immediately appealable. *Id.* at 65.

If confirmed to serve as a circuit court judge, I will faithfully follow this precedent and applicable Supreme Court precedent regarding the use of pseudonyms.

3. During the hearing you asked members of the Committee to consider the full breadth of your 30 year career when evaluating your nomination.

a. What opportunities have you had to work with victims and survivors, and how have those experiences impacted your approach to the law?

Response: Early in my career, in the case of *Moser v. Anderson*, No. 93-634-B (D.N.H. November 25, 1996), I represented a class of plaintiffs in a § 1983 civil

rights class action litigation against law enforcement and corrections officials. My clients had been subjected to non-discretionary government policies in New Hampshire requiring routine full strip searches of all detainees after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain.

In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. Many of those cases involved the most brutal domestic and sexual assault cases in the criminal justice system. Part of my prosecutorial role was to ensure that the voices of survivors were elevated and heard by sentencing judges rending fair and impartial sentencing decisions. I learned through those experiences how trauma impacts victims and survivors, the unique burdens that our adversarial system of justice places on survivors attending court, and the real limitations on the ability of our justice system to address the harm caused to those most personally impacted by needless violence.

I took those experiences with me and drew from them when I served as Attorney General for New Hampshire. I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

If confirmed as a circuit judge, I appreciate that my role would be very different. I would no longer serve as an advocate, but instead, would be called upon to fairly and impartially apply the law to the facts presented in each case, and ensure that the arguments made by all litigants in criminal and civil cases were heard and considered. But I believe my experiences working with and on behalf of survivors would inform my judicial temperament, and I would ensure that the interests of all

parties to a case were fully taken into consideration.

Senator Mike Lee
Questions for the Record
Michael Delaney, Nominee to the United States Circuit Court for the First Circuit

1. How would you describe your judicial philosophy?

Response: I characterize my judicial philosophy as embodying the core judicial traits common to the many trial and appellate judges whom I have admired and before whom I have practiced for nearly 30 years. I would strive to complete the hard work necessary to understand the record, approach oral arguments with focused attention and open-mindedness to all parties, demonstrate the humility to carefully reason and explain rulings in detailed and understandable decisions, work cooperatively with other judges in the First Circuit to render decisions and carefully consider the views of my colleagues, show a strong respect for precedent, and reflect fairness, justice and impartiality in all decision-making.

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

Response: I would first apply any Supreme Court or First Circuit precedent interpreting the statute. In the absence of binding precedent, I would analyze the statutory text using the plain meaning of the words used and any definitions set forth in the statute. If the text were ambiguous, I would consider other tools of statutory construction, including canons of construction, the structure of the statute as a whole, and any interpretation of analogous legal texts that may provide persuasive authority. If the ambiguity could not be resolved using those tools, I would consult any reliable legislative history that might assist with the statutory construction, following Supreme Court precedent establishing limitations on the use and value of legislative history that is unreliable. *See e.g., Exxon Mobil Corp. v. Allapattah, Inc.*, 545 U.S. 546, 568 (2005) (discussing the vulnerabilities of ambiguous or conflicting legislative history).

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

Response: I would first apply any controlling Supreme Court or First Circuit precedent interpreting the constitutional provision. In the unusual instance that the constitutional interpretation at issue was a matter of first impression, I would analyze the text of the constitutional provision. I would then interpret the text of the constitutional provision in accordance with the methods of interpretation that the Supreme Court had followed. For example, in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), the Supreme Court looked to the original meaning of the Sixth Amendment's Confrontation Clause.

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

Response: The Supreme Court has looked to the original meaning to interpret a constitutional provision in some cases, such as the interpretation of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022). If I were confirmed to the First Circuit, I would be bound by any relevant Supreme Court or First Circuit precedent, whether the precedent relied on original meaning or not.

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

Response: The plain text of a statute is the primary source of interpretation. If I were confirmed, I would apply any Supreme Court or First Circuit precedent construing the plain text of a statute. So, I would begin by carefully reviewing and faithfully applying any such precedent, and in the absence of precedent, I would first discern the plain meaning of the words used, consulting any definitions of terms set forth in the law. There are occasions when the plain meaning of the text may be ambiguous. In that case, I would look beyond the plain text and consult analogous statutes or precedent in other circuits that may be helpful. If ambiguity remains, the legislative history could be another source of interpretation to construe the statute as Congress had intended, following Supreme Court precedent establishing limitations on the use and value of legislative history that is unreliable. *See e.g., Exxon Mobil Corp. v. Allapattah, Inc.*, 545 U.S. 546, 568 (2005) (discussing the vulnerabilities of ambiguous or conflicting legislative history).

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

Response: It is a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019) (internal quotations omitted). For constitutional provisions, if I were confirmed, I would be bound to apply the interpretive methodology adopted by the applicable Supreme Court precedent for the constitutional provision under review.

6. What are the constitutional requirements for standing?

Response: The three components of Article III standing are: (1) an injury in fact that is concrete and particularized, and actual or imminent, but not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant, and (3) that the injury would likely be redressed by the relief requested, and is not merely speculative. *See Dantzler, Inc. v. Empresas Berríos Inventory and Operations, Inc.* 958 F.3d 38, 47 (1st Cir. 2020).

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

Response: In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court discussed the "necessary and proper clause" of Article 1, Section 8 of the Constitution, which grants Congress the power to "make all laws which shall be necessary and proper for the carrying into Execution [its enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Supreme Court in *McCulloch* interpreted the necessary and proper clause to include incidental or implied powers as the means necessary and proper to carry out the enumerated powers expressly granted to Congress under the Constitution. *See McCullough*, 17 U.S. at 369.

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

Response: I would evaluate whether Congress had the authority to enact the law under its enumerated powers, and I would also analyze whether the law as enacted ran afoul of any constitutional rights secured by the Constitution. In doing so, I would apply relevant Supreme Court and First Circuit precedent, and I would consider the briefs and arguments of the parties to the case. I would be guided by Supreme Court precedent recognizing that if "no enumerated power authorizes Congress to pass a certain law, that law may not be enacted." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012). Note, however, that the Court has also held that the constitutionality of a Congressional action "'does not depend on recitals of the power which it undertakes to exercise.'" *Id.* at 570 (quoting *Woods v. Cloy W. Miller Co.,* 333 U.S. 138, 144 (1948).

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the Supreme Court stated that the Due Process Clause protects those fundamental rights and liberties, which are, objectively "deeply rooted in this Nation's history and traditions," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Id.* (citations and internal quotation marks omitted). The Court observed that it is our Nation's history, legal traditions, and practices that provide the crucial guideposts for responsible decision-making, and direct and restrain the Supreme Court's exposition of the Due Process Clause. *See id.* If I were confirmed to the First Circuit, I would faithfully follow Supreme Court precedent bearing on this question, including the Court's decisions in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) and *Glucksberg*.

10. What rights are protected under substantive due process?

Response: The rights that the Supreme Court has recognized under substantive due process include the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of

one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 269 U.S. 510 (1925); and to marital privacy and the use of contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

Response: If confronted with a matter involving substantive due process, I would apply all relevant Supreme Court and First Circuit precedent in deciding the case. Any personal views on the personal rights in question would not influence my analysis of the controlling precedent. The applicable precedent includes *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which abrogated *Lochner*, and the Supreme Court's recent decision in *Dobbs*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.

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

Response: Under the commerce clause, Congress can regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and activities that "substantially affect interstate commerce." *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Supreme Court has recognized that Congress' regulatory authority under the commerce clause "is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000). The commerce clause "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* (citations and internal quotation marks omitted).

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

Response: The Supreme Court has discussed "traditional indicia of suspectness" when considering whether a particular group is a suspect class, including a history of discrimination or unequal treatment; obvious, immutable or distinguishing characteristics that define them; minority status or political powerlessness. *See, e.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Court has recognized race, religion, national origin and alienage as suspect classifications. *See e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

Response: Checks and balances and separation of powers are foundational tenets of our democracy and our Constitution. Separation of powers refers to our constitutional framework, which divides the federal government into three separate branches holding independent authority. Checks and balances refers to a system of distributed and offsetting power among the three branches, giving each branch some independent authority to serve as a check on the authority of the other branches. In addition, each branch holds some authority or role related to the removal or appointment of members of the other branches as part of our system of checks and balances. This structure is essential to ensuring that no branch of government can become too powerful and avoid accountability to the people. Our system of dual sovereignty, embodied by the Tenth Amendment, serves a related and complimentary purpose.

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

Response: I would apply the most relevant Supreme Court and First Circuit precedent in deciding such a case. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court reviewed whether the issuance of an executive order exceeded the President's authority. The Court recognized that "the President's power, if any, to issue the order must stem from either an act of Congress or from the Constitution itself." *Id.* at 585. The Court reasoned that "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587.

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

Response: Judges should carefully listen to and consider the arguments of all litigants, and then decide cases based on the law and the record of the particular case before them. Judicial temperament is reflected in thoughtfulness from the bench, respect for all parties and lawyers involved in a case, as well as courtesy and humility while presiding over cases. These attributes can increase confidence in the judiciary and assist litigants in respecting the role of judges in rendering fair and impartial decisions based on the law.

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

Response: Both are undesired outcomes.

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

Response: I have not studied this issue or the data needed to analyze it. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent without prejudging any matters before me.

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

Response: Judicial review is the authority of the courts to hear and decide cases or controversies concerning the laws and government action, as decided in *Marbury v. Madison*, 5 U.S. 137 (1803). I understand judicial supremacy to refer to the idea that the Supreme Court's interpretation of the Constitution should be deemed binding on other branches of government unless and until a constitutional amendment is passed, or the governing interpretation of the Constitution is overruled.

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

Response: Central to our rule of law and our democracy is the notion that all citizens and elected officials will follow the decisions of the Supreme Court unless a constitutional amendment modifies the constitutional provision subject to interpretation, or the Supreme Court overrules the judicial precedent at issue. Article VI of the Constitution requires that all elected officials, as well as all judicial officers, "shall be bound by Oath or Affirmation, to support this Constitution." I believe that elected officials and judicial officers can carry out this oath to support the Constitution by upholding the rule of law and the importance of judicial review under our Constitution.

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

Response: Hamilton's statement reflects the importance to our republic of having citizens abide by decisions that judges make. The rule of law rests on people accepting judicial decisions whether or not they agree with the decisions rendered, subject to the people's will to change the law or constitution. It is an important principle for judges to keep in mind because we rely on our citizens to maintain confidence in the judicial system and respect the importance of judicial review. Judges can help preserve confidence in judicial decision-making by rendering fair and impartial decisions that are untethered from any personal views or predispositions about cases before them.

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

Response: Lower courts must adhere strictly to the rulings made by higher courts within the same jurisdiction even if, as the question notes, the precedent in question does not seem to be rooted in constitutional text, history or tradition. While controlling precedent is static, the facts of each case typically differ and thus distinguish one case from another in certain respects. If controlling precedent does not speak directly to the issue at hand, the lower court judge is obligated to consider the full factual record developed in the case and then fairly and impartially decide the constitutional question presented based on existing authority. In doing so, and in absence of controlling precedent, a lower court judge may consult other related decisions from courts that have opined on similar issues, if those sources will help reach a fair and impartial decision based on the application of constitutional law to the particular facts at issue.

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

Response: Under 18 U.S.C. § 3553(a), those factors are not listed as sentencing factors to be considered in the sentencing analysis.

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

Response: I am not familiar with the definition of equity listed above. If I were confirmed as a judge, I would have no role in addressing any policy considerations concerning how equity should be defined. My role would be limited to deciding cases before me based on the facts presented and the law at issue. In that regard, there are laws and constitutional rights that could be implicated by some of the words or classifications mentioned in the above definition of equity, such as inequality, race, national origin, religious status, socio-economic status, and disparate treatment of individuals. If confirmed, and were a case touching upon any of those issues to come

before me, I would apply the relevant law of the Supreme Court and First Circuit based on the particular claims made.

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

Response: Please see my responses to No. 24 above.

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

Response: The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." If confirmed, I would interpret the Equal Protection Clause by applying Supreme Court and First Circuit precedent.

27. How do you define "systemic racism?"

Response: I have not adopted a specific definition of systemic racism. I understand the term to refer to historical disadvantages that people of color have experienced over time in our society.

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

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

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

Response: My different understanding of the concepts is explained in No. 27 and 28 above.

30. You are a member of the group Manchester Proud, which has proclaimed it seeks to produce graduates who can demonstrate "an equity mindset." What is an equity mindset?

Response: Manchester Proud is a movement of business and community leaders who volunteered time and raised money to draft a comprehensive strategic plan to strengthen the public school system in Manchester, New Hampshire. Manchester Proud's mission is to produce graduates who can demonstrate communication and

collaboration skills; critical thinking and problem solving; a growth mindset and resiliency/adaptability; an equity mindset and cultural competency/empathy; the key work and life ready "basics" we need to survive; and STEM/technology skills. The reference in the mission statement to "equity mindset" tracks a particular focus throughout the strategic plan to grow all learners. The plan was designed and implemented to support the success of every learner in the school district. Strategies to accomplish this goal included expanding project-based learning opportunities, adopting personalized learning plans for all learners, enhancing wraparound supports through a coordinated system of community partnerships, prioritizing professional development training to expand cultural competency in all schools, and driving system improvements within the school administration to build a foundation upon which every student has an opportunity to receive an excellent education.

31. What role should "equity" play in our Article III courts?

Response: Article III courts should ensure that all people have equal access to the justice system, and our courts should reflect independence, integrity and impartiality that promotes the rule of law.

Senator Josh Hawley
Questions for the Record

Michael Delaney
Nominee, U.S. Court of Appeals for the First Circuit

1. **Have you ever contributed to a court filing requesting that a court deny a plaintiff's request to proceed under a pseudonym in any case other than Chessy Prout's suit against St. Paul's school?**

   Response: No. I have not contributed to any other court filing related to the use of pseudonyms in court. I recognize the most serious challenges any survivor of sexual assault faces when seeking redress through the court system. Ms. Prout showed tremendous courage and strength in seeking justice during the criminal trial, her civil lawsuit and thereafter. There is no doubt that civil litigation can have a chilling effect on women who come forward to risk privacy and advance civil claims following a sexual assault. I also recognize the important role that anonymity can play in reducing the likelihood of physical or emotional harm associated with advancing lawsuits in court, including the risk of re-traumatization. The use of pseudonyms can also have the laudatory effect of reassuring other women who may want to come forward and seek justice following a life-altering encounter with sexual violence. These are important considerations I respect and appreciate based on my work and professional experiences as Attorney General and as a prosecutor. Throughout my career, I have worked closely with victims and victim advocates to improve laws and strengthen multi-disciplinary approaches to help protect the rights and privacy of victims.

   On June 1, 2016, when the Prout family filed the civil lawsuit, they simultaneously filed a motion for leave to proceed under pseudonyms. The Court granted that motion provisionally on June 23, 2016, and it provided the school with an opportunity to respond. In short, the Court had already granted the Prout family's request to proceed anonymously shortly after the Complaint was initially filed and before the school had responded.

   The school filed its response on August 11, 2016. In its response, the school acknowledged the Prout family's interest in remaining anonymous at pretrial stages, and the school conditionally agreed to the Prout family's continued use of pseudonyms in accordance with the Court's earlier order. The brief specifically stated: "The school acknowledges that J.D. has an interest in remaining anonymous and does not object to her so proceeding at this time, provided that [certain] conditions are agreed to or ordered."

   Regarding the conditions requested by the school, it requested that the Court ensure that the "plaintiffs, their counsel, and others acting on their behalf shall refrain from making any further public statements about this matter or the facts underlying it until the litigation is completed." Specifically, the school asked the Court to restrain the law firm representing the Prout family from continuing to appear on national broadcast

shows during the pendency of the suit against the school. For example, the brief noted that one of the attorneys representing the Prout family had "engaged in extensive media contact, providing live or recorded interviews to several national broadcast news programs and entertainment shows." During several of those interviews, that attorney "commented on his expectations, or set the range, for a substantial monetary jury verdict," and made a number of other comments that the school viewed as potentially undermining a fair trial process.

I have considerable respect for the role of the First Amendment – including both the freedom of speech and the freedom of the press - in our democracy, and there are established professional conduct rules for lawyers that place limits on what lawyers in a pending lawsuit can say about the case and about the opposing party outside of the courtroom. Those rules are designed to ensure that the judge will be able to empanel an impartial jury that has not been unduly influenced by negative publicity prior to trial. In seeking to apply those rules to this case, the school believed that asking the court to restrain the law firm representing the Prout family from continuing to appear on national broadcast shows during the pendency of the suit against the school was not inconsistent with the Prout family's goal of maintaining their privacy and anonymity during the case.

For additional context concerning why the school requested this condition, I note that the law firm retained by the Prouts had recently been admonished in a published opinion by the federal District Court for the District of Columbia for engaging in a similar media campaign while simultaneously seeking the use of a pseudonym for another client who was a sexual assault survivor. *See Doe v. Cabrera*, 307 F.R.D. 1, 9 (D.D.C. 2014) (The Court stated: "counsel for the plaintiff and other attorneys acting on her behalf should have known better than to publicize the case" and "should have remained silent about the case."). In the *Cabrera* case, Judge Walton presided, and he had authorized the sexual assault survivor to proceed using a pseudonym, but he simultaneously placed conditions on the law firm to require the case to be tried only in a court of law. In the *Prout* case, the school provided the federal court in New Hampshire with a copy of Judge Walton's order issued in the earlier *Cabrera* case, which granted the use of a pseudonym but required the law firm to cease "publiciz[ing] the case" outside of court.

The school asked the Court in New Hampshire to order the same relief that Judge Walton had ordered in the District of Columbia. The position the school advanced did not seek to compel the Prout family to give up anonymity at pretrial stages of the case.

In the school's response, the school did request permission to use Ms. Prout's real name in private settings during pretrial discovery stages of the case, and with jurors at any trial. First, the school asked for permission to use Ms. Prout's real name during pretrial depositions that take place in private settings. That request was made for the practical reason that most witnesses to the case were fellow students and school employees who already knew Ms. Prout by her real name, and many of them had already testified in the criminal trial using her real name. To be clear, the school's request to use Ms. Prout's

real name in depositions would not have resulted in Ms. Prout's name becoming public because any written transcripts of depositions (no depositions were ever taken) would have been subject to a protective order allowing for confidentiality designations, and thus would not have been subject to public dissemination. As a result, the school's response contemplated that for all pretrial purposes, Ms. Prout's name would not become public. Second, the school asked to use real names before jurors at trial if the case ever proceeded to trial. That request was consistent with how other trial courts had handled the use of pseudonyms at public trials. *See e.g.*, *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (prejudice from use of pseudonym may increase during trial stage); *E.E.O.C. v. Spoa, LLC*, 2013 WL 5634337, at *3 (D. Md. October 15, 2013) (finding that during ultimate trial "grant of anonymity would implicitly influence the jury"); *Guerilla Girls, Inc. v. Katz*, 224 F.R.D. 571, 575 (S.D.N.Y 2004) (discussing problems with conducting a trial using pseudonyms). And several years after the Prout case settled, the First Circuit issued an opinion that did in fact distinguish between the use of pseudonyms in pretrial phases and during a trial itself. *See Doe v. MIT*, 46 F.4th 61, 73 (2022) (citing authority "explaining why pseudonymity was appropriate in pretrial states of sexual assault litigation but not during trial").

After the school filed its response, the judge never had the opportunity to consider the briefings. Before the judge considered the court submissions, the Prouts filed an amended complaint using real names, despite the Court's existing order authorizing the family to proceed anonymously.

I do not believe my role as an advocate for the school in this case would compromise by ability to be a fair and impartial judge. Throughout my career, I have focused on advocacy on behalf of victims of crime. Early in my career, I represented a class of victims subjected to unlawful full strip searches after being taken into custody for minor offenses. I learned from clients the impact of wrongful and intrusive official action that violates their privacy and individual autonomy, and breeds humiliation and lasting pain. In my first job in public service, I served as a front line homicide prosecutor overseeing death investigations. I responded directly to crime scenes when violence struck and ended human life, and I worked routinely with and on behalf of devastated and emotionally drained surviving family members seeking justice. When I served as Attorney General for New Hampshire, I tried every day to advance meaningful improvements to our criminal justice system. In a leadership role, I chaired the statewide Domestic Violence Fatality Review Committee, seeking insights into violence prevention through critical case review and data analysis. I also chaired the statewide Commission on Domestic and Sexual Violence, which oversaw the work of many committees addressing domestic and sexual violence from multi-disciplinary perspectives. I led a Lethality Assessment Project to create tools for front line law enforcement officers responding to domestic violence complaints, to help them objectively identify key risk factors in the field when responding to help women experiencing sexual violence. I launched the State's first Sexual Assault Response Teams to create cross-disciplinary responses and trauma-informed services for women experiencing sexual violence in rural areas lacking adequate supports. I oversaw the work of the New Hampshire Victim's Compensation Commission, providing direct

financial support for victims of crime lacking resources. I created a Commission to Combat Human Trafficking to provide victim-centered responses to combatting sex trafficking, particularly in hotels and through websites that were facilitating criminal activity. I worked closely with the State's system of Child Advocacy Centers to provide services to child victims of sexual assault. And I led efforts for the National Association of Attorneys General to rally chief law enforcement officers to support the 2013 Reauthorization of the Violence Against Women Act. Each of these efforts has deepened my understanding of how our laws and regulations play a critical role in addressing the needs of victims and survivors.

If confirmed as a circuit judge, I appreciate that my role would be very different. I would no longer serve as an advocate, but instead, would be called upon to fairly and impartially apply the law to the facts presented in each case, and ensure that the arguments made by all litigants in criminal and civil cases were heard and considered. But I believe my experiences working with and on behalf of survivors would inform my judicial temperament, and I would ensure that the interests of all parties to a case were fully taken into consideration.

a. If so, please list any cases in which you contributed to such a filing

Response: None.

2. **Have you ever contributed to a court filing requesting that a court grant a plaintiff's request to proceed under a pseudonym?**

Response: No, other than in the *Prout* case, where the school's response conditionally agreed to the continued use of pseudonyms by the Prouts at pretrial stages.

a. If so, please list any cases in which you contributed to such a filing.

Response: None, other than as discussed in Response to Question 2 above.

3. **Have you ever given any public presentations or contributed to any publications in which you commented on the practice of sexual assault victims proceeding in court under a pseudonym?**

Response: No.

a. If so, please list any such presentations or publications.

Response: None.

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

Response: Yes.

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 *State v. Perfetto*, 160 N.H. 675 (2010), as Attorney General for New Hampshire, I represented the State of New Hampshire in this criminal appeal after the defendant pled guilty to 61 counts of possession of child pornography. A condition of the defendant's sentence required that he have no contact with minors under the age of 17. After serving his term of imprisonment, the defendant returned to his community, and he moved to amend the conditions of his remaining suspended sentence so that he could attend meetings at a church where children under the age of 17 were regularly present. The trial court denied the defendant's motion to amend the conditions of his suspended sentence. On appeal, the defendant asserted that the trial court's order violated his constitutional rights to religious freedom under the Free Exercise Clause of the First Amendment and part I, article 5 of the New Hampshire Constitution. Relying on state constitutional grounds only, the New Hampshire Supreme Court held that the suspension condition was facially neutral and applied to the defendant's conduct whether he was in a church or elsewhere. The Court held that the defendant's freedom of belief had not been restricted, and his suspension condition was reasonably related to the rehabilitation and supervision of the defendant, as well as the protection of the public from recidivism. *See id.* at 678-680. The New Hampshire Supreme Court affirmed the trial court's decision.

As Attorney General, the nature of my involvement was to supervise the assistant attorney general who wrote the brief and argued the appeal, with the assistance of an Appellate Unit Chief in the Criminal Bureau who directly managed the assistant attorney general's appearance for the State.

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

Response: The Constitution's text is the starting point for constitutional interpretation. In many areas, the Supreme Court has reasoned that the original public meaning of the Constitution guides its analysis. For example, the Supreme Court has relied on the original meaning of the Constitution when interpreting the Second Amendment, *see District of Columbia v. Heller*, 554 U.S. 570 (2008), and the Confrontation Clause of the Sixth Amendment, see *Crawford v. Washington*, 541 U.S. 36 (2004). If I am confirmed to the First Circuit, I will apply the original public meaning of the Constitution where Supreme Court and First Circuit precedent requires.

6. Do you consider legislative history when interpreting legal texts?

Response: The Supreme Court has used legislative history when the meaning of a statute is ambiguous. But the Court has not consulted legislative history when the

meaning of a statute is unambiguous. In the limited circumstances where I might review the legislative history of an ambiguous statute, I would consult any reliable legislative history, following Supreme Court precedent establishing limitations on the use and value of legislative history that is unreliable. *See, e.g., Exxon Mobil Corp. v. Allapattah, Inc.*, 545 U.S. 546, 568 (2005) (discussing the vulnerabilities of ambiguous or conflicting legislative history).

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

Response: The Supreme Court has indicated that committee reports are one of the more instructive forms of legislative history, and that "passing comments" by individual legislators rarely should have any bearing. *See Garcia v. United States*, 469 U.S. 70, 76 (1984). The Supreme Court has also identified other forms of legislative history deemed less probative. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017 (excerpts from committee hearings and scattered floor comments deemed less probative); *United States v. Craft*, 535 U.S. 274, 287 (2002) (failed legislative proposals deemed less probative to rest an interpretation of a prior statute).

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

Response: Domestic law governs constitutional interpretation. The Supreme Court has also referenced English law when interpreting our Constitution. *See, e.g.*, *New York Rifle & Pistol Assoc. Inc. v. Bruen*, 142 S. Ct. 2111, 2140 (2022).

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

Response: The inmate challenging the execution protocol must satisfy two requirements. First, the inmate must establish that the State's method of execution presents a substantial risk of serious harm. Second, he must identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved. *See Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citations and internal quotation marks omitted).

8. 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.

9. 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: Not to my knowledge.

10. 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.

11. 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: A regulation that is neutral and generally applicable does not generally violate the Free Exercise Clause and trigger strict scrutiny, provided that the burden on the exercise of religion is not the object, but rather, the incidental effect of a generally applicable and otherwise valid law. *See Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). However, a law that is not neutral or generally applicable must satisfy strict scrutiny to be upheld. A government regulation is not neutral if specifically directed at a religious practice, *see Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022), or if a government official acting in an adjudicative capacity demonstrates clear and impermissible hostility towards sincere religious beliefs, s*ee Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). A law is not generally applicable if it provides a mechanism for individualized exceptions, *see Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if it treats religious exercise less favorably than any comparable secular activity, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

12. 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: Strict scrutiny applies to claims that government action discriminates against a religious group or religious belief on the basis of their religious status. *See Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) ("Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents on the basis of the religious character of the school, the 'strictest scrutiny' is required").

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

Response: The standard is that the only role of federal courts is to determine if a religious belief is an "honest conviction," and that the courts "have no business" evaluating whether that belief is reasonable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

14. 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 holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008) is that the Second Amendment protects an individual right to keep and bear arms and guarantees the individual right to possess and carry weapons in case of confrontation. *Id.* at 592.

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.

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

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

Response: Justice Holmes was explaining his dissent from the majority opinion in *Lochner*. The majority opinion held that a state statute regulating the working hours of employees was unconstitutional in violation of a general right to make a contract for business, which the majority opinion viewed as part of the liberty of the individual protected by the Fourteenth Amendment of the Constitution. In his dissent, Justice Holmes invoked Mr. Herbert Spencer's treatise to support his reasoning for why the Constitution does not endorse any particular economic theory.

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

Response: *Lochner* was largely abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed as a judge, I would follow relevant Supreme Court and First Circuit precedent on all matters before me.

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

Response: In *Trump v. Hawaii*, 138 S. Ct. 2392, 2432 (2018), the Supreme Court referenced *Korematsu v. United States*, 323 U.S. 214, 248 (1944) as follows: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the constitution.'" *Trump*, 138 S. Ct. at 2423. I understand the phrase "court of history" to be a reference to one of the factors or considerations the Supreme Court may analyze when deciding whether to overrule precedent.

17. 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: As discussed in my response to No. 16, in *Trump v. Hawaii*, 138 S. Ct. 2392, 2432 (2018), the Supreme Court stated: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the constitution.'" *Trump*, 138 S. Ct. at 2423. This declaration in *Trump* about *Korematsu* being overruled "in the court of history" may be responsive to the question.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed as a circuit judge, I would apply Supreme Court and First Circuit precedent on what constitutes a monopoly and how facts before me about

market share might impact my analysis. Any personal view on Judge Hand's statement would not influence my adherence to precedent in the cases which might come before me.

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

Response: As stated above, any personal view on Judge Hand's statement would not influence my adherence to precedent in the cases which might come before me.

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: In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court stated that "Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2 of the Sherman Act." *Id.* (citations omitted).

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

Response: Under *Erie v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court held that "there is no federal general common law." More recently, the Supreme Court has noted that "only limited areas exist in which federal judges may appropriately craft rules of decision." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

20. 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: I would look to precedent of the state's highest court on the appropriate interpretive methodology for its constitutional provisions.

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

Response: Not necessarily, as each text must be interpreted in accordance with controlling precedent regarding that text. State constitutional provisions and federal constitutional provisions that are parallel may, in some cases, be interpreted differently follow the controlling precedent established under state and federal law respectively.

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

Response: A state provision may, in some cases, provide greater protections than a parallel federal provision. The supremacy clause of the United States Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . .shall be the supreme Law of the Land." U.S. Const. Art. VI, cl. 2. Whether a state constitutional provision provides greater protection than a similar federal provision is a question of state law, based on that state's constitutional history and jurisprudence.

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

Response: Yes. Because *Brown v. Board of Education* is well-settled law and it is highly unlikely that the issues raised in the case will be re-visited, I believe that I can confirm it was correctly decided, as other judicial nominees have done.

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

Response: I am not aware of any precedent from the Supreme Court or First Circuit that specifically prohibits the issuance of nationwide injunctions. If confirmed, I will follow all applicable Supreme Court and First Circuit precedent on whether, and under what circumstances, a national injunction may issue.

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

Response: My understanding is that courts issuing nationwide injunctions have done so citing their equitable powers under Federal Rule of Civil Procedure 65 or other statutory authority.

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

Response: As a judicial nominee, it is not appropriate for me to comment on a matter that might come before me if I were confirmed to serve as a Circuit judge. If confirmed, I will follow all applicable Supreme Court and First Circuit precedent on whether, and under what circumstances, a nationwide injunction may issue.

23. 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: As a judicial nominee, it is not appropriate for me to comment on a matter that might come before me if I were confirmed to serve as a Circuit judge. If confirmed, I will follow all applicable Supreme Court and First Circuit precedent on whether, and under what circumstances, a nationwide injunction may issue.

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

Response: Federalism is a core concept embodied in the Constitution, which refers to the distribution of power between the federal and state governments. The Supreme Court has observed that "[a]mong the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857-58 (2014). Under our Constitution, the federal government is one of enumerated powers, s*ee McCulloch v. Maryland*, 17 U.S. 316 (1819). The Constitution and the laws of the United States shall be the supreme law of the land. *See* U.S. Const., Art VI, cl. 2. The Constitution establishes the limits of these enumerated powers. Against this backdrop, it is our framework of dual sovereignty, as embodied in the Tenth Amendment, which allows the States and the people to exercise all powers not delegated to the United States. The role of federalism serves to ensure a healthy balance of power between the States and Federal Government as a central component of our democracy to ensure protection against the accumulation of excessive power in one place.

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

Response: There are many abstention doctrines that apply in the First Circuit.

Pullman abstention requires federal courts to abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941)). In the First Circuit, declining to exercise jurisdiction under *Pullman* abstention 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 obviate the need to resolve a significant federal constitutional question. *See Batterman v. Leahy*, 544 F.3d 370, 373 (1st Cir. 2008).

Younger abstention requires federal courts to abstain from hearing cases that are already pending in state court. *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* case involved an underlying state prosecution against a defendant who then filed suit in federal court to attack the state statute on which his criminal conviction was brought. *See id.* at 38-39. *Younger* abstention has been extended beyond its original roots of non-interference with state criminal prosecutions, and it now applies to noncriminal judicial proceedings when important state interests are involved. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). In the First Circuit, *Younger* abstention applies when the requested relief would interfere (1) with an ongoing state judicial proceeding; (2) that implicates an important state interest; and (3) that provides an adequate opportunity for the federal plaintiff to advance his or her federal constitutional challenge. *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 40 (1st Cir. 2012).

Burford abstention requires federal courts to abstain in complex administrative processes involving difficult questions of state law bearing on policy problems of substantial public import. *Burford v. Sun Oil Co.*, 319 U.S. 315, 330 (1943). The First Circuit has adopted a two-pronged analytical framework. Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the exercise of federal review of the questions in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Chico Service Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 29 (1st Cir. 2011).

Thibodaux abstention instructs that federal courts exercising jurisdiction based on diversity of citizenship should abstain from adjudicating matters where jurisdiction is based solely on diversity and the case involves unsettled questions of state law implicating important state interests. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26-30 (1959). The First Circuit discussed, but did not apply, abstention under *Thibodaux* in the case of *Currie v. Group Ins. Comm'n*, 290 F.3d 1, 11 (1st Cir. 2002).

The *Rooker-Feldman* doctrine provides that lower federal courts should not exercise appellate jurisdiction over final state court judgments. *See Lance v. Dennis*, 546 U.S. 459, 463 (2006). Final state court judgments are reviewable only by the United States Supreme Court, which will consider if the judgment is based on an independent and adequate state ground, which would prevent federal court review. In the First Circuit, *Rooker-Feldman* bars jurisdiction whenever "parties who lost in state court. . . seek[] review and rejection of that judgment in federal court. *See Miller v. Nichols*, 586 F.3d 53, 59 (1st Cir. 2009).

The *Colorado River* doctrine applies to avoid duplicative litigation when state and federal courts contemporaneously exercise concurrent jurisdiction over parallel cases. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The First Circuit has identified six factors making it appropriate for a federal district court to stay proceedings out of deference to pending related state proceedings: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law controls; and (6) whether the state forum will adequately protect the interests of the parties. *See Rivera-Feliciano v. Acevedo-Vila*, 438 F.3d 50, 62 (1st Cir. 2006) (citations omitted).

The ecclesiastical abstention doctrine applies "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them." *Hosanna-Tabor Evangelical Lutheran*

Church & Sch. v. E.E.O.C., 565 U.S. 171, 185-186 (citations and internal quotation marks omitted).

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

Response: It would depend on all of the circumstances presented by a particular case. If I am confirmed to serve as a circuit judge in the First Circuit, I would follow the applicable precedent of the Supreme Court and First Circuit. I would carefully review the entire record concerning any award of damages and injunctive relief that may be subject to appeal, and I would listen to the arguments of the parties and ground any judicial decisions in the record before me, my consideration of the arguments of counsel, and the application of the law and precedent to the facts presented.

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

Response: The Supreme Court's substantive due process analysis has two primary features. First, the Supreme Court has regularly observed that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition, ' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (citations omitted). Second, the Supreme Court requires a "careful description" of the asserted fundamental liberty interest. *Id.* (citations omitted). The Supreme Court recently considered the scope of substantive due process in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

28. 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: A state or federal law or regulation that is neutral and generally applicable does not generally violate the Free Exercise Clause and trigger strict scrutiny, provided that the burden on the exercise of religion is not the object, but rather, the incidental effect of a generally applicable and otherwise valid law. *See Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). However, a law that is not neutral or generally applicable must satisfy strict scrutiny to be upheld. In recent cases, the Supreme Court has articulated circumstances when strict scrutiny will apply because a government fails to act neutrally. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature," *Fulton v. City of*

Philadelphia, 141 S. Ct. 1868, 1877 (2021), or when it targets religious practice, *see Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022), or when government officials acting in an adjudicative capacity demonstrate hostility towards religion or a religious viewpoint. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). The Supreme Court has also identified factors that lower courts must consider in determining if a government action is generally applicable. For example, a law is not generally applicable if it provides for discretionary, individualized exemptions, *see Fulton*, 141 S. Ct. at 1878, or if it treats religious exercise less favorably than any comparable secular activity, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: No. The right to free exercise protects more than the freedom to worship. It provides protection against all laws that burden religious practice. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

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: Under the Free Exercise Clause, I would apply the precedent outlined in the Supreme Court cases discussed in the prior subsections of this question.

Under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, a federal law or action that substantially burdens religious exercise is constitutional only if it serves a compelling government interest through the least restrictive means, even if the law or action is one of general applicability. The burden is on the government to demonstrate that the law or action serves a compelling government interest and is the least restrictive means of furthering that interest. *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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

Response: The standard is that the only role of federal courts is to determine if a religious belief is an "honest conviction," and that the courts "have no business" evaluating whether that belief is reasonable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

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

Response: The Supreme Court has noted that "Because RFRA operates as a kind of super statute, displacing the normal operations of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb-3. But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1754 (2020). "Placing Congress' intent beyond dispute, RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise.'" *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

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

Response: No.

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

Response: The First Circuit has repeatedly stated that "[r]easonable doubt is a fundamental concept that does not easily lend itself to refinement or definition." *United States v. Vavlitis*, 9 F.3d 206, 212 (1st Cir. 1993). For that reason, the First Circuit has advised that the meaning of "reasonable doubt" be left to the jury to discern. *United States v. Cassiere*, 4 F.3d 1006, 1024 (1st Cir. 1993). *See also* Pattern Jury Instructions for the District Courts of the First Circuit, Instruction 3.02 (updated 1/27/23).

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

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

Response: If confirmed to serve as a circuit court judge, this is a question that could come before me in the context of habeas corpus proceedings under 28 U.S.C. 2254(d), which addresses the availability of federal habeas relief with respect to claims previously adjudicated on the merits in state court proceedings.

As a judicial nominee, it would be inappropriate for me to comment, and I would apply relevant Supreme Court and First Circuit precedent to the particular facts presented in the case before me.

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

Response: If confirmed to serve as a circuit court judge, this is a question that could come before me in the context of habeas corpus proceedings under 28 U.S.C. 2254(d), which addresses the availability of federal habeas relief with respect to claims previously adjudicated on the merits in state court proceedings. As a judicial nominee, it would be inappropriate for me to comment, and I would apply relevant Supreme Court and First Circuit precedent to the particular facts presented in the case before me.

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

Response: Please reference my responses to No. 30 (a) and (b).

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

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

Response: Local Rule 36 of the Federal Rules of Appellate Procedure for the First Circuit establishes a policy that it is desirable that opinions be published and available for citation, but that the policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. This policy derives its authority from the Article III of the United States Constitution.

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

Response: Please see my response to No. 31(a) above.

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

Response: If confirmed I would be duty bound to follow Local Rule 36(c) of the Federal Rules of Appellate Procedure for the First Circuit, which states that

unpublished opinions may be cited to the First Circuit, but the issuing panel sees no precedential value in that opinion.

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

Response: Please see my answer to No. 31(a) above.

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

Response: Please see my answer to No. 31 (c) above.

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

Response: Please see my answer to No. 31 (c) above.

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

Response: Please see my answer to No. 31 (c) above.

32. In your legal career:

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

Response: I was sole counsel, chief counsel or co-chief counsel in approximately 12 trials.

b. How many have you tried as second chair?

Response: I was second chair or associate counsel in approximately 3 trials.

c. How many depositions have you taken?

Response: I have not tracked the number of depositions I have taken over the course of my nearly 30 years of legal practice. I estimate that I have taken no less than 50 depositions.

d. How many depositions have you defended?

Response: I have not tracked the number of depositions I have taken over the course of my nearly 30 years of legal practice. I estimate that I have defended no less than 50 depositions.

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

Response: My appellate practice has largely been before the New Hampshire Supreme Court. I have argued one federal appeal, and I have supervised attorneys arguing several appeals.

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

Response: I have not tracked the number of cases I have argued over the course of my nearly 30 years of legal practice. I have argued dozens of appeals and exercised supervisory authority over more than 250 appeals.

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

Response: For approximately 11 years, I appeared before federal agencies in my capacity as an assistant attorney general, deputy attorney general, and attorney general. For the past 10 years, I have appeared before federal agencies as a private practitioner representing clients. I do not have records available that would allow me to quantify how many times I have appeared before federal agencies over my nearly 30-year career. I have appeared before federal agencies often.

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

Response: I estimate that I have argued dozens of dispositive motions before trial courts.

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

Response: I estimate that I have argued dozens of evidentiary motions before trial courts.

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

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

Response: I tracked hours in private practice and during a portion of my career in public service. As a homicide prosecutor for the State, at some point between 1999 and 2004, I have a general recollection of tracking 2800 annual worked hours during a demanding period of trial work. I believe that is the maximum number of hours I worked/billed in a single year.

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

Response: I did not have an opportunity to handle pro bono work when engaged in public service between 1999 to 2004. In 2022, my Pro Bono Time Report shows 38.2 hours devoted to two pro bono cases currently pending in the Family Division of the Circuit Court in Manchester, New Hampshire and the United States District Court for the District of New Hampshire. In addition to pro bono case work, I have accepted approximately 15 indigent criminal defense cases as a member of the New Hampshire Supreme Court indigent defense task force. I also serve as Co-Chair of the New Hampshire Campaign for Legal Services Leadership Council, where I lead efforts to fundraise and promote awareness of the important work of the State's two civil legal aid organizations, New Hampshire Legal Assistance and 603 Legal Aid.

34. 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: Reviewing the statement standing alone and without additional context, I believe Justice Scalia was stating that judges should avoid judicial decision-making driven by personal views or preferred outcomes.

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

a. What do you understand this statement to mean?

Response: Reviewing the statement standing alone and without additional context, I understand the simile to reference the limited role of judges to decide cases based on the facts and law before them, and not based on personal viewpoints or desired outcomes.

b. Do you agree or disagree with this statement?

Response: I agree with the statement.

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

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

Response: Reviewing the statement standing alone and without additional context, I understand the statement to reference a judge's obligation to render decisions based on the application of law to the facts of the case, and not based on any personal views about whether the correct application of the law is fair or just in a particular case.

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

Response: I agree that a judge's obligation is to render decisions based on the application of law to the facts in each case presented, and I also agree that doing so serves the interests of justice.

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

Response: Yes.

a. If yes, please provide appropriate citations.

Response: *Aliera Healthcare, Inc. d/b/a Aliera Companies, Inc. and Trinity Healthshare, Inc. v. New Hampshire Ins. Dep't*, Docket No. 217-2020-CV-0-162 (Merrimack, New Hampshire Superior Court) (facial constitutional challenge to state insurance law regulating health care sharing ministries for alleged violation of the religious liberty clauses of part I, articles 5 & 6 of the New Hampshire Constitution based on the State's unequal regulation of different religions based on their date of establishment); *United States v. Windsor*, 570 U.S. 744 (2013) (joining amicus brief of 16 states including New Hampshire in support of respondent, 2013 WL 840031, contesting the constitutionality of Section 3 of the Defense of Marriage Act); *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (joining amicus brief of 14 states including New Hampshire in support of respondent, 2013 WL 840014, contesting the constitutionality of California's Proposition 8 excluding same-sex couples from marriage); *In Re Opinion of the Justices (Requiring Attorney General to Join Lawsuit)*, 162 N.H. 160 (2011) (challenging the constitutionality of a proposed House Bill 89 under the state Separation of Powers Clause for mandating the attorney general to join the State as a party plaintiff in a federal lawsuit challenging a federal law).

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

Response: No.

39. What were the last three books you read?

Response: John Clayton, *Remembering Manchester: Towering Titans and Unsung Heros*, American Chronicles (July 1, 2009); Steven R. Covey and Jim Collins, *The 7 Habits of Highly Effective People*, The Covey Habits Series, 30th Anniversary Series (May 19, 2020); Amor Towles, *Rules of Civility*, Penguin Books (June 26, 2012).

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

Response: There are examples in our history of difficulties faced by many Americans who have experienced illegal discrimination on the basis of protected classifications. Our justice system strives to ensure that every American receives a fair and impartial adjudication of cases and controversies before the federal courts. If I were confirmed as a judge, I would address cases involving racial discrimination based on the claims advanced by the parties to each case, taking into consideration all of the facts and law applicable to those claims. I would faithfully apply Supreme Court and First Circuit precedent. Systemic issues are properly entrusted to policymakers for consideration.

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

Response: *State v. Joseph Whittey*, 149 N.H. 463 (2003).

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

Response: Yes.

a. How did you handle the situation?

Response: I represented my client to the best of my ability irrespective of my personal views.

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

Response: Yes.

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

Response: I am unable to identify three law professors whose works I read most often. As a private practitioner, I tend to review legal works and law review articles based on subject matter of the works, as determined by the legal issues pending in my litigated matters, and not based on the particular law professor who wrote the work.

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

Response: There is not one Federalist Paper that has most shaped my views of the law.

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

Response: *United States v. Jones*, 565 U.S. 400 (2012). The question presented addressed whether the attachment of GPS tracking devices to motor vehicles to monitor a vehicle's movements on public streets constituted an unconstitutional search under the 4th Amendment. GPS trackers were used frequently at that time without obtaining a search

warrant. As Attorney General, I was most concerned about criminal investigations being compromised if attachment of the GPS tracking device was declared unconstitutional. Police officers relied heavily on GPS tracking of motor vehicles to solve crimes and infiltrate criminal enterprises. I listed to the oral argument, during which Chief Justice Roberts asked the Solicitor General's Office whether the government could attach a GPS tracking device to the motor vehicles of the nine Supreme Court justices without a warrant if the method was deemed constitutional. The Supreme Court issued a decision finding that the use of GPS tracking on motor vehicles without a warrant constituted an unlawful search under the Fourth Amendment. The decision helped changed my mind about the need for law enforcement to operate within the strict requirements of the 4th Amendment when using emerging technology for law enforcement purposes.

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

Response: In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court declined to answer the question of when human life begins.

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

Response: Yes. In August 2009, I testified at a confirmation hearing regarding my nomination to serve as Attorney General for New Hampshire. In January of 2011, I testified in a hearing conducted by the New Hampshire Division of Securities Regulation as a fact witness concerning the investigation of Federal Resources Mortgage, Inc. for defrauding New Hampshire investors through a Ponzi scheme. My testimony or materials evidencing my testimony have previously been supplied to the Senate as attachments to my Senate Judiciary Questionnaire.

48. 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.

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

a. Apple?

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

b. Amazon?

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

c. Google?

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

d. Facebook?

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

e. Twitter?

Response: No. I have investments in mutual funds that hold stocks but am not aware of the specific securities held in those funds.

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

Response: Not to my knowledge.

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

Response: Please see my response directly above.

51. Have you ever confessed error to a court?

Response: Not to my knowledge.

a. If so, please describe the circumstances.

Response: Please see my response directly above.

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

Response: I understand that the duty of candor requires all nominees to answer all questions posed to them honestly and to the best of their ability.

Nomination of Michael Arthur Delaney
to be United States Circuit Judge for the First Circuit
Questions for the Record
Submitted February 22, 2023

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?**

   Response: No.

2. **Was *D.C. v. Heller*, 554 U.S. 570 (2008) rightly decided?**

   Response: *District of Columbia v. Heller* is binding precedent of the Supreme Court. If confirmed, I will apply *District of Columbia v. Heller* as precedent in cases before me. As a federal judicial nominee, it is generally inappropriate for me to comment on the merits of Supreme Court decisions when it is possible that cases raising related issues could come before the lower federal courts.

3. **Is the Second Amendment right to keep and bear arms an individual right belonging to individual persons, or a collective right that only belongs to a group such as a militia?**

   Response: It is an individual right. In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Court stated: "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment."

4. **Has your understanding of the Second Amendment changed at all as a result of the Supreme Court's holding in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022)? If so, how?**

   Response: Yes. In *Bruen*, the Supreme Court addressed the regulation of firearms as follows: "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. at 2126. If I am confirmed to the First Circuit, I will apply all Supreme Court and First Circuit precedent related to the Second Amendment.

5. **In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022), the Supreme Court ruled that, to justify a regulation restricting Second Amendment rights, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." How would you, as a judge, go about determining the "historical tradition" of acceptable firearm regulation in the United States?**

Response: I would apply the methodological approach adopted by the Supreme Court in *Bruen.* The *Bruen* court stated that in some cases the inquiry will be "fairly straightforward," and in other cases implicating unprecedented societal concerns or dramatic technological changes, a more nuanced approach may be required involving "reasoning by analogy – a commonplace task for any lawyer or judge." *See Bruen*, 142 S. Ct. at 2131-32.

6. **Do you believe that judges should respect Congress's legislative choices regarding the sentencing of criminals under federal law, including the choice of whether to apply sentencing reductions retroactively?**

Response: I believe judges should respect Congress' legislative choices regarding federal sentencing. An appellate judge's role should be limited to reviewing sentencing decisions made by lower district courts under the applicable standard of review for the questions presented on appeal, as well as to review any challenges to the constitutionality of any law passed by Congress related to sentencing. If confirmed, I would faithfully apply Supreme Court and First Circuit precedent when doing so.

7. **Do you believe that finality and predictability are important in federal criminal sentencing? Why or why not?**

Response: Courts have identified the importance of finality and predictability in sentencing as advancing the basic purposes of sentencing related to just punishment, deterrence, incapacitation and rehabilitation of the offender. With respect to finality, except for the review of legal errors in sentencing, appellate courts apply a highly deferential approach to reviewing sentencing decisions by lower federal courts. *See United States v. Contreras-Delgado*, 913 F.3d 232, 238-39 (1st Cir. 2019). With respect to predictability, the United States Sentencing Commission's *Guidelines Manual* identifies three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984: to combat crime through an effective, fair sentencing system, to achieve reasonable uniformity in sentencing by narrowing sentencing disparities for similar criminal offenses, and proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity. *See* United States Sentencing Commission, *Guidelines Manual* Guidelines, Ch. 1, Pt. A. In *United States v. Pena*, 742 F.3d 508, 520 (1st Cir. 2014), the First Circuit discussed the public interest in certainty and finality related to sentencing.

8. **Does the president have unilateral authority to categorically ignore immigration laws established by Congress?**

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that may come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent if a matter before me addressed this issue.

9. What is your understanding of the Citizenship Clause of the Fourteenth Amendment?

Response: The citizenship provisions of the Fourteenth Amendment are found in the first two sections of the Fourteenth Amendment. The first sentence of Section 1 of the Fourteenth Amendment states in relevant part: "All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." The second sentence of Section 1 states in relevant part that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." The apportionment clause of Section 2 of the Fourteenth Amendment also references "citizens of the United States." If I were confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court precedent and First Circuit precedent in deciding any cases involving these citizenship provisions.

10. Do you believe that the Citizenship Clause of the Fourteenth Amendment contains any exceptions? If so, please describe who you believe to be excluded from birthright citizenship.

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that may come before me if I were confirmed to serve as a Circuit judge. This question addresses exceptions to citizenship provisions of the Fourteenth Amendment, which is a matter that might come before me if I were confirmed, and it would not be appropriate for me to comment. If I were confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court precedent and First Circuit precedent concerning any exceptions related to the citizenship provisions discussed in No. 9 above.

11. Is it unlawful for an agent of state government to actively assist any individual in breaking federal immigration law?

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that may come before me if I were confirmed to serve as a circuit judge. If I were confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court precedent and First Circuit precedent when reviewing any matters involving immigration laws or other federal laws.

12. Is it unlawful for an agent of state government to actively shield or hide an individual from lawful federal immigration enforcement?

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that may come before me if I were confirmed to serve as a circuit judge. If I were confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court precedent and First Circuit precedent when reviewing any matters involving immigration laws or other federal laws.

13. Please describe what you believe to be the limits of the Environmental Protection Agency's authority according to the terms of the Supreme Court's ruling in *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

Response: In *West Virginia v. Envtl. Protection Agency*, 142 S. Ct. 2587 (2022), the Supreme Court held that Congress did not grant the Environmental Protection Agency the authority to establish certain regulations adopting "a best system of emission reduction" standard of performance related to carbon emissions. *Id.* at 2602-2605. The Supreme Court applied the "major questions doctrine" to the case and held that the agency lacked "clear congressional authorization" to adopt the challenged regulations. *Id.* at 2614. The Court reversed the circuit court decision and remanded the case for further proceedings.

14. Please describe what you believe to be the Supreme Court's holding in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022).

Response: In *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the Court held that the United States Constitution does not provide a right to abortion, and the authority to regulate abortion must be returned to the people and their elected representatives.

15. Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), the Court held that government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious activity. The Supreme Court granted emergency injunctive relief to the applicants challenging the State's public health restrictions as applied to at-home religious gatherings because the State treated comparable secular activities more favorably than religious worship under its COVID-19 restrictions.

16. What is your understanding of the fiduciary duties owed by investment firms to their investors?

Response: The Investment Advisers Act of 1940 establishes federal fiduciary standards to govern the conduct of investment advisors. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1970). The fiduciary duty is broad and applies to the entire adviser-client relationship. The duty of care requires an investment advisor to act in his clients' best interests at all times, including among other things, the duty to provide advice in the best interest of the client, the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and the duty to provide advice and monitoring over the course of the relationship. The duty of loyalty requires that an advisor put his clients' interests first and either avoid conflicts of interest or make full and fair disclosure of all material

conflicts to his clients, the public and his employer. *See generally, Jones v. Harris Associates, L.P.,* 559 U.S. 335 (2010).

17. Do federal drug scheduling actions pursuant to the Controlled Substances Act preempt state or local laws that purport to 'legalize' substances contrary to their federal drug control status?

Response: Section 903 of the Controlled Substances Act states: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." I would faithfully apply Supreme Court precedent and First Circuit precedent concerning cases involving the Controlled Substances Act, or questions involving preemption by federal law.

18. Under what circumstances, if any, do you believe that it is appropriate for courts to order attorneys to break attorney-client privilege?

Response: "The attorney-client privilege is the oldest of the privileges for confidential communications know to the common law." *Upjohn v. United States*, 449 U.S. 383, 389 (1981); *see also* Federal Rule of Evidence 502. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Id.* Exceptions to the testimonial privilege include communications in furtherance of future illegal conduct, the so-called "crime-fraud" exception, *see United States v. Zolin*, 491 U.S. 554, 556 (1989), and the fiduciary exception, which precludes a trustee of a common law trust from asserting privilege against beneficiaries related to the execution of fiduciary obligations. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 167 (2011). There are other circumstances where a breach of attorney-client privilege may need to be analyzed and decided by a judge depending on the facts presented, for example, communications placed at issue due to an alleged breach of duty by the lawyer to his client, communications about an attested document if the lawyer is a witness to the attestation, communication relevant to an issue between parties who claim through the same deceased client, or communications regarding joint clients who hired the same lawyer when offered in an action between the clients. If confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court and First Circuit precedent concerning the attorney-client privilege.

19. What is your understanding of the current state of the law regarding the executive privilege of the president of the United States?

Response: The Supreme Court analyzed the executive privilege in *United States v. Nixon*, 418 U.S. 683 (1974). If confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court and First Circuit precedent concerning the executive privilege.

20. Please describe what you believe to be the Supreme Court's holding in *United States v. Taylor*, 596 U.S. ____ (2022).

Response: In *United States v. Taylor*, 142 S. Ct. 2015 (2022), the Supreme Court held that an attempted Hobbs Act robbery does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because no element of the offense of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force. To convict a defendant of an attempted Hobbs Act robbery, the prosecution must prove that the defendant intended to complete the offense and that he completed a "substantial step" toward that end. As such, the attempted Hobbs Act robbery cannot constitute a "crime of violence" under § 924(c)(3)(A) because neither element requires proof the defendant used, attempted to use or threatened to use force, even though in many cases force may be present.

21. If an individual is ordered deported by our immigration courts, and the individual has exhausted all appeals, should the court's deportation order be carried out, or ignored?

Response: Court orders should be followed.

22. What is your view of arbitration as a litigation alternative in civil cases?

Response: The Federal Arbitration Act makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). If confirmed to serve as a Circuit judge, I would faithfully apply Supreme Court and First Circuit precedent concerning the Federal Arbitration Act.

23. Please describe what you believe to be the Supreme Court's holding in *Kennedy v. Bremerton*, 597 U.S. ____ (2022).

Response: In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), the Supreme Court held that a high school football coach's quiet prayer at midfield after a game is personal, protected, religious expression. The school district's suspension of the coach for that religious expression was neither neutral nor generally applicable action under the Free Exercise Clause. *See id.* The Court reasoned that the school district's action was not neutral because it specifically targeted the coach's expressive religious practice. Nor was the action generally applicable because the school district treated comparable, post-game secular activity of other members of the coaching staff more favorably than the coach's religious practice on the field. *See id.* at 2423. Under the Free Speech Clause, the Court found that the coach engaged in private speech, not government speech attributable to the school district, when he prayed quietly outside of the scope of his school duties. *See id.* at 2425. The Court also rejected the school district's defense that its actions were required

under the Establishment Clause, stating that the *Lemon* test had been "abandoned," and instructing that the Establishment Clause must be interpreted by reference to historical practices and understandings. *Id.* at 2427-2428. Finally, the Court held that the religious exercise was not impermissible government coercion of students to pray. *Id.* at 2430-31.

24. Please describe what you believe to be the Supreme Court's holding in *Torres v. Texas Department of Public Safety*, 597 U.S. ____ (2022).

Response: In *Torres v. Texas Dept. of Public Safety*, 142 S. Ct. 2455 (2022), the Supreme Court held that the State of Texas could not assert sovereign immunity as a legal defense to a federal lawsuit brought by an employee against his employer for failing to rehire him following military deployment, as required under the Uniformed Services Employment and Reemployment Rights Act. The Court held that by ratifying the Constitution, the States agreed that their sovereignty would yield to the national power to raise and support the Armed Forces pursuant to Article I, Section 8, Clauses 12-13 of the Constitution. Congress thus holds the power to authorize private damages suits against nonconsenting States pursuant to the Act. The Court applied the *PennEast* test for structural waiver to find that the States renounced their right to interfere with national policy for the Armed Forces when the States entered the federal system. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021).

25. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

Response: On February 22, 2023, the Office of Legal Policy sent me these questions. I read the questions, conducted research about litigated matters, reviewed judicial decisions, and drafted answers. I sent a draft of my answers to the Office of Legal Policy who provided feedback. After considering that feedback, I submitted my answers to these questions.

26. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please identify the department or agency with which those officials are employed.

Response: No. See my response to No. 25 above.

Senator John Kennedy
Questions for the Record

Mr. Michael Delaney

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: I characterize my judicial philosophy as embodying the core judicial traits common to the many trial and appellate judges whom I have admired and before whom I have practiced for nearly 30 years. I would strive to complete the hard work necessary to understand the record, approach oral arguments with focused attention and open-mindedness to all parties, demonstrate the humility to carefully reason and explain rulings in detailed and understandable decisions, work cooperatively with other judges in the First Circuit to render decisions and carefully consider the views of my colleagues, show a strong respect for precedent, and reflect fairness, justice and impartiality in all decision-making.

2. **Do you believe the meaning of the Constitution is immutable or does it evolve over time?**

   Response: In *McCulloch v. Maryland,* 17 U.S. 316 (1819), the Court stated that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2126, 2132 (2022), the Court noted that "although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."

3. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: If the plain meaning of the text is clear, then a judge should not look beyond the text to consider its purpose and the consequences of ruling a particular way. The interpretive process ends at the text when its meaning is unambiguous.

4. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: A judge should first examine the meaning of the text of the statute and consider its structure. If the statute is clear, legislative history would not be consulted because the plain wording of the statute best reflects the legislature's intent. However, if the language is of the statute is ambiguous, legislative history may aid the statutory construction. In the limited circumstances where I might review the legislative history of an ambiguous statute, I would consult any reliable legislative history, following Supreme Court precedent establishing limitations on the use and value of legislative history that is unreliable. *See, e.g., Exxon Mobil Corp. v. Allapattah, Inc.*, 545 U.S. 546, 568 (2005)

(discussing the vulnerabilities of ambiguous or conflicting legislative history). The Supreme Court has identified some forms of legislative history it deems more persuasive, including committee reports, and that "passing comments" rarely should have any bearing. *See Garcia v. United States*, 469 U.S. 70, 76 (1984).

5. What First Amendment restrictions can the owner of a shopping center place on private property?

Response: The rights secured by the First Amendment protect against government intrusions on protected liberties, not the actions of private property owners. The Supreme Court has considered rights to expression at shopping malls under the Free Speech Clause of the First Amendment. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court rejected a claim that the First Amendment prevents private owners of shopping mall from enforcing a hand-billing restriction on the shopping center premises, finding that property does not lose its private character merely because the public is generally invited to use it for designated purposes. However, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court clarified that *Lloyd* does not limit the authority of States to adopt individual free speech liberties at shopping malls more expansive than those conferred by the United States Constitution.

6. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment does not apply to the search and seizures by United States agents of property owned by a nonresident alien and located in a foreign country. However, the Supreme Court listed other cases that had applied certain constitutional provisions to resident non-citizens. *Id.* at 271. I am unaware of any Supreme Court or First Circuit precedent specifically addressing whether non-citizens possess a right of privacy. As a judicial nominee, I should not further comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding the constitutional rights of non-citizens.

7. Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?

Response: In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment does not apply to the search and seizures by United States agents of property owned by a nonresident alien and located in a foreign country. I am unaware of any Supreme Court or First Circuit precedent specifically addressing this question. As a judicial nominee, I should not further comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit

judge. I would faithfully apply Supreme Court and First Circuit precedent regarding the constitutional rights of non-citizens.

8. **At what point is a human life entitled to equal protection of the law under the Constitution?**

   Response: The Fourteenth Amendment states that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court declined to answer the question of when human life begins.

9. **A federal district court judge in Washington, DC recently suggested that the Thirteenth Amendment may provide a basis for the right to abortion in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*.**

   a. **Do you agree?**

      Response: *Dobbs* is controlling precedent, and if confirmed, I will faithfully apply *Dobbs*. As a judicial nominee, it would be inappropriate for me to comment on a case pending in the federal courts.

   b. **Is it ever appropriate for a lower court judge to imply the existence of a constitutional right despite the existence of controlling precedent to the contrary?**

      Response: See my response to No. 9 (a) above.

10. **Is there ever an appropriate circumstance in which a district court judge ignores or circumvents precedent set by the circuit court within which it sits or the U.S. Supreme Court?**

    Response: No.

11. **Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?**

    Response: The Supreme Court upheld the constitutionality of a voter identification law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding voting laws.

12. **Please describe the analysis will you use, if confirmed, to evaluate whether a law or regulation infringes on an individual's rights under the Second Amendment in light of the Supreme Court's opinion in *Bruen*.**

Response: Under *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), violations of the Second Amendment right of ordinary, law-abiding citizens to carry a handgun for self-defense outside of the home are prohibited. The Supreme Court has instructed that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126. If I am confirmed to the First Circuit, I will apply all Supreme Court and First Circuit precedent related to the Second Amendment.

13. The Supreme Court relies on a list of factors to determine whether overturning precedent is prudent in the context of stare decisis.

a. How many factors are necessary to provide a special justification for overturning precedent?

Response: Supreme Court precedent does not identify a minimum threshold of factors necessary to provide a special justification for overturning precedent. *See e.g.*, *Janus v. American Federation of State, County and Mun. Employees*, 138 S. Ct. 2448, 2478 (2018) (listing factors that should be taken into account in deciding whether to overrule a past precedent).

b. Is one factor alone ever sufficient?

Response: The Supreme Court has typically analyzed a number of factors when overturning precedent based on a special justification, assuming no abrogation of the precedent created by a change in law or constitutional amendment. *See id.*

14. Please explain the difference between judicial review and judicial supremacy.

Response: Judicial review is the authority of the courts to hear and decide cases or controversies concerning the laws and government action, as decided in *Marbury v. Madison*, 5 U.S. 137 (1803). I understand judicial supremacy to refer to the idea that the Supreme Court's interpretation of the Constitution should be deemed binding on other branches of government unless and until a constitutional amendment is passed, or the governing interpretation of the Constitution is overruled.

15. Does the Ninth Amendment protect individual rights or does it provide structural protection applicable to the people?

Response: The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." There is limited Supreme Court precedent interpreting the Ninth Amendment. If confirmed, I would faithfully apply Supreme Court and First Circuit precedent to address any cases that might come before me involving the Ninth Amendment.

16. Under former U.S. Supreme Court Justice Stephen Breyer's view of 'active liberty', is the Ninth Amendment evolving?

Response: See my response to No. 15 above.

17. Are the Bill of Rights informative for understanding the meaning of the Ninth Amendment or should it be interpreted independently of the other amendments?

Response: The Bill of Rights establishes enumerated constitutional rights. The Ninth Amendment addresses reserved rights, other than certain rights enumerated in the Constitution. *See United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947).

18. Is Founding-era history useful for understanding the meaning of the Ninth Amendment?

Response. See my response to No. 15 above.

19. The First, Second, Fourth, Ninth, and Tenth Amendments reference "the people."

a. Who is included within the meaning of *'the people*'?

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), the Supreme Court stated that "the people" refers to "a class of persons who are part of a national community" or who have "otherwise developed sufficient connection with this country to be part of that community." (citations omitted). In *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), the Supreme Court repeated this description of "the people" as stated in *Verdugo-Urquidez*.

b. Is the term's meaning consistent in each amendment?

In *Verdugo-Urquidez*, the Court reasoned that this definition of "the people" applied consistently throughout the Bill of Rights. *See Verdugo-Urquidez*, 494 U.S. at 265.

20. Does 'the people' capture non-citizens or illegal immigrants within the meaning of any amendment?

Response: The Court in *Verdugo-Urquidez* listed a series of cases in which the Supreme Court has held that aliens enjoy certain constitutional rights. *See id.* at 271 (listing cases).

21. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the Supreme Court determined that the right to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment since its practice has been offensive to our national traditions and practices. Do evolving social standards of acceptance for practices like assisted suicide suggest that the meaning of the Due Process Clause changes over time?

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the Supreme Court stated that the Due Process Clause protects those fundamental rights and liberties, which are, objectively "deeply rooted in this Nation's history and traditions," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Id.* (citations and internal quotation marks omitted). The Court observed that it is our Nation's history, legal traditions, and practices that provide the crucial guideposts for responsible decision-making, and direct and restrain the Supreme Court's exposition of the Due Process Clause. *See id.*

22. Could the Privileges or Immunities Clause within the Fourteenth Amendment a source of unenumerated rights?

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding the privileges or immunities clause.

23. Is the right to terminate a pregnancy among the 'privileges or immunities' of citizenship?

Response: *Dobbs* held that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. at 2242.

24. What is the original holding of *Chevron*? How have subsequent cases changed the *Chevron* doctrine?

Response: In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court held that, in the first instance, a court and agency must give effect to the unambiguously expressed intent of Congress if the intent of Congress is clear. If, however, the statue is silent or ambiguous, the Supreme Court typically interprets it as granting the agency leeway to enact rules that are reasonable in light of the text, nature and purpose of the statute. *Id.*; *see also United States v. Mead Corp.*, 533 U.S. 219, 229 (2001). In cases following *Chevron*, the Supreme Court has identified a category of regulations called "major questions" of "vast economic or political significance" that fall outside agency reach in the absence of clear congressional authorization. *See, e.g., West Virginia v. Envtl. Protection Agency*, 142 S. Ct. 2587 (2022).

25. How does the judicial branch decide when an agency exercised more authority than Congress delegated or otherwise exercised its rulemaking powers?

Response: Under the non-delegation doctrine, the Supreme Court has held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). The Administrative Procedures Act provides that courts may hold

unlawful and set aside agency action, findings and conclusions under a number of circumstances, including action that is arbitrary and capricious, not in accordance with law, contrary to constitutional right, power, privilege or immunity; or in excess of statutory jurisdiction, authority or law. *See* 5 U.S.C. §§ 701-706.

26. How does the Constitution limit the powers of Congress? Please provide examples.

Response: There are many examples. The Constitution vests Congress only with those legislative powers that are "herein granted." U.S. Const. art. I, §1. Congress has only limited and enumerated powers. The Bill of Rights prohibits Congress from enacting laws that intrude on fundamental rights and individual liberties. The Constitution also lists powers that are denied to Congress. U.S. Const. art. I, § 9. The Constitution authorizes the President to veto legislation passed by Congress, U.S. Const. art. I, § 7, and the Supreme Court can declare Congressional enactments unconstitutional. U.S Const. art. III. The bicameral structure of Congress distributes power within Congress, U.S. Const. art. I, §§ 2,3, and the separations of powers establishes three equal branches of government to serve as a system of checks and balances on one another. U.S. Const. art. I, II and III.

27. Please describe the modern understanding and limits of the Commerce Clause.

Response: Under the commerce clause, Congress can regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and activities that "substantially affect interstate commerce." *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Supreme Court has recognized that Congress' regulatory authority under the Commerce Clause "is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000). The Commerce Clause "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* (citations and internal quotation marks omitted).

28. Please provide an example of activity Congress cannot regulate under the Commerce Clause.

Response: In *United States v. Lopez*, 514, U.S. 549, 567 (1995), the Supreme Court held that "[t]he possession of a handgun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." The Court held that the Gun Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority. *See id.*

29. Should Due Process in the Fourteenth Amendment and Fifth Amendment be interpreted differently? Please explain.

Response: The Due Process Clause of the Fourteenth Amendment echoes that of the Fifth Amendment. The Fifth Amendment, however, applies only against the federal government. The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law."

30. In *Gundy v. United States*, 588 U.S. ___ (2019), justices in dissent indicated willingness to limit the non-delegation doctrine, arguing that Congress can only delegate authority that is non-legislative in nature. Does the Constitution limit the power to define criminal offenses to the legislative branch?

Response: Yes. *See Whitman v. United States*, 574 U.S. 1003, 1004 (2014) ("[L]egislatures, not executive officers, define crimes"); *United States v. Eaton*, 144 U.S. 677, 688 (1892) ("It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense . . . .").

31. Please describe how courts determine whether an agency's action violated the Major Questions doctrine.

Response: The Supreme Court first analyzes whether the case is one in which the "history and breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *West Virginia v. Envtl. Protection Agency*, 142 S. Ct. 2587, 2608 (2022). If so, "something more than a merely plausible textual basis for agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609.

32. Please describe your understanding and limits of the anti-commandeering doctrine.

Response: The anti-commandeering doctrine recognizes that Congress' legislative power is limited to certain enumerated powers, and the Tenth Amendment reserves all other legislative power to the States. In *New York v. United States*, 505 U.S. 144, 178 (1992), the Supreme Court ruled that Congress may not command a state government to enact a state regulation forcing states to "take title" to low level radioactive waste. The Court reasoned that no matter how powerful the federal interest involved may be, the Constitution "simply does not give Congress the authority to require the States to regulate." *Id.* The Supreme Court has confirmed that the anti-commandeering doctrine also prohibits the federal government from commanding a State's officer, or those of their political subdivisions, to administer or enforce a federal regulatory program. *See Printz v. United States*, 521 U.S. 898, 929-930 (1997). The doctrine also restricts Congress from prohibiting a State from enacting a law. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). Limitations include the ability of Congress to ask a state legislature to consider federal regulatory standards. S*ee FERC v. Mississippi*, 456 U.S. 742 (1982). The doctrine also does not apply when Congress evenhandedly regulates an activity in which both State and private actors engage. *See Reno v. Condon*, 528 U.S. 141 (2000).

33. Does the meaning of 'cruel and unusual change over time? Why or why not?

Response: The Supreme Court has stated that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *See Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

34. Is the death penalty constitutional?

Response: Yes. *See Glossip v. Gross*, 576 U.S. 863 (2015).

35. Can Congress require a federal prosecutor to convene a grand jury for someone charged with criminal contempt of Congress if prosecutorial discretion belongs to the executive branch?

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding grand jury issues.

36. Please describe which presidential aides, if any, are entitled to "absolute immunity" from congressional subpoenas.

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding absolute immunity.

37. Do private social media companies create any type of forum that protects speech against restrictions in the context of the First Amendment?

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding First Amendment issues for social media companies.

38. How does the Supremacy Clause interact with the Adequate and Independent State grounds doctrine?

Response: The Supremacy Clause, U.S. Const., art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985). The adequate and independent state grounds doctrine refers to the standard used by the Supreme Court to determine if it will hear a case from state court. "If the state court decision indicates clearly and expressly that is alternatively based on bona fide separate, adequate, and

independent grounds, we, of course will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). The doctrine is based, in part, on "the limitations of [the Court's] own jurisdiction. *Id.* at 1042.

39. Please explain why the Fifth Amendment's Due Process Clause does not require the federal government to provide notice and a hearing to an individual before their name is added to the no-fly list.

Response: As a judicial nominee, I should not comment on a matter that might come before me so as not to leave any misimpression that I have prejudged matters that might come before me if I were confirmed to serve as a Circuit judge. I would faithfully apply Supreme Court and First Circuit precedent regarding due process challenges involving the no-fly list.

40. What's the textual source of the different standards of review for determining whether state laws or regulations violate constitutional rights?

Response: Article III of the United States Constitution.

41. Please describe the legal basis that allows federal courts to issue universal injunctions.

Response: My understanding is that Courts issuing universal injunctions have done so citing their equitable powers under Federal Rule of Civil Procedure 65 or other statutory authority. I am not aware of any precedent from the Supreme Court or First Circuit that specifically prohibits the issuance of universal injunctions. If confirmed, I will follow all applicable Supreme Court and First Circuit precedent on whether, and under what circumstances, a universal injunction may issue.