Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Lara Montecalvo
Nominee to the Court of Appeals for the First Circuit
June 1, 2022

1. **In your eighteen years as a public defender in Rhode Island, you have represented countless indigent defendants at both the trial and appellate level. You have also worked on civil matters in post-conviction cases.**

   a. **How do you think your time as a public defender will inform your approach to judicial decision-making?**

      Response: I have been profoundly enriched by my professional interactions with clients, colleagues, judges, police officers, prosecutors, witnesses, and victims of crime. These specific interactions, and my general experience as a public defender, have fortified my resolve to ensure that, should I be confirmed, every party that appears before me will be treated respectfully and fairly, and with the benefit of my full attention and hard work, and receive equal justice under law.

   b. **Could you elaborate on your civil experience?**

      Response: As a Public Defender, I have handled appeals as well as trial court litigation in civil post-conviction proceedings which are governed by the Civil Rules of Procedure. I have also represented parents in civil appeals of the termination of their parental rights. Moreover, as Director of the Rhode Island Public Defender's Office, I research, make, and execute legal and policy decisions involving the Office and its employees in the areas of employment law, labor law, landlord-tenant law, and contracts. When litigating civil cases as a Public Defender, I have drawn on the professional experiences I had early in my career when I worked as a civil litigator in the United States Department of Justice, Tax Division.

2. **You previously stated that you wish to see more of an acknowledgement of the role that addiction and mental illness play in the lives of criminal defendants and their victims because the criminal justice system too often fails individuals who struggle with these issues.**

   I have long supported funding for drug courts and veterans treatment courts because I believe such programs help reduce recidivism and target some of the root causes of crime—and, as a result, they keep our communities safer.

   In your experience, are these sorts of programs useful for justice-involved individuals? Do those benefits extend to local communities?

   Response: As Public Defender for the State of Rhode Island I have seen first-hand the benefits of customized programs that divert certain non-violent offenders away from

incarceration and toward rehabilitation both for public defender clients and for the community as a whole. The state legislature in Rhode Island has created both a drug court and a veterans court, overseen by the judiciary. The Rhode Island drug court is a judicial program that prioritizes rehabilitation over incarceration for certain individuals with substance use disorders who are facing non-violent felony drug charges and meet specific criteria for participation. Each case is directly overseen and managed by a Superior Court judge who reviews the client's progression through a rigorous treatment program. Upon successful completion of the program's requirements, that client may then be eligible to have his or her case dismissed and the associated records expunged.

Participation in the Rhode Island veterans court is available to military veterans struggling with substance use disorders and/or mental health issues and facing misdemeanor criminal offenses. This program, directly overseen by a District Court judge, encourages and supports the rehabilitation of participating veterans by providing access to medical and social service resources designed to equip the veteran with the skills and tools to address his or her unique challenges. Participants in the program commonly receive treatment for trauma, post-traumatic stress, substance use disorders, and mental health conditions. Compliance with therapeutically appropriate treatment and other conditions of the program is regularly reviewed by a District Court judge.

In my experience, both programs seek to reduce recidivism and promote public safety by infusing within each participant a measure of self-worth and optimism that benefits both the individual client and the community as a whole.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Lara E. Montecalvo
Judicial Nominee to the United States Court of Appeals for the First Circuit

1. **In a recent December 2020 interview with the Rhode Island Women's Bar Association you said that you would like to see "[a] serious reckoning with the indisputable fact that racial inequities permeate the system." Do you believe that the Rhode Island justice system is systemically racist? Why or why not?**

   Response: The above remark to the Rhode Island Women's Bar Association was offered in reference to and in support of the Rhode Island Supreme Court's 2020 letter pertaining to racial inequities within the Rhode Island criminal justice system. Both the federal and Rhode Island state criminal justice systems are designed to ensure that every person, irrespective of race, receives the benefit of a fair and just process. It is incumbent upon courts to ensure that case results are based on the fair application of law to the facts presented in an individual case. If confirmed, I would faithfully adhere to the concept of equal justice under the law and approach each case with an open mind, applying the law and the precedents of the Supreme Court and First Circuit to the facts of the case before me.

2. **In a recent December 2020 interview with the Rhode Island Women's Bar Association you said that you would like to see "[a] serious reckoning with the indisputable fact that racial inequities permeate the system." Do you believe that the federal justice system is systemically racist? Why or why not?**

   Response: Please see my response to Question 1.

3. **During your time as a State Governing Board Member of Common Cause Rhode Island the organization invested significant resources opposing state voter identification laws. Do you believe that voter identification laws are constitutional? Why or why not?**

   Response: The Supreme Court held in *Crawford v. Marion County*, 553 U.S. 181 (2008), that photo identification requirements for voting were not per se unconstitutional. If confirmed, I will follow all binding Supreme Court and First Circuit precedent.

4. **You served as an alumni member of the Head's Advisory Council at the Gordon School, a self-described progressive school, for 11 years. The members of the Head's Advisory Council act as "informal advisers to the head of school on a range of issues including multicultural education, planning the centennial celebration and reviewing the school's marketing initiatives." During this time, the school hosted the Interim Deputy Legal Director for LGBTQ Rights & Special Litigation from the Southern Poverty Law Center to promote advocacy work to middle school students.**

a. **Do you agree with the Southern Poverty Law Center's classification of certain organizations, including Alliance Defending Freedom and the Family Research Council, as "hate groups"?**
b. **Why or why not?**
c. **Do you believe it is consistent with the school's purported respect for the "customs, traditions, values and perspectives of individuals of different . . . religion[s]" to label mainstream religious groups as hate groups?**

Response: I graduated from the Gordon School in 1988 and as an alumni member of the Gordon School advisory council I attended one to two meetings per year where I participated in discussions pertaining to alumni relations, the planning of the school's centennial celebration, and fundraising initiatives. I have never provided input on school curriculum or policy statements and aside from attending one or two advisory council meetings each year, I was not involved with the school in any manner. I am therefore unaware of guest speakers hosted by the school including the visit by a member of the Southern Poverty Law Center referenced above and I am not aware of that organization's policies on any issue. I am also unfamiliar with the Alliance Defending Freedom and the Family Research Council. I am unable to provide any opinion on whether the Southern Poverty Law Center's categorization of any group or organization is consistent or inconsistent with any particular Gordon School policy statement or initiative.

5. **While you were on the council as an advisor, the head of school made numerous public statements about the role of race in education. Do you agree with the Gordon School head of school that "[y]oung children are breathing in the smog of racist messages around them" and if the school does not "actively counter[] racist messages, then they're going to stick"[1]?**

    a. **What did you understand the head of school to mean by "actively counter[] racist messages"?**

    Response: I am unfamiliar with the quoted statement and the context in which it was made and thus am unable to provide an opinion on the topic addressed in this question.

6. **During your 11-year tenure as an advisor to the Gordon School, the school was consulted by bookseller Barnes & Noble on "how to support anti-racist, anti-bias classrooms."[2] What does it mean to you to be "anti-racist" and "anti-bias"?**

    Response: I am unfamiliar with this quote and the context in which it was made. I am unaware of, and did not participate in, any consultation or communication between the Gordon School and Barnes & Noble booksellers. If confirmed as a circuit court judge, I would faithfully apply Supreme Court and First Circuit precedent and would render decisions consistent with that precedent. The duty of a federal judge is to apply

[1] https://twitter.com/halliesmills/status/1273761315669016577?cxt=HHwWgoCw0d_Kp60jAAAA
[2] https://twitter.com/Gordonschool/status/1278792070027673601?cxt=HHwWgoCwuZinl78jAAAA.

the law faithfully and impartially in all cases. Additionally, it would be my duty to ensure that every litigant that appears before me is treated equally and without bias.

7. What is your understanding of the definition of "racist"? What is your understanding of "anti-racist"? How do you distinguish between "racist" and "anti-racist"?

Response: I am not familiar with these quotes from the Gordon School or the context in which they were made. I generally understand the term "racist" to mean a belief that there is an inherent superiority in a particular race. I am less familiar with the term "anti-racist" and I do not know of one single definition for that term but I generally understand "anti-racist" to mean a belief opposing racism. If confirmed as a circuit court judge, and confronted with these terms, I would consider all the relevant facts of the particular case before me and would faithfully apply Supreme Court and First Circuit precedent and render decisions consistent with that precedent. The duty of a federal judge is to apply the law faithfully and impartially in all cases. Additionally, it would be my duty to ensure that every litigant that appears before me is treated equally and without bias.

8. What is your understanding of the First Circuit laws on affirmative action?

Response: The Supreme Court has said, "[a]s this Court's cases have made clear . . . the compelling interest that justified consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity." *Fisher v. Univ. of Tex.*, 579 U.S. 365, 381 (2016) (internal quotations omitted). Additionally, the Supreme Court has agreed to hear two cases challenging admission programs at universities, including one appealing a decision from the First Circuit, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F. 3d 157 (1st Cir. 2020). If confirmed, I will apply all binding Supreme Court and First Circuit precedent.

9. Under current First Circuit and Supreme Court precedent, how many genders are there, and who determines the universe of genders?

Response: Questions concerning gender and gender identity are currently being litigated in federal courts. As a judicial nominee it would not be appropriate for me to offer an opinion on an issue that may be the subject of litigation before the court. If confirmed, I will follow all Supreme Court and First Circuit precedent.

10. In what area of the law do you hope to affect the most change?

Response: Affecting change is not within the scope of duty for a federal circuit court judge and, if confirmed, I would not seek to affect change in any particular area of law. Instead, I would faithfully apply Supreme Court and First Circuit precedent and would render decisions consistent with that precedent. The duty of a federal judge is to apply the law impartially and faithfully in all cases.

11. Which Supreme Court opinion—including dissents and concurrences in addition to majority opinions—most clearly demonstrates your approach to the law?

Response: There is no one Supreme Court opinion that most clearly demonstrates my approach to the law.

12. What should a circuit court judge do when the text of a statute would lead to a bad outcome on the facts before her?

Response: A federal circuit judge's duty is to faithfully and impartially apply the law to the facts presented irrespective of whether that judge, or anyone else, subjectively considers the resulting outcome to be "bad". If confirmed as a circuit court judge I would faithfully adhere to the text of all relevant statutes, would faithfully apply Supreme Court and First Circuit precedent, and would render decisions consistent with that precedent. The duty of a federal court judge is to apply the law faithfully and impartially in all cases.

13. Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?

Response: The Supreme Court held in *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969) that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." If confirmed and confronted with this issue I would apply this standard and any other relevant Supreme Court and First Circuit precedent.

14. Is there an analytical difference between *Auer* deference and *Seminole Rock* deference?

Response: The Supreme Court has referred to the doctrine that a court should defer to an agency's construction of its own regulation as *Auer* deference but "before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019).

15. When interpreting text you find to be ambiguous, which tools would you use to resolve that ambiguity?

Response: If confirmed as a circuit court judge, I would consult and follow Supreme Court and First Circuit precedent interpreting the relevant text. If there is no binding precedent, I would first look to the text and interpret the text according to its plain and ordinary meaning. If there was ambiguity in the text, I would then look to any relevant canons of statutory construction, and Supreme Court or First Circuit precedent interpreting analogous statutory provisions, and potentially consider persuasive authority from other circuit courts. If necessary, I would consult legislative history to the extent permitted by Supreme Court and First Circuit precedent.

16. When interpreting text you find to be ambiguous, how would you handle two competing, contradictory canons of statutory interpretation?

Response: Any question as to ambiguity must be resolved by following the statutory interpretation canons provided by the Supreme Court and First Circuit precedent, including resolving competing canons of statutory interpretation. Please see my response to Question 15, above.

17. How do you decide when text is ambiguous?

Response: The plain meaning of a text should be apparent upon a careful reading of that text. Any question as to ambiguity must be resolved by following the statutory interpretation canons provided by Supreme Court and First Circuit precedent. Please see my response to Question 15, above.

18. You can answer the following questions yes or no:

a. **Was *Brown v. Board of Education* correctly decided?**
b. **Was *Loving v. Virginia* correctly decided?**
c. **Was *Griswold v. Connecticut* correctly decided?**
d. **Was *Roe v. Wade* correctly decided?**
e. **Was *Planned Parenthood v. Casey* correctly decided?**
f. **Was *Gonzales v. Carhart* correctly decided?**
g. **Was *District of Columbia v. Heller* correctly decided?**
h. **Was *McDonald v. City of Chicago* correctly decided?**
i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**
j. **Was *Sturgeon v. Frost* correctly decided?**
k. **Was *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission* correctly decided?**

Response: As a judicial nominee to the First Circuit Court of Appeals it would be inappropriate for me to comment on the correctness of any Supreme Court precedent. If confirmed, I will faithfully apply Supreme Court and First Circuit precedent.

As is the practice of prior judicial nominees, however, I make an exception to that general rule for *Brown v. Board of Education* and *Loving v. Virginia* as the holdings in those cases are unlikely to be challenged in future litigation. With that context in mind, I believe that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided.

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

Response: I am not familiar with Justice Ketanji Brown Jackson's comment in 2013 nor the context in which it was made. If confirmed as a circuit court judge I would faithfully apply all Supreme Court and First Circuit precedent relevant to the interpretation of the

Constitution and would render decisions consistent with that precedent. The duty of a federal judge is to apply the law impartially and faithfully in all cases.

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

Response: Judicial decisions should be the result of application of relevant law to the facts presented. If confirmed as a circuit court judge, I would strive to ensure that all decisions were the result of this procedure. The duty of a federal court judge is to impartially and faithfully apply the law in all cases.

21. Do parents have a constitutional right to direct the education of their children?

Response: Yes. The Supreme Court has held that parents have the right to direct the education of their children. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

22. Is when a human life begins a scientific question?

Response: In *Planned Parenthood v. Casey*, the Supreme Court observed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992). This question potentially implicates scientific, religious, philosophical, political, and moral considerations. If confirmed as a circuit court judge, and this issue were presented in a legal context, I would faithfully apply Supreme Court and First Circuit precedent and would render decisions consistent with that precedent.

23. Is threatening Supreme Court justices right or wrong?

Response: Threatening a Supreme Court justice is wrong. It may also be a crime under 18 U.S.C. § 115.

24. Is leaking draft court opinions right or wrong?

Response: The term "leaking" suggests the release or distribution of material without the appropriate authorization. I am aware that certain courts follow specific protocols regarding the release of opinions and departure from those protocols would generally be considered "wrong." Personally speaking, if I were confirmed to the First Circuit and a draft opinion in a case I participated in was leaked before it was finalized, I would be very troubled.

25. Do you understand the First Amendment to protect protesting at the homes of private individuals? Please explain.

Response: As a judicial nominee to the First Circuit Court of Appeals I am constrained from prospectively offering any opinion on questions of constitutional interpretation and application that may present before the court on which, if confirmed, I might sit. If confronted with this issue as a federal judge, I would faithfully and impartially apply

Supreme Court and First Circuit precedent and would render a decision consistent with that precedent.

26. Do you believe that we should defund or decrease funding for police departments and law enforcement? Please explain.

Response: The appropriate level of funding for police departments and law enforcement is a policy determination appropriately made by policy makers and not within the purview of federal judges. The duty of a federal judge is to apply the law impartially and faithfully in all cases.

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

Response: Allocation of resources within a local government's fiscal budget is a policy matter to be decided by authorized government representatives pursuant to established rules and procedures and is not within the purview of federal judges. The duty of a federal judge is to apply the law impartially and faithfully in all cases.

28. Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."

a. Who decides whether a burden exists on the exercise of religion, the government or the religious adherent?

Response: Whether a law represents a substantial burden on the exercise of religion is determined by the courts. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

b. How is a burden deemed to be "substantial[]" under current caselaw?

Response: Pursuant to the holding in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), courts must apply a two-part analysis. The court must first determine whether non-compliance with the challenged law would impose "severe" economic costs and, second, determine whether compliance with the challenged law would force plaintiffs to violate their sincere religious beliefs. *Burwell*, 573 U.S. at 720-726.

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

Response: The United States Supreme Court has defined "fighting words" as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572 (1942). Fighting words include "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Cohen v.*

California, 403 U.S. 15, 20 (1971). Symbolic speech does not constitute fighting words unless likely to be seen as "a direct personal insult or invitation to exchange fisticuffs." *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

30. Should a defendant's personal characteristics influence the punishment he or she receives?

Response: A defendant's history and personal characteristics is one of the factors a court must consider in fashioning an appropriate sentence. 18 USC § 3553 (a) provides that a sentencing court must consider, among other factors, "(1) the nature and circumstances of the offense and the history and characteristics of the defendant. . . ."

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

36. **The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors."**

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: On August 3, 2021, I submitted an application to Senators Jack Reed and Sheldon Whitehouse to be considered for a position on the United States Court of Appeals for the First Circuit. On August 24, 2021, I interviewed with staff from both Senators' offices. On September 1, 2021, I interviewed with the Senators themselves. On October 4, 2021, I interviewed with attorneys from the White House Counsel's Office. Since November 30, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On April 27, 2022, the President announced his intention to nominate me.

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

Response: No.

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

Response: No.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I received the questions on June 1, 2022. I prepared answers to each question based on my own knowledge and individual research. I submitted draft answers to the Office of Legal Policy (OLP) on June 2, 2022. I considered the input of OLP and finalized my answers for submission to the Senate Judiciary Committee.

Questions for the Record for Lara E. Montecalvo, Nominee for the First Circuit

I. Directions

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

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

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

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

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

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

II. Questions

1. Is racial discrimination wrong?

Response: Yes. Discrimination on the basis of race is generally illegal. For instance, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, religion, sex, and national origin.

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

Response: The primary function of a judge is to impartially apply the law, as it exists, to the facts presented in any particular case. If confirmed as a circuit court judge, I would approach each case in a neutral manner, carefully considering the arguments presented by the parties, identify relevant Supreme Court and First Circuit precedent, and apply that precedent to the relevant facts in a fair and impartial manner treating the parties before the court with courtesy and respect. As someone who has devoted much of my career to representing indigent defendants, I am especially mindful that when my clients came before judges what they wanted most was a judge who would treat them respectfully, who would listen carefully to the evidence in the case, and who would maintain an open mind and not prejudge the outcome. It would be my goal to be that kind of fair, respectful, and unbiased judge, working collegially with other judges on the First Circuit to resolve the cases that come before the court, and being open-minded to both the arguments of the parties as well as my colleagues on the bench.

I have not studied the judicial philosophies of the Supreme Court justices in depth and cannot identify a particular Supreme Court Justice whose philosophy is most analogous to mine.

3. Please explain the judicial philosophies of each of the following U.S. Supreme Court Justices and specify whether or not you agree with that judicial philosophy.

a. Justice Ruth Bader Ginsburg
b. Justice Antonin Scalia
c. Justice Stephen Breyer
d. Justice Clarence Thomas
e. Justice William J. Brennan
f. Justice Thurgood Marshall

Response: I have not studied the judicial philosophies of the Supreme Court justices in great depth and cannot provide an opinion on the particular philosophies of the judges noted here.

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

Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning to interpret the Second Amendment and in *Crawford v. Washington,* 541 U.S. 36 (2004), the Supreme Court looked to the original meaning of the text of the Confrontation Clause in rendering its decision. I would not describe myself by any particular interpretative doctrine. If confirmed, I would follow the methods of interpretation directed by the Supreme Court and the First Circuit.

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 defines living constitutionalism as: "The doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Black's Law Dictionary (11th ed. 2019). I would not describe myself by any particular interpretative doctrine. If confirmed, I would apply Supreme Court and First Circuit precedent regarding interpretative methods to the particular case before me.

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

Response: If confirmed as a circuit court judge, I would be bound by Supreme Court and First Circuit precedent interpreting the particular constitutional provision. If I were confronted with the rare circumstance that the interpretation of the constitutional provision was an issue of first impression, I would consider the text of the provision and apply the method of interpretation used by the Supreme Court in the most analogous circumstance. I would then look to any analogous First Circuit precedent or persuasive authority from other circuits.

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

Response: If confirmed, I will follow the Supreme Court and First Circuit precedent regarding interpretive methods. The Supreme Court has indicated that the plain or "ordinary" meaning refers to the public understanding of the text at the time of its enactment. *See, e.g., Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

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

Response: No. The Constitution is an enduring document that does not change over time, absent changes through the amendment process.

9. 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. There are limits to what the government may impose or require of religious organizations or small businesses based on the First Amendment of the United States Constitution as well as certain statutes such as the Religious Freedom Restoration Act. *See e.g., Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

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

Response: The Supreme Court held in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* that laws that incidentally burden the free exercise of religion are subject to strict scrutiny when they are not facially neutral or generally applicable; such laws must be justified by a compelling governmental interest and narrowly tailored to advance that interest. 508 U.S. 520, 533 (1993). However, the Supreme Court has also indicated that the Free Exercise Clause generally does not excuse an individual from complying with laws that are neutral and generally applicable. *See id.*; *Emp. Div., Dep't Human Res. of Or. v. Smith*, 494 U.S. 872, 878-82 (1990). Moreover, the Supreme Court has recently held that a statute is not neutral and generally applicable if it treats comparable activity between secular and religious groups differently. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

With respect to actions by the federal government which are subject to the Religious Freedom Restoration Act, even actions that are neutral and generally applicable are subject to strict scrutiny if they substantially burden the free exercise of religion. The Religious Freedom Restoration Act requires that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court looked to two factors to find that the plaintiffs' religious exercise was substantially burdened: (1) non-compliance with the contraceptive mandate would cause severe economic consequences for the plaintiffs and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. 573 U.S. 682, 720, 723 (2014).

11. 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*, the Supreme Court found that religious entity plaintiffs satisfied the requirements for a preliminary injunction of the government regulations they challenged. 1441 S. Ct. 63, 66 (2020) (finding the religious entity "made a strong showing that the challenged restrictions violate[d] the minimum requirement of neutrality to religion.") The Court explained that the religious entity plaintiffs "clearly established that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Id.* "Because the challenged restrictions are not 'neutral' and of 'general applicability' they must satisfy 'strict scrutiny' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Id.* at 67. Because the regulations were not neutral, the Court applied strict scrutiny and found that the government's regulations were not narrowly tailored to achieve the compelling interest of reducing the spread of Covid-19. *Id.* at 67. In determining that injunctive relief was appropriate, the Court found "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* Furthermore, there was no evidence that in granting the injunction the public would be harmed. *Id.* at 68.

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

Response: The Supreme Court has held that a statute is not neutral and generally applicable if it treats comparable activity between secular and religious groups differently. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In so doing, the Court concluded that the plaintiffs were entitled to a preliminary injunction of the State's Covid-19 restrictions that treated comparable secular activities more favorably than at-home religious exercise. In *Tandon*, the Supreme Court observed that when assessing whether two activities are comparable for the purposes of the Free Exercise Clause, "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* the Supreme Court held that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause where a transcript of the commission meetings showed a religious animus against the cakeshop owner's religious beliefs. 138 S. Ct. 1719 (2018).

15. 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. Sincere religious beliefs will be protected and a court's inquiry is limited to whether the beliefs are sincerely held, not whether the beliefs are consistent with any

particular religious faith or doctrine. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989).

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

Response: The Supreme Court has determined that individuals are entitled to invoke First Amendment protection for "sincerely held religious beliefs" even if the belief does not represent an accepted belief or tenet of the person's religious organization. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 832-35 (1989). "Only beliefs rooted in religion are protected by the Free Exercise Clause," however, and "[p]urely secular views do not suffice." *Id.* at 833.

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

Response: An individual's sincerely held religious beliefs are protected; the inquiry is not whether an individual correctly applied the religious tenets of a particular religion or whether there are "disagreements among members" or whether the particular belief "respond[s] to the commands of a particular religious organization." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833-34 (1989).

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

Response: I do not think this is the official position of the Catholic Church. In general, however, as a nominee, it would be inappropriate for me to provide an opinion regarding the official position of a religious organization.

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

Response: *Our Lady of Guadalupe School v. Morrissey-Berru* involved the question of whether the ministerial exception applied to two teachers at Catholic schools. 140 S. Ct. 2049 (2020). The Supreme Court held that the teachers fell into the exception based on the "abundant record evidence that [the teachers] performed vital religious duties" including teaching religion and even though they did not have the title of ministers and had less formal training, their core responsibilities were similar to the ministerial function. *Id.* at 2066.

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

Response: In *Fulton v. City of Philadelphia*, the Supreme Court found that a restriction that burdens religious liberty is not generally applicable if it allows for discretionary exemptions that may allow for different treatment between secular and religious groups. 141 S. Ct. 1868, 1882 (2021). The Supreme Court reasoned that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877. The Court emphasized that a "law is not generally applicable if it invites[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (internal quotations omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), an Amish religious community filed suit seeking declaratory judgment that they did not have to adopt the use of modern septic tanks for the disposal of grey water as county government officials had required. The Supreme Court vacated the lower court's decisions siding with the county officials and remanded the case for further proceedings. Justice Gorsuch concurred in the opinion of the Court in *Mast*, but indicated that there were other factors he thought the lower courts and county officials should consider on remand in light of *Fulton v. City of Philadelphia.* 141 S. Ct. at 2430-34. In the concurrence, Justice Gorsuch emphasized that "the County and the courts below erred by treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the specific application of those rules to *this* community." *Id.* at 2432 (emphasis in original). He also noted that "the County and lower courts erred by failing to give due weight to exemptions other groups enjoy." Furthermore, he found that the lower courts had erred by not giving sufficient weight to how other jurisdictions handled the sanitation issue. *Id.* at 1233.

19. At your hearing, you specified that you would follow U.S. Supreme Court precedent on the issue of voter ID laws. The U.S. Supreme Court has upheld voter ID laws several times. You specified that voter ID laws are only constitutional in "some circumstances." Can you give three examples with circumstances in which voter ID laws would be unconstitutional?

Response: The Supreme Court held in *Crawford v. Marion County*, 553 U.S. 181 (2008), that photo identification requirements for voting were not per se unconstitutional. As a judicial nominee, it would be inappropriate for me to comment on whether a particular voter ID law was constitutional or unconstitutional, as federal and state courts around the country evaluate those questions on a case-by-case basis based on the specific requirements of the law and facts in the case. If I am confirmed, I will fully and faithfully follow all binding Supreme Court and First Circuit precedent.

20. Independently of what the U.S. Supreme Court has ruled on voter ID laws, do you

personally believe that voter ID laws are racist?

Response: As a nominee, it would be inappropriate for me to provide a personal opinion on this question or any other. If I am confirmed, I will fully and faithfully follow all binding Supreme Court and First Circuit precedent.

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

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

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

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

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

Response: I am not familiar with any of the court's trainings for employees. If I were asked to evaluate the court's employee training program, I would examine whether the program was consistent with the constitution and federal law.

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

Response: I am not familiar with such trainings.

23. 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.

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

Response: As a sitting nominee, it would be inappropriate for me to comment on how the Executive Branch selects its political appointments. If I am confirmed and a case came before me presenting this issue, I would fully and faithfully follow all binding Supreme Court and First Circuit precedent.

25. Is the criminal justice system systemically racist?

Response: This is an important question for policy makers. The federal criminal justice system is designed to ensure that every person, irrespective of race, receives the benefit

of a fair and just process. It is incumbent upon courts to ensure that case results are based on the fair application of law to the facts presented in individual cases. If confirmed, I would faithfully adhere to the concept of equal justice under the law and approach each case with an open mind, applying the law and the precedents of the Supreme Court and First Circuit to the facts of the case before me. If I am confirmed, my job as a judge would be to evaluate any claims of racial discrimination in light of the facts of the case before the Court and the Constitution and laws that apply to the case. Additionally, it would be my duty to ensure that every litigant who appears before me is treated equally and without bias.

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

Response: This is a question best left to policy makers. If confirmed, I will faithfully follow all precedent from the Supreme Court.

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

Response: An individual's right to keep and bear firearms is a right protected by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the right is fundamental and applied to the states through the Fourteenth Amendment. *Id.* at 626.

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

Response: Please see my response to Question 27. I am unaware of any Supreme Court or First Circuit precedent that the right to own a firearm receives less protection than other rights.

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

Response: Please see my response to Question 28.

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

Response: Generally speaking, it is the executive's duty to enforce the laws although prosecutors have discretion to prosecute cases based on the facts and evidence of the specific cases before them. If confirmed, I will apply all Supreme Court and First Circuit precedent to decide this issue if it comes before me.

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

Response: Generally speaking, prosecutors have the discretion to prosecute cases based on the facts and the evidence of the specific cases before them. Administrative rule change is controlled by the Administrative Procedure Act.

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

Response: The Federal Death Penalty Act, 18 U.S.C. § 3591 permits the federal death penalty. Presidents may not unilaterally repeal or abolish acts of Congress.

33. 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*, 141 S. Ct. 2485 (2021) the Supreme Court vacated the District Court's stay of its judgment vacating the Center for Disease Control (CDC) moratorium on evictions. The Supreme Court's ground for vacating the judgment was that the statute on which the CDC relied did not grant the agency the broad authority it relied upon in imposing the nationwide moratorium. "If a federally imposed eviction moratorium is to continue," the Court reasoned, "Congress must specifically authorize it." *Id.* at 2490.

34. In 2020, your office filed an emergency petition asking the Rhode Island Supreme Court to end cash bail and release nonviolent defendants. The court denied and noted that there was no reason to think judges were not taking the pandemic into account as they set bail. Do you agree with the court's decision? Why or why not?

Response: In this case, I fulfilled my duty as an advocate to zealously advocate for my clients' interests regardless of any personal views I might have about my clients or their conduct. The decision of the Rhode Island Supreme Court was arrived at after fairly and impartially considering the relevant law, the briefs and arguments of the parties, and the facts of the case before the Court.

35. You served on the Gordon School's advisory council for 11 years. Listed below are the values that the school promoted as a "progressive school." In your opinion, what defines a "progressive" education?

Response: I graduated from the Gordon School in 1988 and as an alumni member of the Gordon School advisory council I attended one to two meetings per year where I participated in discussions pertaining to alumni relations, the planning of the school's centennial celebration, and fundraising initiatives of the school. I do not have a basis for an opinion about what Gordon School defines as a "progressive" education.

36. Did any of these core values of the Gordon School influence your continued service for the school?

a. Diversity, Equity, and inclusion
b. Multicultural practice

c. LBTQ initiatives

Response: I participated in the advisory council because I was an alumna of the school.

Senator Josh Hawley
Questions for the Record

Lara Montecalvo
Nominee, First Circuit

1. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**
    a. **Do you agree with that philosophy?**
    b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

    Response: I am not familiar with this quotation, but I believe a judge's role is to apply the law to the facts of a particular case in a fair and impartial manner. All federal judges must follow the judicial oath which is codified in 28 U.S.C. § 453.

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

    Response: *Younger* abstention doctrine requires federal courts to abstain from hearing cases that are already pending in state proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* involved a pending state criminal prosecution but the Supreme Court later extended the doctrine to some state civil proceedings. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975). In the First Circuit the *Younger* abstention doctrine applies "when the requested relief would interfere (1) with an ongoing state judicial proceeding; (2) that implicates an important state interest; and (3) that provides an adequate opportunity for the federal plaintiff to advance his federal constitutional challenge." *Rossi v. Gemma*, 489 F.3d 26, 34-35 (1st Cir. 2007).

    Under *Pullman* abstention, first established in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), federal courts should abstain from a decision when "difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Haw. Housing Auth. V. Midkiff*, 467 U.S. 229, 236 (1984). The First Circuit considers two factors in determining whether *Pullman* abstention is appropriate: "(1) whether there is substantial uncertainty over the meaning of the state law at issue; and (2) whether a state court's clarification of the law would obviate the need for a federal constitutional ruling." *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001).

    Under *Burford* Abstention, first formulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), federal courts will abstain from cases in which federal adjudication could interfere with a complex state administrative schemes. The First Circuit has found that *Burford* abstention applies narrowly and "rest[s] upon . . . the threat . . . that a federal court might, in the context of the state regulatory scheme, create a parallel, additional, federal 'regulatory review' mechanism, the existence of which would

significantly increase the difficulty of administering the state regulatory scheme" *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 75 (1st Cir. 2021) (quoting *Bath Mem'l Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988)). Thus *Burford* Abstention applies only in "unusual circumstances, where the federal court risks usurping the state's role as the regulatory decision-making center." *Forty Six Hundred LLC*, 15 F.4th at 75 (internal quotations omitted).

Rooker-Feldman doctrine prevents "lower federal courts . . . from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006). This is because 28 U.S.C. §1257 vests sole jurisdiction over appeals from final state-court judgments in the Supreme Court. *Id.* The First Circuit applies the *Rooker-Feldman* abstention doctrine where "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." *Federacion de Maestros v. Junta de Relaciones del Trabajo*, 410 F.3d 17, 23-24 (1st Cir. 2005) (quoting *Exxon Mobil Corp. v. Saudi Basic Induc. Corp.*, 544 U.S. 280, 291 (2005)).

Under the *Colorado River* abstention doctrine, federal courts may stay proceedings in cases involving concurrent state and federal suits addressing the same subject matter based on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). The First Circuit will consider its authority under an exceptional circumstances test balancing the non-exclusive list of factors drawn from *Colo. River* and its progeny: "(1) whether either court has assumed jurisdiction over a res; (2) the [geographical] inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) the adequacy of the state forum to protect the parties' interests; (7) the vexatious or contrived nature of the federal claim; and (8) respect for the principles underlying removal jurisdiction." *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 27-28 (1st Cir. 2010) (internal quotations omitted).

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

   Response: To the best of my recollection, I have never worked on a legal case or representation where I opposed a party's religious liberty claim.

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

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

Response: If confirmed, I will follow the Supreme Court and First Circuit precedent regarding interpretation of the Constitution. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning to interpret the Second Amendment and in *Crawford v. Washington,* 541 U.S. 36 (2004), the Supreme Court looked to the original meaning of the text of the confrontation clause in rendering its decision.

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

   Response: The Supreme Court has found that "when the meaning of a statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020). When a text is ambiguous and there is no binding precedent interpreting the text, a court may look at legislative history to interpret the text. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

      Response: The Supreme Court has found that Committee Reports are the most reliable form of legislative history. *Garcia v. U.S.*, 469 U.S. 70, 76 (1984).

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

      Response: It is not appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

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

   Response: "A prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and the State has refused to adopt without a legitimate penological reason" in order to establish that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

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

Response: The Supreme Court held in *Glossip v. Gross*, that "[a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives." 576 U.S. 863, 877-78 (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)).

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

   Response: I am not aware of such a right.

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

   Response: No.

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

    Response: The Supreme Court held in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, that laws which incidentally burden the free exercise of religion are subject to strict scrutiny when they are not facially neutral or generally applicable; such laws must be justified by a compelling governmental interest and narrowly tailored to advance that interest. 508 U.S. 520, 533 (1993). The Supreme Court has found that a statute is not neutral and generally applicable if it treats comparable activity between secular and religious groups differently. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Moreover, in *Fulton v. City of Philadelphia*, the Supreme Court found that a restriction that burdens religious liberty is not generally applicable if it allows for discretionary exemptions that may allow for different treatment between secular and religious groups. 141 S. Ct. 1868, 1882 (2021). And in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* the Supreme Court held that the government's application of a facially neutral public accommodations law violated the Free Exercise Clause where a transcript of the commission meetings showed a religious animus against the cakeshop owner's religious beliefs. 138 S. Ct. 1719 (2018).

11. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a**

state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: Please see my response to Question 10.

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

Response: A court's inquiry is limited to whether the beliefs are sincerely held, not whether the beliefs are consistent with any particular religious faith or doctrine. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). A sincerely held religious belief need not be based on a "tenet, belief or teaching of an established religious body" and but may instead be based on an individual's personal religious conviction. *Id.* at 831-33; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

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

Response: The Supreme Court held in *District of Columbia v. Heller*, that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008).

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

Response: No.

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

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

Response: As a nominee, it is not appropriate for me to provide an opinion regarding my personal beliefs about what Justice Holmes may have meant. In that same dissent, he also observed, "a Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

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

Response: *Lochner v. New York*, 198 U.S. 45 (1905) was largely abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). If confirmed, I would be duty-bound to apply current Supreme Court precedent.

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

a. If so, what are they?

Response: If confirmed, I would be duty-bound to follow all Supreme Court precedent. As a judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting on issues that are pending or that might come before the court.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed, I will follow all Supreme Court and First Circuit precedent about what constitutes a monopoly. I do not have a view on the opinion expressed by Judge Learned Hand.

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

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

Response: In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, the Supreme Court found that evidence that a party holds more than an 80% share of the product market, "with no readily available alternatives," was sufficient to support a finding of monopoly power. 504 U.S. 451, 481 (1992). The Court in *Eastman* also cited to two earlier cases where the Supreme Court held that companies holding 87% of the market and more than two-thirds of the market constituted monopolies. *Id.* (citing *United States v. Grinnell Corp.,* 384 U.S.

563, 571 (1966); *American Tobacco Co. v. United States,* 328 U.S. 781, 797 (1946)).

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

Response: In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court found that "[t]here is no federal general common law."

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

Response: Federal courts must interpret state constitutional provisions in accordance with state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-79 (1938).

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

Response: Please see my response to Question 18.

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

Response: State constitutional provisions may provide greater protections than those provided for in the federal constitution.

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

Response: As a judicial nominee, the Code of Conduct for United States Judges requires that I refrain from public comment on issues that might come before the court or from providing opinion on the correctness of an opinion of the Supreme Court. As is the practice of prior judicial nominees, however, I make an exception here to that general rule for *Brown v. Board of Education* as its holding is unlikely to be challenged in future litigation. With that context in mind, I believe that *Brown* was correctly decided.

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

Response: Federal Rule of Civil Procedure 65 governs the procedures for issuing injunctions. The Supreme Court has found that an "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). A nationwide injunction must not be more burdensome to the defendant than is necessary to provide complete relief to the plaintiffs. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (injunctive relief was permitted in case where nationwide class certified).

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

Response: Please see my response to Question 20.

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

Response: There is an ongoing debate about the power of the federal judiciary to issue nationwide injunctions. If confirmed, I will follow all Supreme Court and First Circuit precedent relating to injunctions.

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

Response: Please see my response to Question 20.

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

Response: In *Bond v. United States*, the Supreme Court stated that "[f]ederalism. . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." 564 U.S. 211, 222 (2011).

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

Response: Please see my response to Question 2.

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

Response: If confirmed, I would follow Supreme Court and First Circuit precedent in weighing and balancing the advantages and disadvantages of awarding damages verses injunctive relief in the particular case before the court.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clause of the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." This concept is known as substantive due process. *Id.* The "liberty"

interests protected by the due process clause include, among others, the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); and to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

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

Response: The Free Exercise Clause of the First Amendment is one of the fundamental rights in the Constitution establishing an individual's right to practice religion. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).

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

Response: The Supreme Court has said that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain food or certain modes of transportation." *Emp. Div., Dep't. Hum. Res. of Oregon v. Smith*, 494 U.S. 871, 877 (1990).

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

Response: The Religious Freedom Restoration Act requires that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court looked to two factors to find that the plaintiffs' religious exercise was substantially burdened: (1) non-compliance with the contraceptive mandate would cause severe economic consequences for the plaintiffs and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. 573 U.S. 682, 720, 723 (2014).

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

Response: Please see my response to Question 12.

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

Response: With respect to actions by the federal government which are subject to the Religious Freedom Restoration Act, even actions that are neutral and generally applicable are subject to strict scrutiny if they substantially burden the free exercise of religion. The Religious Freedom Restoration Act requires that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court looked to two factors to find that the plaintiffs' religious exercise was substantially burdened: (1) non-compliance with the contraceptive mandate would cause severe economic consequences for the plaintiffs and (2) compliance with the mandate would require the plaintiffs to violate their sincerely held religious beliefs. 573 U.S. 682, 720, 723 (2014). The Free Exercise Clause and the Establishment Clause prohibit government interference with religious institutions' employment of certain key employees such as ministers and teachers. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

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

Response: No.

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

a. What do you understand this statement to mean?

Response: I am not familiar with this quote but I understand it to mean that a judge should put aside their personal beliefs and apply the facts to the law.

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

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

a. If yes, please provide appropriate citations.

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

Response: I have not posted content on social media. I have deleted a Facebook account that listed my first name and a LinkedIn account listing my name and occupation; neither account contained content posted by me.

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

Response: If I am confirmed, my job as a judge would be to evaluate any claims of racial discrimination in light of the facts of the case before the Court and the constitution and laws that apply to the case.

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

Response: Yes.

32. How did you handle the situation?

Response: I performed my duty to zealously represent my clients and their interests regardless of my personal views.

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

Response: Yes.

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

Response: My views of the law have not been shaped by any particular Federalist Paper.

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

Response: I am not aware of any law governing this question. As a nominee to the First Circuit Court of Appeals, it would be inappropriate for me to provide any personal views about this question because it addresses an issue that could arise in a case before the First Circuit.

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

Response: About 15 years ago, I generally recall being called to testify in a criminal case involving a former client who was seeking a modification of a sentence in a related matter. At the conclusion of the hearing, the Court denied the defendant's motion. I do not have any notes, transcripts, or other details regarding the proceeding.

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

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

Response: No.

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

Response: No.

c. Systemic racism?

Response: No.

d. Critical race theory?

Response: No.

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

a. Apple?

Response: No.

b. Amazon?

Response: No.

c. Google?

Response: No.

d. Facebook?

Response: No.

e. Twitter?

Response: No.

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

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

Response: To the best of my recollection, I have never authored a brief that was filed in court without my name. As an attorney in the appellate unit of the Rhode Island Public Defender's Office and as Chief of that unit, I have provided editing on many appellate briefs written and filed by my colleagues in the office. My editing usually consisted of grammatical or typographical comments rather than broad substantive changes. I have no way to identify those cases where I provided editing.

40. Have you ever confessed error to a court?

a. If so, please describe the circumstances.

Response: To the best of my recollection, no.

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

Response: At my confirmation hearing, I made a promise to tell the truth and to answer your questions to the best of my ability. And I have done so.

Questions for the Record

Senator John Kennedy

Lara E. Montecalvo

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

   Response: The primary function of a judge is to impartially apply the law, as it exists, to the facts presented in any particular case. If confirmed as a circuit court judge, I would approach each case in a neutral manner, carefully considering the arguments presented by the parties, identify relevant Supreme Court and First Circuit precedent, and apply that precedent to the relevant facts in a fair and impartial manner treating the parties before the court with courtesy and respect. As someone who has devoted much of my career to representing indigent defendants, I am especially mindful that when my clients came before judges what they wanted most was a judge who would treat them respectfully, who would listen carefully to the evidence in the case, and who would maintain an open mind and not prejudge the outcome. It would be my goal to be that kind of fair, respectful, and unbiased judge, working collegially with other judges on the First Circuit to resolve the cases that come before the court, and being open-minded to both the arguments of the parties as well as my colleagues on the bench.

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

   Response: If the text of a law is clear, a judge must apply that law to the relevant facts of the case before the court; in such a scenario, a judge must not look beyond the law's text.

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

   Response: I am aware that in *Trump v. Hawaii*, the Supreme Court looked at statements made by the President for the purpose of evaluating whether a law survived rational basis review before concluding that the government had set forth a sufficient national security justification to survive rational basis review. 138 S. Ct. 2392, 2420 (2018) (determining "we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can be reasonably understood to result from a justification independent of unconstitutional grounds.") If confirmed, I will follow this and all other binding Supreme Court and First Circuit precedent.

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

   Response: In *Lloyd Corp. v. Tanner*, the Supreme Court examined the question of whether citizens protesting the Vietnam war could exercise their First Amendment rights by distributing handbills on the private property of a shopping mall with no public streets or

sidewalks. 407 U.S. 551, 567-69 (1972). The Court held in that case that "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Id.* at 571.

5. How does the Major Questions Doctrine relate to *Chevron*?

Response: Although I have not professionally encountered the "major questions doctrine", my understanding is that it dictates that courts do not defer to an administrative agency's otherwise reasonable interpretation of an ambiguous statute if the interpretation concerns questions of particular economic and political significance. The relationship between the major questions doctrine and *Chevron* deference is the subject of significant recent litigation and I, as a judicial nominee to the First Circuit Court of Appeals, am prohibited from prospectively commenting on an issue capable of presenting before that court. *See, e.g., Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021); *FDC v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

6. What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?

Response: The Supreme Court has observed that the reference to "the people" within the Bill of Rights appears to be a term of art employed in particular parts of the Constitution. *See District of Columbia v. Heller*, 554 U.S. 570, 579-81 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The Supreme Court has found that "the reference to 'the people' protected by the Fourth Amendment and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265.

7. Are non-citizens unlawfully present in the United States entitled to a right of privacy?

Response: In *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Supreme Court found that noncitizens in this country have due process rights, explaining "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens" but rather applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." And in *Zadvydas v. Davis*, the Court observed that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." 533 U.S. 678, 693 (2001). If confirmed, I will apply this and all binding Supreme Court and First Circuit precedent.

8. When does equal protection of the law in the United States attach to a human life?

Response: I am not aware that the Supreme Court has addressed this question. My understanding of current Supreme Court precedent is that` *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992) analyzed fetal viability and stated that "advances in neonatal care have advanced viability to a point somewhat earlier" than 1973, the year the Court decided *Roe v.*

Wade, 410 U.S. 113 (1973). The Court also observed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. If confirmed, I will apply this and all binding Supreme Court and First Circuit precedent.

9. Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?

Response: The Supreme Court held in *Crawford v. Marion County*, 553 U.S. 181 (2008), that photo identification requirements for voting were not per se unconstitutional. If I am confirmed, I will fully and faithfully apply all binding Supreme Court and First Circuit precedent.

Senator Mike Lee
Questions for the Record
Lara Montecalvo, Nominee to be United States Circuit Judge for the First Circuit

1. How would you describe your judicial philosophy?

Response: The primary function of a judge is to impartially apply the law, as it exists, to the facts presented in any particular case. If confirmed as a circuit court judge, I would approach each case in a neutral manner, carefully considering the arguments presented by the parties, identify relevant Supreme Court and First Circuit precedent, and apply that precedent to the relevant facts in a fair and impartial manner treating the parties before the court with courtesy and respect. As someone who has devoted much of my career to representing indigent defendants, I am especially mindful that when my clients came before judges what they wanted most was a judge who would treat them respectfully, who would listen carefully to the evidence in the case, and who would maintain an open mind and not prejudge the outcome. It would be my goal to be that kind of fair, respectful, and unbiased judge, working collegially with other judges on the First Circuit to resolve the cases that come before the court, and being open-minded to both the arguments of the parties as well as my colleagues on the bench.

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

Response: If confirmed as a circuit court judge, I would consult and follow Supreme Court and First Circuit precedent interpreting the relevant text. If there is no binding precedent, I would first look to the text and interpret the text according to its plain and ordinary meaning. If there was ambiguity in the text, I would then look to any relevant canons of statutory construction, and Supreme Court or First Circuit precedent interpreting analogous statutory provisions, and potentially consider persuasive authority from other circuit courts. If necessary, I would consult legislative history to the extent permitted by Supreme Court and First Circuit precedent.

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

Response: If confirmed as a circuit court judge, I would be bound by Supreme Court and First Circuit precedent interpreting the particular constitutional provision. If I were confronted with the rare circumstance that the interpretation of the constitutional provision was an issue of first impression, I would consider the text of the provision and apply the method of interpretation used by the Supreme Court in the most analogous circumstance. I would then look to any analogous First Circuit precedent or persuasive authority from other circuits.

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

Response: Where the Supreme Court has created binding precedent that a constitutional provision should be interpreted based on the text and the original public meaning, as it did in *District of Columbia v. Heller*, 554 U.S. 570 (2008), I will faithfully apply that 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: Please see my response to Question 2.

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

Response: If confirmed, I will follow the Supreme Court and First Circuit precedent regarding interpretive methods. The Supreme Court has indicated that the plain or "ordinary" meaning refers to the public understanding of the text at the time of its enactment. *See, e.g., Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

6. What are the constitutional requirements for standing?

Response: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court described the constitutional requirements for standing. The Court set out three elements that must be met to establish standing: (1) the plaintiff must have suffered an "injury in fact" that is actual or imminent; (2) the injury must be traceable to the action of the defendant; and (3) it must be likely that the injury will be redressed by the court. *Id.* at 560-61.

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

Response: In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that the Necessary and Proper Clause of the Constitution provides Congress with implied powers that are necessary and proper to execute Congress's enumerated powers.

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

Response: I would look to Supreme Court and First Circuit precedent to guide my inquiry into whether Congress has exceeded its constitutional authority.

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that the Due Process Clause of the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." This concept is known as substantive due process. *Id.* The "liberty" interests protected by the due process clause include, among others, the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); and to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. What rights are protected under substantive due process?

Please see my response to Question 9.

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

Response: The only appropriate basis to distinguish these rights are those authorized by Supreme Court precedent. The Supreme Court has found that the economic rights at issue in *Lochner v. New York* were not entitled to heightened scrutiny under the Due Process Clause. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). It is my understanding that *Lochner* has been largely overturned by subsequent case law, including *West Coast Hotel Co.* The Supreme Court has found that some personal rights are protected under the substantive due process, see my response to Question 9. If confirmed, I will apply all binding Supreme Court and First Circuit precedent.

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

Response: Limits to Congress's power under the Commerce Clause require a determination that the act is unrelated to interstate commerce and foreign commerce. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that the Commerce Clause empowers Congress to regulate three categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) activities that "substantially affect interstate commerce." *Id.* at 558-59. *See also National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 551 (2012).

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

Response: The Supreme Court has designated four suspect classifications: race, national origin, religion, and alienage.

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

Response: The framers of the United States Constitution designed the government to balance power between the branches of government as a way to safeguard the democratic system and so as to avoid concentration of power in one branch.

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

Response: If confirmed, I would look to Supreme Court and First Circuit precedent to resolve the conflict.

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

Response: Empathy must play no role in a judge's consideration of a case. A judge must impartially consider each case without regard to personal views.

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

Response: Both actions are equally bad.

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

Response: This is not an area that I have studied and I do not have a basis upon which to offer an opinion.

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

Response: *Marbury v. Madison* established that judicial review refers to the judicial branch's constitutional authority to determine the legality of actions taken by the legislative and executive branch. 5 U.S. 137, 177 (1803). I understand judicial supremacy to refer to the principle that the other coequal branches of government must follow the Supreme Court's holdings on constitutional issues.

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court

. . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials abide by their oath to support the Constitution and must respect judicial decisions and enact laws that are consistent with the United States Constitution and the Supreme Court's interpretation of the Constitution.

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

Response: I understand this to mean that judges have a limited role and must only address the cases before them, applying the law and the applicable precedent to the facts of the individual controversy before the court.

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

Response: Lower court judges are duty-bound to follow the precedent of the Supreme Court and the circuit in which they sit and evaluate each case on its own facts and the applicable law and precedent.

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

Response: None. 18 U.S.C. § 3553(a) sets out the appropriate sentencing factors judges should consider when fashioning a sentence and demographics do not play a role. The United States Sentencing Guidelines also sets out that considerations of race, sex, national origin, creed, religion, and socio-economic status are not relevant in determining a sentence. U.S.S.G. § 5H1.10.

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons**

otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I am not familiar with the statement referenced here. Black's Law Dictionary defines equity as "[f]airness; impartiality; evenhanded dealing." *Equity,* Black's Law Dictionary (11th ed. 2019). The same dictionary defines equality as "the quality, state or condition of being equal; esp., likeness in power or political status." *Id.*

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

Please seem my response to Question 24.

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

Response: The Fourteenth Amendment guarantees "equal protection of the laws."

27. How do you define "systemic racism?"

Response: I am not aware of any consistent definition of the term systematic racism. I generally understand the term to describe the concept that racism has been embedded within systems due to widespread differing treatment based on race.

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

Response: I have not researched the meaning of "critical race theory." I generally understand the term to describe a branch of academic study.

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

Response: My general understanding is that "critical race theory" is an academic field of study whereas "systematic racism" describes circumstances that may be present in a given system.

Senator Ben Sasse
Questions for the Record for Lara E. Montecalvo
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
May 25, 2022

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

   Response: No.

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

   Response: The primary function of a judge is to impartially apply the law, as it exists, to the facts presented in any particular case. If confirmed as a circuit court judge, I would approach each case in a neutral manner, carefully considering the arguments presented by the parties, identify relevant Supreme Court and First Circuit precedent, and apply that precedent to the relevant facts in a fair and impartial manner treating the parties before the court with courtesy and respect. As someone who has devoted much of my career to representing indigent defendants, I am especially mindful that when my clients came before judges what they wanted most was a judge who would treat them respectfully, who would listen carefully to the evidence in the case, and who would maintain an open mind and not prejudge the outcome. It would be my goal to be that kind of fair, respectful, and unbiased judge, working collegially with other judges on the First Circuit to resolve the cases that come before the court, and being open-minded to both the arguments of the parties as well as my colleagues on the bench.

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

   Response: Black's Law Dictionary defines originalism as "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted." Black's Law Dictionary (11th ed. 2019). In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court looked to the original public meaning to interpret the Second Amendment and in *Crawford v. Washington,* 541 U.S. 36 (2004), the Supreme Court looked to the original meaning of the text of the Confrontation Clause in rendering its decision. I would not describe myself by any particular interpretative doctrine. If confirmed, I would follow the methods of interpretation directed by the Supreme Court and the First Circuit.

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

   Response: I would not describe myself by any particular interpretative doctrine although I do believe the text of a statute is the best evidence of its meaning. If confirmed, I would follow the methods of interpretation directed by the Supreme Court and the First Circuit.

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

   Response: I believe the Constitution is an enduring and fixed document. It may not be changed except through the amendment process.

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

   Response: There is not one particular Justice whose jurisprudence I admire the most.

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

   Response: In the First Circuit, precedential decisions of a panel are binding on later panels. *See United States v. Santiago-Colon*, 917 F.3d 43, 57 (1st Cir. 2019) (determining that the law of the circuit, a branch of *stare decisis*, holds that "newly constituted panels in a multi-panel circuit are bound by prior panel decisions that are closely on point.") Where there is no controlling Supreme Court precedent, the exceptions to the rule of *stare decisis* are extremely limited. *Id.* at 57-58. Exceptions come into play only if the holding of a prior panel is contradicted by subsequent authority in an *en banc* decision, subsequent decision of the Supreme Court, or a legislative overruling, or "in those rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sounds reason for believing that the former panel, in light of fresh developments, would change its collective mind." *Id.*

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

   Response: Please see my response in Question 7.

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

   Response: If confirmed as a circuit court judge, I would consult and follow Supreme Court and First Circuit precedent interpreting the relevant text. If there is no binding precedent, I would first look to the text and interpret the text according to its plain and ordinary meaning. If there was ambiguity in the text, I would then look to any relevant canons of statutory construction, and Supreme Court or First Circuit precedent interpreting analogous statutory provisions, and potentially consider persuasive authority from other circuit courts. If necessary, I would consult legislative history to the extent

permitted by Supreme Court and First Circuit precedent. "General principles of justice" are not an accepted method of statutory interpretation.

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

Response: The factors a judge may consider when fashioning a sentence are set out in 18 U.S.C. § 3553(a). The United States Sentencing Guidelines Manual states that race, sex, national origin, creed, religion, and socio-economic status are not relevant in determining a sentence. U.S.S.G. § 5H1.10.

Questions from Senator Thom Tillis
for Lara E. Montecalvo
Nominee to be US Circuit Judge for the
First Circuit

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

   Response: Yes.

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

   Response: I understand the term "judicial activism" to refer to a judge's insertion or of his or her own personal views into legal matters before the court on which they sit. I would consider this judicial approach inappropriate. The duty of a federal judge is to apply the law as it exists, fairly and impartially, and without regard to that judge's personal views or opinions.

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

   Response: It is the duty and responsibility of every judge to maintain impartiality. Every federal judge is duty-bound to maintain their oath. If confirmed, I will swear an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me . . . under the Constitution and laws of the United States." If confirmed, I will faithfully adhere to this oath and faithfully and impartially apply Supreme Court and First Circuit precedent.

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

   Response: No. Judges are not policymakers and are duty-bound to apply the law to the facts as presented irrespective of that judge's personal beliefs as to the desirability of the resulting outcome.

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

   Response: Yes. The role of a federal judge is to apply the law to the facts as presented without regard to that judge's personal beliefs as to the desirability of the outcome. If confirmed, I would unreservedly and faithfully apply Supreme Court and First Circuit precedent and would render decisions consistent with that precedent.

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

Response: No.

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

   Response: Qualified immunity is a doctrine which provides government officials protection from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In analyzing a qualified immunity claim, the Supreme Court has set out a two-part test to determine whether qualified immunity applies: 1) whether the plaintiff has established a violation of a constitutional right; and 2) whether the right at issue was "'clearly established' at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Saucier v. Katz*, 522 U.S. 194, 201 (2001)). If confirmed, I would apply all binding Supreme Court and First Circuit precedent regarding qualified immunity for all government officials including police officers.

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

   Response: If I am confirmed as a Judge on the First Circuit, I would apply all binding Supreme Court and First Circuit precedent regarding qualified immunity. The question of whether the qualified immunity doctrine provides sufficient protection for law enforcement officers is a question for policy makers.

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

   Response: If I am confirmed as a Judge on the First Circuit, I would apply all binding Supreme Court and First Circuit precedent regarding qualified immunity. The scope of the qualified immunity doctrine as applied to law enforcement officers is a question for policy makers.

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

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

    Response: None.

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

Response: None.

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

Response: None.

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

Response: I have handled cases in which First Amendment and free speech issues were implicated. However, these cases did not involve intellectual property or copyright issues. As a law student, I wrote a student note which addressed intellectual property issues and patent protections but not copyright issues. *See Seed Wars: Biotechnology, Intellectual Property and the Quest for High Yield Seeds*, B.C. Int'l & Comp. L. Rev. XXIII, No. 2 (Spring 2000). As a practicing lawyer, I have not handled cases involving intellectual property or copyright or otherwise written or studied in those areas.

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

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

Response: If confirmed as a circuit court judge, I would consult and follow Supreme Court and First Circuit precedent interpreting the relevant text. If there is no binding precedent, I would first look to the text and interpret the text according to its plain and ordinary meaning. If there was ambiguity in the text, I would then look to any relevant canons of statutory construction, and Supreme Court or First Circuit precedent interpreting analogous statutory provisions, and potentially consider persuasive authority from other circuit courts. If necessary, I would consult legislative history to the extent permitted by Supreme Court and First Circuit precedent. *See, e.g., Milner v. Department of the Navy*, 562 U.S. 562, 572 (2011); *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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

Response: The Supreme Court articulated the standard for judicial deference to an administrative agency's statutory interpretation in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984). In *Chevron,* the Court established a two-part test to determine if agency deference is appropriate. First, the reviewing court must determine if Congress has directly addressed the issue in question. If so, the judicial review will end. If, however, the statute is silent or ambiguous on the issue the reviewing court must consider whether the agency's interpretation is reasonable. If it is reasonable, then reviewing courts must grant deference to that interpretation. In *Christensen v. Harris County,* 529 U.S. 576, 587 (2000), the Supreme Court found that when a court addresses the issue of an interpretation of an agency opinion letter, policy statement, manual, or enforcement guideline, *Chevron* deference is not warranted. Instead, *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) sets out the level of deference: the agency positions are entitled to respect but only to the extent they have the power to persuade.

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

Response: I have not had occasion in my professional career to address this issue. If confirmed, and confronted with this issue, I would diligently research the governing law, study the facts of the case, and faithfully apply Supreme Court and First Circuit precedent and render decisions consistent with that precedent.

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

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

Response: Judges are duty-bound to interpret statutes as they are written. Changes to the meaning of any statute, in response to technological advances or otherwise, must be legislatively determined and enacted.

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

Response: If confirmed, I will faithfully apply all binding Supreme Court and First Circuit precedent. Both of those courts have standards guiding whether and when the court should overturn its own precedent, whether in consideration of technological advances or other factors.

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

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

Response: I have not had occasion to study "judge shopping" or "forum shopping" within a particular judicial district and have not formed an opinion on the issue. These are also not issues that I have experienced as a practicing lawyer.

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

Response: Please see my response to Question 13 (a).

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

Response: Though I am unfamiliar with this issue, as described above, a federal judge's duty is to faithfully and impartially apply the law in any case before that judge. If confirmed, I commit that I will not take steps to proactively encourage certain types of cases or litigants to come before me.

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

Response: I have not had occasion to professionally study this topic and therefore cannot provide an opinion.

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

Response: I have not had occasion to professionally study this topic and therefore cannot provide an opinion.

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

Response: I have not had occasion to professionally study this topic and therefore cannot provide an opinion.

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

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

Response: I have not had occasion to professionally study the frequency of mandamus reversals by the courts of appeal and do not have a basis for an opinion on this issue.

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

Response: I have not had occasion to professionally study the frequency of mandamus reversals by the courts of appeal and do not have a basis for an opinion on this issue.