**Senator Lindsey Graham, Ranking Member**
**Questions for the Record**
**Mr. Brian Murphy**
**Nominee to be United States District Judge for the District of Massachusetts**

1. **Are you a citizen of the United States?**

   Response: Yes.

2. **Are you currently, or have you ever been, a citizen of another country?**

   Response: No.

   a. **If yes, list all countries of citizenship and dates of citizenship.**
   b. **If you are currently a citizen of a country besides the United States, do you have any plans to renounce your citizenship?**
      i. **If not, please explain why.**

3. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant oral argument? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

4. **Is it appropriate for a federal judge to consider an immutable characteristic of an attorney (such as race or sex) when deciding whether to grant additional oral argument time? If yes, please describe in which circumstances such consideration would be appropriate.**

   Response: No.

5. **According to your Committee questionnaire, you have served as a "Board Member" of the Massachusetts Association of Criminal Defense Lawyers (MACDL) from 2014-2024 (approximately 10 years). You also served as the organization's Treasurer from 2016-2023 (approximately 7 years). You have been a member of the organization since 2006 (approximately 18 years).**

   a. **Have you ever donated to the Massachusetts Association of Criminal Defense Lawyers?**

      Response: I do not recall ever donating money to MACDL besides paying yearly dues.

      i. **If yes, please provide the amounts and dates of donations?**
   b. **Have you ever requested, solicited, suggested, or facilitated donations or financial support from any person or entity to the Massachusetts Association of Criminal Defense Lawyers?**

Response: I do not recall ever soliciting money for MACDL.

i. **If yes, please identify who donated, how much was donated, and explain your role in facilitating the donation?**

c. **Please explain your duties as a Board Member from 2014 to 2024.**

i. **Is being a "Board Member" a different way of saying that you were a member of the "MACDL's Board of Directors"?**

Response: Being a Board Member and a Member of MACDL's Board of Directors refers to the same position. I participated in board meetings that happened about 9 times a year. I helped select MACDL's leadership team and participated in the discussion of some events such as yearly dinners.

ii. **Did you ever plan, communicate about, or approve any events hosted by MACDL? If so, which ones?**

Response: The Board was generally informed about events that MACDL had planned. These were primarily twice-yearly social events. The Board was involved with picking the event date and the honorees. I do not believe I was ever involved in the planning of these events.

iii. **Did you ever plan, communicate about, review, edit, or approve any public statements issued by MACDL? If so, which ones?**

Response: I do not recall ever being involved in the drafting or editing of public statements. I also do not recall voting on public statements made by MACDL though I would generally have received an email copy of such statements.

d. **Please explain your duties as Treasurer of the MACDL from 2016-2023.**

Response: My duties as Treasurer were to manage the checking account of MACDL. MACDL's primary source of revenue is membership dues. I would ensure these dues were deposited at the bank if they came via check and deal with any issues that arose with erroneous payments. I also was responsible for paying MACDL's bills and ensuring the yearly tax return was prepared.

6. **While you were a Board Member, the MACDL Board of Directors signed a public letter on June 15, 2022 titled: "In Reply to the Justices of the Supreme Judicial Court." <u>Your name is listed on the letterhead</u>. Among other outlandish proposals, the letter argued to "*eliminate arrests for all alleged minor infractions such as using a counterfeit $20 bill to buy cigarettes, as happened to George Floyd, but also for fraught and unnecessary police encounters involving possessory offenses, assault and battery, breaking and entering, and similar offenses*."**

a. **Were you a member of the MACDL Board of Directors when the Board signed this letter?**

Response: Yes

b. **Did you disclose this letter to the Committee?**

Response: No.

i. **If not, why did you not disclose this letter to the Committee as required?**

Response: I diligently searched my own records, my electronic mail and the MACDL website to gather all documents that were responsive to the Senate Judicial Questionnaire. Despite this diligent search, which I conducted multiple times, I did not find this letter nor did I have a memory of it existing. I regret that my searches did not uncover this letter and apologize to the Committee for failing to uncover this letter.

c. **Why did the Board sign a letter arguing to "*eliminate arrests*" for "*all misdemeanors and non-violent offenses"* including *"possessory offenses, assault and battery, breaking and entering, and similar offenses"?***

Response: I do not recall any discussion about this letter nor do I recall reading it. I do not know what led to the issuance of this letter.

d. **The letter argues that eliminating arrests for all misdemeanors and non-violent offenses *"would not only prevent a majority of the police violence against Black lives, but would dramatically reduce false complaints of resisting arrest and assault and battery on a police officer—charges that are often a smoke screen for police brutality*"?**

i. **What is your basis for arguing that police officers "often" file false charges as "a smoke screen for police brutality"?**

Response: I do not recall any discussion about this letter, nor do I recall reading it. I do not know what led to the issuance of this letter nor what basis was relied upon for its factual assertions.

ii. **Please explain how eliminating arrests for crimes like "breaking and entering" and "assault and battery" would "prevent a majority of the police violence against Black lives"?**

Response: I do not recall any discussion about this letter, nor do I recall reading it. I do not know what led to the issuance of this letter nor what basis was relied upon for its factual assertions.

e. **The letter argues that "*Rules regarding composition of the venire should be amended so that defendants can be tried before peers from their community rather than a county-wide jury that too often lacks racial diversity*."**

i. **Does this suggest that people of different races are not "peers" before the law?**

Response: I do not recall any discussion about this letter, nor do I recall reading it. I do not know what led to the issuance of this letter nor what basis was relied upon for its factual assertions.

ii. **What practically, does this statement mean? Please explain how this proposal would be implemented.**

Response: I do not recall any discussion about this letter, nor do I recall reading it. I do not know what led to the issuance of this letter nor what basis was relied upon for its factual assertions. I also do not know anything more about the specifics of the policy proposals.

f. **The letter argues that "*After trial, no defendant should be sentenced until a future date when the judge shall receive from the defense a social worker's report that describes the defendant's background and circumstances, including how structural racism has impacted the defendant's life*."**

i. **How should judges factor in "how structural racism has impacted the defendant's life" when pronouncing sentence?**

Response: If I am so lucky as to be appointed a district court judge, my sentencing considerations would be limited to those outlined in 18 U.S.C. 3553 and would not be based on any racial characteristics of the defendant.

ii. **Is it appropriate for a judge to consider the race of a criminal defendant when pronouncing sentence?**

Response: If I am so lucky as to be appointed a district court judge, my sentencing considerations would be limited to those outlined in 18 U.S.C. 3553 and would not be based on any racial characteristics of the defendant.

g. **To implement these outlandish proposals, the MACDL Board of Directors ends the letter with the statement: "*We stand ready to help*."**

i. **Do you stand ready to help implement the proposals outlined in this letter?**

Response: No. As a nominee I stand ready to apply the law fairly and justly, to follow all First Circuit and Supreme Court precedent and to do so with dispassion.

7. **While you were affiliated with the MACDL (including in leadership roles), the organization filed a number of amicus briefs. For each subpart listed below, please provide: (1) a brief summary of the MACDL's argument; (2) whether you were**

**aware of the brief; (3) whether you agree with the position taken by your organization:**

a. ***Commonwealth v. Arrington***
b. ***Commonwealth v. A Juvenile***
c. ***Commonwealth v. Barros***
d. ***Commonwealth v. Canjura***
e. ***Commonwealth v. Gelin***
f. ***Commonwealth v. Marrero***
g. ***Commonwealth v. McDermott***
h. ***Commonwealth v. Padilla***
i. ***Commonwealth v. Shepard***
j. ***Commonwealth v. Rossetti***
k. ***Commonwealth v. Santana***
l. ***Commonwealth v. Lunn***
m. ***Commonwealth v. McDermott***
n. ***Commonwealth v. Feliz***
o. ***Commonwealth v. Vazquez-Diaz***
p. ***Vega v. Commonwealth***

Response:

(1) While on the MACDL board I was not involved in the solicitation or preparation of any of the amicus briefs filed on behalf of MACDL nor did I approve or review any drafts. As I have no greater insight into the argument being forwarded in each of these briefs than the briefs themselves, I cannot offer a summary more cogent than the brief itself which was produced in connection with my Senate Judiciary Questionnaire.

(2) While on the MACDL board I was not involved in the solicitation or preparation of any of the amicus briefs filed on behalf of MACDL nor did I approve or review any drafts. The extent of my awareness with any amicus brief would have been a summary provided either via email or in person at a board meeting. I do not have a specific memory of discussion of these briefs but I expect I was made aware of their existence when they were filed.

(3) While on the MACDL board I was not involved in the solicitation or preparation of any of the amicus briefs filed on behalf of MACDL nor did I approve or review any drafts or provide any input into the arguments contained in the brief. The Code of Conduct for United States Judges, by which I am bound as a nominee, precludes me from offering any opinion on these issues as they are all issues that have been the subject of recent litigation. If I am confirmed, I would follow all First Circuit and Supreme Court precedent.

8. **The *Washington Free Beacon* has reported on your leadership role with the Massachusetts Association of Criminal Defense Lawyers. One report states: "*Judges should embrace a 'presumption of release' when making bail decisions due to 'concerns about institutional racism,' the group asserted in May 2020.* (*See* Chuck Ross, Yet Another Biden Judicial Pick Has Ties to a Left-Wing, Anti-Cop Group, WASHINGTON FREE BEACON (Apr. 17, 2024)).**

   a. **Do you think it promotes public safety to "*require judges who set bail to include a presumption of release based on concerns about institutional racism*"?**

   Response: If I am so lucky as to be confirmed as a district court judge I would apply the law as enacted by Congress and interpreted by the First Circuit and the Supreme Court. In the case of bail, this is governed by 18 U.S.C. § 3142 and caselaw from the First Circuit and the Supreme Court interpreting and applying this statute. Institutional racism is not one of the factors listed in 18 U.S.C. § 3142. I would faithfully apply this statute to each individual that appears before me. Concerns about institutional racism and presumptions on detention are policy questions that should be decided by policy makers in the legislative branches and topics about which the Code of Conduct for United States Judges, by which I am bound as a nominee, precludes me from offering any opinion.

9. **In a May 2020 statement, the Massachusetts Association of Criminal Defense lawyers issued a statement calling to: "*Repeal legislation that gives police officers and prosecutors immunity from civil liability*."**
   a. **Do you agree with this statement? Why or why not?**

   Response: If I am so lucky as to be confirmed as a district court judge I would apply the law as it is enacted by Congress and interpreted by the First Circuit and the Supreme Court. In the area of qualified immunity there is clear and binding precedent in both the First Circuit and the Supreme Court and I would apply this precedent faithfully. Concerns about the ideal bounds of qualified immunity are policy questions that should be decided by policy makers in the legislative branches and topics about which the Code of Conduct for United States Judges, by which I am bound as a nominee, precludes me from offering any opinion.

10. **The Massachusetts Association of Criminal Defense Lawyers regularly articulates anti-police rhetoric and policy proposals. How can police officers be confident that you will treat them fairly if they appear before you?**

    Response: Throughout my personal and professional career, I have treated police officers with the utmost of respect. If I am so lucky as to be confirmed as a district court judge,

police officers would be treated fairly and dispassionately in my courtroom as would all litigants and witnesses. As a judge, I would not enter into any proceeding with any preconceived notions, either positive or negative, about any witness in the courtroom.

**11. Do parents have a right to question a school board regarding the content of an elementary school curriculum?**

Response: The right to petition the government is enshrined in the First Amendment. This core Constitutional right applies to all levels of government from local to national, and if I am so lucky as to be confirmed as a district court judge I would follow all precedent from the First Circuit and the Supreme Court and I would apply this precedent faithfully.

**12. Do parents have a right to question a school board regarding the content of a high school curriculum?**

Response: The right to petition the government is enshrined in the First Amendment. This core Constitutional right applies to all levels of government from local to national, and, if I am so lucky as to be confirmed as a district court judge, I would follow all precedent from the First Circuit and the Supreme Court and I would apply this precedent faithfully.

**13. You are a named partner at the law firm of Murphy & Rudolf LLP.**

a. **Is the "Murphy" in Murphy & Randolph a reference to you?**

Response: The firm's name is Murphy & Rudolf LLP and I am the Murphy in the name.

**14. Your law firm advertises the following services:**

***Mounting a solid defense against domestic violence charges is crucial for achieving the best possible outcome. Our attorneys employ a range of defenses tailored to the specific circumstances of each case, including:***

- ***False Accusations: Challenging the accuser's credibility: We investigate the circumstances surrounding the allegations, seeking evidence that may cast doubt on the veracity of the claims.***
- ***Self-Defense: Demonstrating lawful actions: In cases where physical force was used, we work to establish that our clients acted in self-defense, protecting themselves from harm.***
- ***Lack of Evidence: Scrutinizing the prosecution's case: We thoroughly examine the evidence presented, identifying weaknesses and gaps that can be exploited in the defense.***

- ***Mistaken Identity: Providing an alibi or alternative suspect: If applicable, we present evidence that our client was not present at the alleged incident or that someone else may have committed the offense.***
- ***Inadmissible Evidence: Challenging improperly obtained evidence: We scrutinize law enforcement's methods to gather evidence, seeking to exclude any unlawfully obtained information.***

b. **Is it appropriate to challenge the credibility of domestic violence or sexual assault survivors by seeking evidence to cast doubt on the veracity of her claims?**

Response: It is crucial that all people involved in the criminal justice system be aware of, and sensitive to, the personal difficulty that is inherent when crime victims are testifying and participating in the prosecution process. However, it is ethically required of a defense lawyer to test the credibility of witnesses. This ethical requirement requires investigating the veracity of statements through pretrial investigation as well as ferreting out inconsistencies in an effort to reach a just outcome at trial. We have an adversarial system of justice, and this system depends on advocates demonstrating the strength of the evidence they are proposing and testing the strength of the evidence against them.

c. **Have you ever challenged the credibility of a domestic violence or sexual assault survivor? If so, please provide the citation to the relevant cases and a brief description.**

Response: Yes. I have investigated and tested the veracity of the claims against my clients in nearly every case where I have been a defense lawyer. Challenging the credibility of the accusers is at the very heart of defending someone accused of a crime. It is an ethical mandate to investigate and test the reliability of evidence proffered against an individual charged with a crime. It is also an ethical mandate that a defense attorney explore all exculpatory evidence and zealously advocate for their client.

**15. Do you have implicit bias?**

Response: As I understand the term, implicit bias is bias about which one is not self-aware.

**16. Is health care a human right?**

Response: The definition of a human right is not one that I believe has been clarified by the Supreme Court or is mentioned in the Constitution. Concerns about the bounds of legislatively created rights are policy questions that should be decided by policy makers

in the legislative branches and topics about which the Code of Conduct for United States Judges, by which I am bound as a nominee, precludes me from offering any opinion.

**17. Are there any Constitutional rights that are not available to illegal immigrants?**

Response: Yes, for example, residents who are not citizens do not have a constitutional right to vote in elections.

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

Response: Generally, no. However, if the U.S. Supreme Court or the First Circuit instructs courts to consider foreign law then it would be appropriate to do so. See *District of Columbia v. Heller*, 554 U.S. 570, 598-600 (2008) and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 39–44 (2022).

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

Response: I disagree with this statement. Judges are bound to apply settled law to the facts before them without consideration of their personal views.

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

Response: No. The role of a federal judge is to impartially apply the law to the facts of the case.

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

Response: Yes.

**22. In the aftermath of the brutal terrorist attack on Israel on October 7, 2023 the president of New York University's student bar association wrote "Israel bears full responsibility for this tremendous loss of life. This regime of state-sanctioned violence created the conditions that made resistance necessary." Do you consider such a statement, publicly made by a law student, to be disqualifying with regards to a potential clerkship in your chambers? Please provide a yes or no answer. If you**

**would like to include an additional narrative response, you may do so, but only after a yes or no answer. Failure to provide a yes or no answer will be construed as a "no."**

Response: Yes.

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

Response: A prisoner may directly appeal the sentence to the higher court, either to a district court judge from a sentence imposed by a magistrate judge or the First Circuit Court of Appeals if sentenced by a district court judge. The prisoner may also collaterally attack the sentence pursuant to 28 U.S.C. § 2255 and seek relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). A prisoner may also collaterally attack a sentence pursuant to 28 U.S.C. § 2241.

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

Response: In *Students for Fair Admissions, Inc. v. University of North Carolina and Students for Fair Admissions Inc. v. President & Fellows of Harvard College* the Supreme Court held that the use of race in admission policies violated Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court held that these policies were subject to constitutional review under the strict scrutiny standard and found the policies did not survive such review. As such the Court concluded that the policies violated both Title VI and the Constititon.

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

Response: Yes.

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

Response: I have been an integral part of the hiring process since I opened my own law firm.

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

Response: No.

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

Response: No.

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

Response: Not to my knowledge.

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

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

Response: Yes.

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

Response: In *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), the Supreme Court held that a website designer could not be compelled to prepare a website that promoted ideas that were contrary to his sincerely held religious beliefs. The Court held that to compel such website design was violative of the website designer's free speech rights under the First Amendment.

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

**Is this a correct statement of the law?**

Response: Yes. *Barnette* is binding precedent and is therefore a correct statement of the law.

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

Response: In determining whether a law that regulates speech is "content-based" or "content-neutral," I would follow all Supreme Court and First Circuit precedent. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Even if facially neutral, a government regulation can target speech if "the purpose and justification for the law are content based" *Reed* at 166.

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

Response: The standard I would apply to determine if a statement is not protected speech is the standard articulated by the Supreme Court, "[t]rue threats are serious expressions conveying that a speaker means to commit an act of unlawful violence." *Counterman v. Colorado*, 600 U.S. 66, 74 (2023).

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

Response: The Supreme Court has recognized three categories of fact vs. law namely purely factual questions, purely legal questions, and questions of mixed fact and law. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020). The Supreme Court has held that question of law include both "the application of a legal standard to undisputed or established facts." *Id.* at 227. When determining if something is a factual question the court will often examine if this question concerned "what happened" of an "appraisal of witness credibility and demeanor." *Thompson v. Keohane*, 516 U.S. 99, 111 (1995).

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

Response: Pursuant to 18 U.S.C. § 3553(a), a federal district judge must consider seven factors including these four. The statute does not prioritize one sentencing factor over any other and, if I were to become a federal judge, I would faithfully weigh all these factors to fashion a just and fair sentence.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

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

Response: 18 U.S.C. § 1507 states:

"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."

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

Response: I am not aware of any precedent in either the Supreme Court or the First Circuit addressing the Constitutionality of this statute. The Supreme Court in *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) upheld a similar Louisiana statute as not violative of the First Amendment. As a nominee for judicial office, the Code of Conduct for United States Judges precludes me from expressing an opinion on an issue that could come before me as a judge.

**40. 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 federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

Consistent with the practice of prior judicial nominees, however, *Brown v. Board of Education* falls within a small class of cases that is so unlikely to ever come before me and I can therefore state that *Brown* was correctly decided.

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

Response: Yes. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

Consistent with the practice of prior judicial nominees, however, *Loving v. Virginia* falls within a small class of cases that is so unlikely to ever come before me and I can therefore state that *Loving* was correctly decided.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned *Roe v. Wade*.

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

Response: The Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned *Planned Parenthood v. Casey*.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

m. **Was *303 Creative LLC v. Elenis* correctly decided?**

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from expressing an opinion on the merits of binding Supreme Court precedent, which I would faithfully apply as a judge, or from expressing an opinion on an issue that could come before me.

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

Response: I would approach any case concerning the Second Amendment by faithfully applying all Supreme Court and First Circuit precedent. Specifically, I would apply *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* 597 U.S. 1, 17 (2022) ("[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.") (quotations omitted).

**42. 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: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

**43. 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: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

**44. 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: Not to my knowledge.

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: Not to my knowledge.

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: Not to my knowledge.

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: Not to my knowledge.

45. **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: Not to my knowledge.

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

    Response: Not to my knowledge.

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

    Response: Not to my knowledge.

46. **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: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: On November 28, 2023, I learned that there was a vacancy on the U.S. District Court for the District of Massachusetts. On December 11, 2023, I submitted an application to the Advisory Committee on Massachusetts Judicial Nominations, which was convened by Senators Markey and Warren. On December 22, 2023, I interviewed with the Advisory Committee. On January 9, 2024, I was interviewed by Senators Markey and. Warren. On January 19, 2024, I was interviewed by attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 20, 2024, the President announced his intent to nominate me.

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

Response: Not to my knowledge.

**49. 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: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: Not to my knowledge.

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

Response: The selection of specific cases to include on my questionnaire was my own. I considered a large number of significant cases from my career. While I consulted with a number of people in the process about which areas of practice might highlight my experience in the most beneficial light, I decided which cases would be included.

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

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

Response: On November 28, 2023, I learned that there was a vacancy on the U.S. District Court for the District of Massachusetts. On December 11, 2023, I submitted an application to the Advisory Committee on Massachusetts Judicial Nominations, which was convened by Senators Markey and Warren. On December 22, 2023, I interviewed with the Advisory Committee. On January 9, 2024, I was interviewed by Senators Markey and. Warren. On January 19, 2024, I was interviewed by attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 20, 2024, the President announced his intent to nominate me.

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

Response: I received these questions from the Office of Legal Policy on April 24, 2024. I reviewed the questions and prepared a draft of my responses. I then sent this draft to the Office of Legal Policy, which provided limited feedback. I modified my answers to the

extent that I agreed with the proposed modifications. I then transmitted these answers to the Office of Legal Policy for submission to the Senate Judiciary Committee.

**Senator Mazie K. Hirono**
**Senate Judiciary Committee**

**Nominations Hearing | April 17, 2024**
**Questions for the Record for Brian E. Murphy**

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

QUESTIONS:

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

   Response: No

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

   Response: No

**Senator Mike Lee**
**Questions for the Record**
**Brian Edward Murphy, Nominee for District Court Judge for the District of Massachusetts**

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

Response: My approach to rendering decisions on the bench will be built upon transparency and fairness. I will strive to give all litigants an opportunity to be heard, to find the facts fairly and with dispassion, and to apply facts justly to established law. My goal as a judicial officer would be to render decisions that are clear and understandable and that ensure the litigants know they have been heard and their arguments fairly considered. It would be my goal that everyone leaves the courtroom feeling that they were given a chance to present their arguments and that they were given due consideration even if the court adopts a contrary position.

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

Response: When interpreting a federal statute, the first consideration is the text of the statute and any binding precedent in the First Circuit and the Supreme Court. Any interpretation of the statute by either the First Circuit or the Supreme Court would be binding upon me and I would apply it to the facts at issue. If there were no binding precedent I would review and apply the relevant text if it were unambiguous. It is my expectation that these sources of understanding would resolve most cases requiring statutory interpretation. If these two sources of understanding do not resolve the ambiguity, I would turn to canons of interpretation recognized by the First Circuit and the Supreme Court and would consider persuasive authority from other courts.

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

Response: First, I would examine the text of the provision itself. Since, as a district court judge, I am bound by all First Circuit and Supreme Court precedent, I would research if there was any such precedent interpreting the provision at issue. If either the text or precedent was clear and unambiguous then the interpretation is complete. The Supreme Court has instructed lower courts to apply the original public meaning of a Constitutional provision in certain instances. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If the provision remains unclear, I would turn to canons of interpretation recognized by the First Circuit and the Supreme Court and would consider persuasive authority from other courts.

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

Response: The Supreme Court has held that certain constitutional provisions are to be interpreted using their original meaning. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If I am confirmed as a district court judge I would faithfully apply all First Circuit and Supreme Court precedent.

**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: When interpreting a federal statute, the first consideration is the text of the statute and any binding precedent in the First Circuit and the Supreme Court. Any interpretation of the statute by either the First Circuit or the Supreme Court would be binding upon me, and I would seek to apply it to the facts at issue. If there were no binding precedent, I would review and apply the relevant text if it were unambiguous. It is my expectation that these sources of understanding would resolve most cases requiring statutory interpretation. If these two sources of understanding do not resolve the ambiguity, I would turn to canons of interpretation recognized by the First Circuit and the Supreme Court and would consider persuasive authority from other courts.

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

Response: The Supreme Court has clearly stated that "a statute [should be read] in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). As a district court judge I would faithfully apply this precedent.

**7. What are the constitutional requirements for standing?**

Response: The Supreme Court has held that an Article III "plaintiff must have (1) suffered an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016).

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

Response: The Congress has the power to enact all laws that are necessary and proper to legislate within its enumerated powers. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Response: If a case were to come before me challenging the scope of legislative power to pass a statute, I would evaluate that challenge by applying all First Circuit and Supreme Court precedent. *E.g. National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 570 (2012) ("The question of the Constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise") (internal quotations omitted), *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013) ("The [Necessary and Proper] Clause allows Congress to adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution.").

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

Response: The Supreme Court has recognized certain rights that are protected by the Constitution's due process clauses to include " the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, [and] to bodily integrity." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal citations omitted). Since this decision the Supreme Court has also recognized the right to marry a person of the same gender. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

**11. What rights are protected under substantive due process?**

Response: Please see my response to Question 10.

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

Response: *Lochner v. New York,* 198 U.S. 45 (1937) was overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The Supreme Court has held that the Due Process clauses recognize certain unenumerated rights, including the right to contraception, and I would faithfully apply all First Circuit and Supreme Court precedent in this area.

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

Response: "[T]here are three categories of activity that Congress may regulate under its commerce power: (1) 'the use of the channels of interstate commerce'; (2) 'the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities'; and (3) 'those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.'" *Taylor v. United States*, 579 U.S. 301, 306 (2016).

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

Response: The Supreme Court has recognized that statutes targeting "suspect distinctions such as race, religion, or alienage" are subject to strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Lyng v. Castillo,* 477 U.S. 635, 638 (1986).

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

Response: The Supreme Court has held that "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015). The system of checks and balances ensures that no one branch of the government becomes too powerful such that the separation of powers is maintained.

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

Response: If the question involved the power of Congress to pass a piece of legislation I would apply the analysis indicated in Question 9 namely:

If a case were to come before me challenging the scope of legislative power to pass a statute, I would evaluate that challenge by applying all First Circuit and Supreme Court precedent. *E.g. National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012), *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013) ("The [Necessary and Proper] Clause allows Congress to adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution.").

If this was a question of presidential power, I would evaluate that challenge by applying all First Circuit and Supreme Court precedent. *E.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-638 (1952) (Jackson J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate…When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain…When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

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

Response: A judge must decide cases based on impartial application of the law equally to all parties.

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

Response: Both are to be avoided.

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

Response: I have not studied this area or compared the body of decisions from these two periods. As a district court judge, I would apply all First Circuit and Supreme Court precedent faithfully and fairly.

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

Response: Judicial review is the power of a court to review a statute to determine its constitutionality. *Marbury v. Madison*, 5 U.S. 137 (1803). Judicial supremacy is "the doctrine that interpretations of the Constitution by the federal judiciary in the exercise of judicial review…are binding on the coordinate branches of the federal government and the states." Black's Law Dictionary (11th ed. 2019).

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

Response: If I am confirmed as a judge and am required to resolve a conflict involving the actions of an elected official, I would follow all First Circuit and Supreme Court precedent faithfully. *Cooper v. Aaron,* 358 U.S. 1, 18 (1958) ("no state legislature or executive or judicial officer can war against the Constitution without violating his undertaking to support it").

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

Response: The role of the judiciary is to faithfully apply the law, not to craft answers to policy questions. If I am lucky enough to be confirmed I will faithfully apply the law as it is laid out in the Constitution, duly passed statutes, and all First Circuit and Supreme Court precedent.

**23. As a federal judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a federal 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 federal judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: Vertical stare decisis is absolute. If the First Circuit or the Supreme Court has made a decision on a particular point, as district judge I would be obligated to, and will, apply that precedent to the case at issue.

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

Response: None.

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

Response: I am not familiar with this definition of equity. Black's Law Dictionary (11th ed. 2019), defines equity as "fairness; impartiality; evenhanded dealing." If the definition of equity were to arise in a case that appeared before me, I would apply all First Circuit and Supreme Court precedent to resolve the question.

**26. Without citing a dictionary definition, do you believe there is a difference between "equity" and "equality?" If so, what is it?**

Response: With the caveats that this question precludes me from referring to an authoritative text and that I am not a linguist, my understanding of the common usage of these terms is that equality refers to being equal while equity refers to being fair.

**27. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 25)?**

Response: I am not aware of any Supreme Court or First Circuit case that applies the term "equity" as discussed in Question 25. If I am so lucky as to be confirmed as a district court judge, I would faithfully apply all First Circuit and Supreme Court precedent to any question along these lines that arose.

**28. According to your current understanding, and without citing a dictionary definition, how do you define "systemic racism?"**

Response: This is not a term I use in my daily lexicon. My colloquial understanding is that this refers to the lingering effects of racism on institutions. If this were to arise in a case before me, I would research its vernacular usage and apply all First Circuit and Supreme Court precedent.

**29. According to your current understanding, and without citing a dictionary definition, how do you define "Critical Race Theory?"**

Response: This is not a term I use in my daily lexicon. My understanding is that this is an area of academic study, but it is not one with which I am acquainted. If this were to arise in a case before the court, I would research its vernacular usage and apply all First Circuit and Supreme Court precedent.

**30. Do you distinguish "Critical Race Theory" from "systemic racism," and if so, how?**

Response: I have not studied "Critical Race Theory" nor done any substantive reading on its tenants so I cannot compare it to the concept of "systemic racism." If this were to arise in a case before the court, I would research its vernacular usage and apply all First Circuit and Supreme Court precedent.

**31. You served as a board member and treasurer for the Massachusetts Association of Criminal Defense Lawyers ("MACDL") for the last ten years (seven years as treasurer). In your previous answers to this Committee, you disclaimed the statements made by MACDL. However, it is important to know why you maintained membership in that organization given the radical position it has taken in many briefs. In one brief, the MACDL wrote that "the word illegal . . . is inherently prejudicial, conjuring and activating implicit associations between race, ethnicity, otherness, and criminality." Is it a crime to illegally enter a sovereign nation without permission? Is it inappropriate to use accurate language?**

Response: Yes, it is a crime to enter the United States improperly. *See* 8 U.S.C. § 1325. I do not believe it inappropriate to use accurate language.

**32. If an illegal alien is arrested in the United States, is it a violation of the Fourth Amendment for Immigration and Customs Enforcement to detain that alien until the alien's case is adjudicated or the alien is deported? Why or why not?**

Response: The constitutionality of any detention is fact dependent and cannot be addressed in a vacuum. Congress has authorized detention in certain circumstances and the Supreme Court has not held that such detention is unconstitutional. Therefore, detention passes constitutional muster in some situations. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of a matter that may come before me so I cannot comment on a hypothetical situation. If I am so fortunate as to be confirmed, I would faithfully apply all First Circuit and Supreme Court precedent.

**33. That same MACDL brief states that "implicit bias jury instructions may result in unintended consequences or amplify bias." Do you believe that implicit bias trainings are ever appropriate for prospective jurors? If yes, would you ever implement implicit bias trainings in your courtroom?**

Response: I do not have any plan to implement implicit bias training for prospective jurors in my courtroom should I be confirmed.

**34. Is it an "unreasonable search" to order GPS monitoring for convicted sex offenders?**

Response: Applying the complex web of First Circuit and Supreme Court precedent to determine if a particular factual scenario implicates the 4th amendment is a fact dependent inquiry that cannot be answered without reference to the factual underpinnings of a particular situation. The use of GPS monitoring has been extensively litigated and it is clearly appropriate and allowable in many circumstances. As to any specific case, as a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of a matter that may come before me. If I am so fortunate as to be confirmed, I would faithfully apply all First Circuit and Supreme Court precedent.

**35. Another MACDL brief states that "mandatory minimum sentences impose a racially disparate impact on [b]lack and Hispanic defendants." Do mandatory minimum sentencing requirements specify different minimum sentences according to a defendant's race? Are mandatory minimum sentences racist?**

Response: Mandatory minimum sentences that currently exist do not specify different sentences based on a defendant's race and are therefore not racist insofar as they do not treat similarly situated people differently based on race. The propriety of mandatory minimum sentences is a policy question to be resolved by legislative policy makers. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me commenting on propriety of a political action. If I am so fortunate as to be confirmed, I would faithfully apply all First Circuit and Supreme

Court precedent as well as all applicable statutes concerning mandatory minimum sentences.

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

**Questions for the Record for Brian Murphy, nominated to be United States District Judge for District of Massachusetts**

## I. Directions

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

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

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

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

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

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

## II. Questions

1. **Is racial discrimination wrong?**

Response: Yes.

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

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of a matter that may come before me. *See* Cannon 3(A)(6). If I am so fortunate as to be confirmed, I would faithfully apply all precedent including the test for identifying rights not enumerated in the Constitution described by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (finding such rights must be "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty").

3. **How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.**

Response: My approach to rendering decisions on the bench will be built upon transparency and fairness. I will strive to give all litigants an opportunity to be heard, to find the facts fairly and with dispassion, and to apply facts justly to established law. My goal as a judicial officer would be to render decisions that are clear and understandable and that ensure the litigants know they have been heard and their arguments fairly considered. It would be my goal that everyone leaves the courtroom feeling that they were given a chance to present their arguments and that they were given due consideration even if the court adopts a contrary position.

My nomination as a district court judge is a different role than that of a Supreme Court Justice and I am not sufficiently familiar with each of the Justice's philosophies to identify with one in particularity.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "Originalism" as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." I would not ascribe any label to myself concerning constitutional interpretation. My role, should I be confirmed as a district court judge, would be to apply binding First Circuit and Supreme Court precedent on constitutional matters and I would do so without reservation. The Supreme Court has held that certain constitutional provisions are to be interpreted using

their original meaning. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If I am confirmed as a district court judge I would faithfully apply all First Circuit and Supreme Court precedent.

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

Response: Black's Law Dictionary (11th ed. 2019) defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." I would not ascribe any label to myself concerning constitutional interpretation. My role, should I be confirmed as a district court judge would be to apply binding First Circuit and Supreme Court precedent on constitutional matters and I would do so without reservation. I am not aware of any precedent applying "living constitutionalism" as an interpretive method.

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

Response: If I am facing an issue of Constitutional first impression, I would begin by examining the text itself. If this text was clear, the analysis ends at this point and I would apply the constitutional provision to the facts at issue. If ambiguity remained, I would then examine analogous Supreme Court and First Circuit precedent. I would also consult Supreme Court and First Circuit precedent to find the appropriate methodology to apply to interpreting the constitutional provision at issue. For example, the Supreme Court has held that certain constitutional provisions are to be interpreted using their original meaning. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (Second Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment). If I am confirmed as a district court judge I would faithfully apply all First Circuit and Supreme Court precedent.

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: The Supreme Court has clearly stated that "a statute [should be read] in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty*., 590 U.S. 644, 654 (2020). As a district court judge I would faithfully apply this precedent.

8. **Do you believe the meaning of the Constitution changes over time absent changes**

**through the Article V amendment process?**

Response: No. The Constitution changes through amendment under Article V. The Supreme Court has held that the Constitution "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022)

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

Response: Yes, this is settled law and if confirmed as a judge I will faithfully apply it.

a. **Was it correctly decided?**

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

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

Response: Yes, this is settled law and if confirmed as a judge I will faithfully apply it.

a. **Was it correctly decided?**

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

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

Response: Yes, this is settled law and if confirmed as a judge I will faithfully apply it.

a. **Was it correctly decided?**

Response: Yes. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

Consistent with the practice of prior judicial nominees, however, *Brown v. Board of Education* falls within a small class of cases that is so unlikely to ever come before me and I can therefore state that *Brown* was correctly decided.

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

Response: Yes, this is settled law and if confirmed as a judge I will faithfully apply it.

a. **Was it correctly decided?**

Response: As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

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

Response: Yes, this is settled law and if confirmed as a judge I will faithfully apply it.

a. **Was it correctly decided?**

Response: Yes. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of binding precedent. If I am so fortunate as to be confirmed, I would faithfully apply all precedent.

Consistent with the practice of prior judicial nominees, however, *Gibbons v. Ogden* falls within a small class of cases that is so unlikely to ever come before me and I can therefore state that it was correctly decided.

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

Response: The Bail Reform Act has a rebuttable presumption of detention in certain drug offenses, certain firearm and terrorism offenses, human trafficking offenses and certain offenses involving minors. *See* 18 U.S.C. § 3142. Under 18 U.S.C. § 3142(e)(2) a rebuttable presumption in favor or pretrial detention also arises when a defendant committed certain offenses while on pretrial release.

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

Response: Pretrial detention is appropriate when "no condition or combination of conditions will reasonable assure the appearance of the person as required and the safety of any other person and the community." *See* 18 U.S.C. § 3142(e)(2); *United States v. Salerno*, 481 U.S. 739, 747-751 (1987). As a district court judge my job is to follow the law as written by the legislature and interpreted by the First Circuit and the Supreme Court. Presumptions of detention are policy questions that should be decided by policy makers in the legislative branches and topics about which the Code of Conduct for United States Judges, by which I am bound as a nominee, precludes me from offering any opinion.

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

Response: Yes, the Supreme Court has identified both constitutional and statutory limits on when the Government can impose limits on observant activities. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Masterpiece Cakeshop, Ltd., v. Colorado Civ. Rts. Comm'n*, 584 U.S. 617, 618-19 (2018); *Tandon v. Newsom*, 593 U.S. 61, 62-63 (2021).

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

Response: The Supreme Court has interpreted the Free Exercise Clause of the First Amendment to prohibit disfavoring treatment of religious institutions as compared to secular ones. *See Masterpiece Cakeshop, Ltd., v. Colorado Civ. Rts. Comm'n*, 584 U.S. 617, 618-19 (2018) (Government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."); *Tandon v. Newsom*, 593 U.S. 61, 62-63 (2021).

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

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 15-21 (2020), the Supreme Court held that a preliminary injunction should issue because the plaintiffs were likely to prevail on the merits of their claim that religious institutions were being treated in a manner inferior to that of non-religious institutions and any such discrepancy was unlikely to survive strict scrutiny analysis. Regulations were found to have singled out houses of worship for especially harsh treatment.

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

Response: The Supreme Court held the 9th Circuit had erred when refusing to enjoin the COVID restrictions imposed by California that prohibited in home worship gatherings because "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 exercise" and this regulation would not survive strict scrutiny. *Tandon v. Newsom,* 593 U.S. 61, 62 (2021).

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

Response: Yes. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

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

Response: In *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 584 U.S. 617, 630-40 (2018), the Supreme Court held that the free exercise requirement of the First Amendment was violated when the Colorado Commission Against Discrimination displayed hostility to religion and required a cake shop to make a wedding cake for a same sex wedding that was violative of their sincerely held religious beliefs.

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

Response: Yes

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

Response: Yes, if the religious belief is sincerely held. *See Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989).

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

Response: Yes, if the religious belief is sincerely held. *See Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989).

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

Response: As a judicial nominee it would be inappropriate for me to speculate on the core tenants of the Catholic Church.

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

Response: The Supreme Court in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), held that the Free Exercise Clause prohibited the enforcement of a state's employment discrimination law against a Catholic school. The Court held that educating students about their faith was a central purpose of the school, so the 'ministerial exception' applied to all the teachers, not only those tasked with

teaching religion.

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

Response: In *Fulton v. City of Philadelphia*, 593 U.S. 522, 526 (2021), the Supreme Court held that a requirement that a religious provider of foster care services allow same sex couples to be foster parents unduly burdened the free exercise of religion triggering strict scrutiny review. This strict scrutiny review found this requirement was not narrowly tailored to accomplish the governmental interest of ensuring a sufficient number of foster parents and therefore was struck down.

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

Response: In *Carson v. Makin*, 596 U.S. 767 (2022), the Supreme Court held that if a state chooses to subsidize private education the state may not disqualify schools from receipt of this subsidy simply because they have a religious mission in addition to an educational one.

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

Response: The Supreme Court in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 542-44 (2022), held that it was violative of the free exercise and free speech provisions of the First Amendment to discipline a school coach for praying after a football game. Non-religious speech was permitted in this circumstance and the prohibition on silent prayer triggered, and did not survive, strict scrutiny.

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

Response: Justice Gorsuch concurred in the judgement in *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021) but wrote separately to emphasize that the Religious Land Use and Institutionalized Person Act required that strict scrutiny be applied to review the validity of this regulation as applied to these home-owners. Justice Gorsuch emphasized that "the question in this case is not whether the County has a compelling interest in enforcing its septic system requirement *generally*, but whether it has such an interest in denying an exception from that requirement to the Swartzentruber Amish *specifically*." *Id.* at 2432 (internal citations omitted).

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

Response: 18 U.S.C. § 1507 states:

"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."

As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of a matter that may come before me. If I am so fortunate as to be confirmed, I would faithfully apply all First Circuit and Supreme Court precedent.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

29. **Will you commit that your court, so far as you have a say, will not provide**

**trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: Yes.

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

Response: Yes.

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

Response: The power to make a political appointment is an inherently political decision that is vested in the appointing authority. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me commenting on propriety or constitutionality of a political action.

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

Response: No. Disparate impact alone does not establish a discriminatory intent though it can be considered when analyzing if a discriminatory intent exists. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). However, some federal anti-discrimination claims can be made relying on disparate impact. *E.g., Texas. Dep't of Housing and Community Affairs v. Inclusive Communities Project*, Inc., 576 U.S. 519 (2015).

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

Response: Congress is empowered to set the number of justices on the Supreme Court. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me commenting on propriety of a political action.

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

Response: No.

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

Response: The Supreme Court has recognized the 2nd Amendment protects an individual's right to bear arms at home and in public. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2117 (2022); *District of Columbia v. Heller*, 554

U.S. 570 (2008).

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

Response: The Supreme Court has held that:

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

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

Response: Yes. *See District of Columbia v. Heller*, 554 U.S. 570, 602 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

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

Response: No, in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111. 2156 (2022) the Supreme Court explained that the Constitutional right to bear arms in public for self-defense is "not a second-class right." (internal quotation omitted).

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

Response: No, in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111. 2156 (2022) the Supreme Court explained that the Constitutional right to bear arms in public for self-defense is "not a second-class right." (internal quotation omitted).

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

Response: The Constitution instills in the president the power "to take Care that Laws be faithfully executed." U.S. Const. art. II, § 3. While "prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is ... subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985).

41. **Explain your understanding of what distinguishes an act of mere 'prosecutorial**

**discretion' from that of a substantive administrative rule change.**

Response: Prosecutorial discretion is "[a] prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court." Black's Law Dictionary (11th ed. 2019). A substantive rule change is a change to an administrative regulation that has the force of law and must be made in accordance with the procedures in the Administrative Procedure Act. *See* 5 U.S.C. §§ 551-559.

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

Response: No.

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

Response: In *Alabama Association of Realtors v. HHS*, the Supreme Court vacated a nationwide eviction moratorium on the grounds that the Center for Disease Control would be unlikely to prevail on its assertion that the Public Health Service Act authorized it to impose such a moratorium.

44. **Is it appropriate for a prosecutor to publicly announce that they are going to prosecute a member of the community before they even start an investigation as to that person's conduct?**

Response: As a nominee it would be inappropriate for me to comment on the decisions or actions of prosecutors. If I am so fortunate as to be confirmed, I would faithfully apply all First Circuit and Supreme Court precedent to any case that should come before me.

45. **You served as a board member (2014-2024) and Treasurer (2016-2023) of the Massachusetts Association of Criminal Defense Lawyers. The organization issued numerous briefs while you served on its leadership board—briefs that you, on your committee questionnaire, attempted to distance yourself from. Despite your disclaimer, the fact remains that you chose to remain as board member for an organization that issued amicus briefs in support of a number of controversial topics over the last ten years.**

a. **Were you aware of the organization's amicus effort?**

Response: Yes. I was aware that we had an amicus committee that regularly either prepared, or solicited others to prepare, amicus briefs.

b. **Did you ever disagree with the organization's amicus briefs?**

Response: I generally did not review these briefs or form positions on their legal

arguments.

c. **If so, what steps did you take to note your disagreement?**

Response: I generally did not review these briefs or form positions on their legal arguments.

46. **Several amicus briefs were quite concerning and quite radical. I am interested in your support for the arguments made in this amicus briefs.**

a. **Do ICE detainers violate the U.S. Constitution?**

Response: The question of whether ICE detainers violate the Constitution regularly comes before federal courts and determining whether an ICE detainer violates the Constitution requires a fact intensive inquiry. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of a matter that may come before me.

b. **Should mandatory GPS monitoring for all sex offenders, regardless of risk, be prohibited?**

Response: The mandatory imposition of GPS monitoring is a policy question to be resolved by legislative policy makers. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me commenting on propriety of a political action. If I am so fortunate as to be confirmed, I would faithfully apply all First Circuit and Supreme Court precedent as well as all applicable statutes concerning imposition of GPS monitoring.

c. **Do you agree with your group's brief that the man who sexually assaulted a child should go free because the prosecutor used the term "illegal alien" in the trial?**

Response: I generally did not review these briefs or form positions on their legal arguments and am generally unaware of the underlying facts of the case. Release decisions require judges to make fact intensive inquiries. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me from commenting on the merits of a matter that may come before me.

d. **Is the term "illegal alien" stigmatizing?**

Response: Whether the use of this term is stigmatizing is a sociological question whose answer turns upon the context of its use.

e. **Were you offended by President Biden referring to Laken Riley's killer as "an illegal"?**

Response: As a federal judicial nominee, the Code of Conduct for United States

Judges precludes me commenting on the propriety of a political action.

47. **Should a prosecutor with allegations of routine misrepresentations to defense counsel be confirmed to the federal judiciary?**

Response: The confirmation of a political appointment is a political question to be resolved by the Senate. As a federal judicial nominee, the Code of Conduct for United States Judges precludes me commenting on propriety of a political action.

48. **As a judge, how would you handle a prosecutor who makes misrepresentations?**

Response: Candor with the Court is a clearly established ethical requirement of all attorneys who appear in court. The proper response to a failure to fulfill this requirement is a fact intensive inquiry that cannot be addressed absent a specific factual basis.