Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Julie Rikelman
Nominee to be United States Circuit Judge for the First Circuit
September 28, 2022

1. **During your confirmation hearing, you were asked several questions about a law review article you wrote 15 years ago entitled "Justifying Forcible DNA Testing Schemes Under the Special Needs Exception to the Fourth Amendment: A Dangerous Precedent."**

    a. **Can you elaborate on the context of this article?**

    Response: Thank you for the opportunity to clarify this issue. I briefly reviewed the article before my hearing to remind myself of the topic it addressed and its central thesis. In preparing for the hearing, I reviewed the roughly 1000 pages I submitted to the committee, as well as the decisions and briefs in cases I had litigated during my 25-year career, numerous Supreme Court and First Circuit decisions in areas outside my own practice, and other documents, such as federal statutes and the criminal rules of procedure. I did not focus on this article because I had written it over 15 years ago, and it concerned an area of law that had not been part of my legal practice for almost 20 years. I apologize I did not recall the last few pages of the article during the hearing.

    To give additional context for the article, it was well settled at the time the article was published that the government could search an individual to obtain DNA evidence after obtaining a warrant for such a search based on probable cause. However, whether and under what circumstances the government could search an individual to obtain DNA without a warrant or any individualized suspicion was an unsettled area of law. In particular, the article focused on whether, under DNA testing statutes, the government could search an individual to obtain DNA without a warrant or individualized suspicion by relying on the special needs exception to the warrant requirement. At the time, the Supreme Court had applied the special needs exception only when the government conducted a search for reasons other than criminal law enforcement (such as drug tests of student athletes to determine eligibility for school athletics.) The Court also had recently reiterated that the special needs exception did not apply when a search was conducted for ordinary crime-solving purposes. *See Ferguson v. City of Charleston*, 532 U.S. 67, 70-71 (2001). As the article discussed, DNA testing statutes applied in a wide range of circumstances and allowed the government to search individuals, without a warrant or individualized suspicion, to obtain DNA for inclusion in a database for the purpose of future crime-solving. The end of the article predicted that if the Supreme Court were to uphold such statutes, it would do so under a balancing test, rather than the special needs exception, and then briefly discussed which types of DNA testing statutes were more likely to survive such review under existing precedent.

b. Please explain current U.S. Supreme Court and First Circuit precedent on this area of law.

Response: Six years after this article was published, in *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court upheld a Maryland DNA testing statute, which permitted warrantless, suspicionless searches to obtain the DNA of individuals arraigned on serious offenses. The Court upheld the statute by relying on a general balancing test, rather than the special needs exception. *Id.* at 461-466. Justice Scalia authored the dissent, arguing that the Court should have struck down the search at issue as unconstitutional. In his dissenting opinion, Justice Scalia wrote that the Fourth Amendment's text and previous Supreme Court precedent made clear that "suspicionless searches are never allowed if their principal end is ordinary crime-solving." *Id.* at 469.

Should a case raising these issues come before me as a judge, I will faithfully apply *Maryland v. King* and any other relevant Fourth Amendment precedent of the Supreme Court or the First Circuit.

c. Would this article, written 15 years ago, have any bearing on your decisionmaking should you be confirmed to the First Circuit?

Response: No. This article would have absolutely no bearing on my decision-making were I confirmed as a circuit judge. I wrote this article shortly after working on a litigation about the scope of the special needs exception, based on precedent in effect at the time. To be clear, were I confirmed as a circuit judge, no prior commentary I have offered related to cases I have litigated or positions I have advocated for on behalf of my clients would have any bearing on my decision-making.

2. You have spent approximately half of your legal career as an advocate, litigating cases involving reproductive rights. In that role, you advanced a number of arguments in court. However, you have now been nominated to serve as a federal judge and set aside your advocacy.

a. How do you understand the difference between serving as an advocate and serving as a judge?

Response: Having been part of our legal system for 25 years, as both an appellate law clerk and an advocate, I understand very well the different roles of advocates and judges. The role of an advocate is to vigorously represent one's clients, within the bounds of the law. The role of a judge is to approach each case with an open mind and carefully analyze the claims in the case based on the relevant precedent, and the facts as found under the rules of evidence.

Throughout my career, I have relied on federal judges around the country to follow the law, regardless of their previous work experience or personal views. My clients have depended on judges to be fair and impartial in every case.

If I were fortunate enough to be confirmed to the First Circuit, that is exactly the kind of judge that I would be.

b. Do you believe you can fairly decide cases before you, without regard to who the party is or what your personal beliefs are?

Response: Yes. If I were confirmed, I would decide every case that may come before me fairly and impartially, regardless of the claims or the parties involved. My parents immigrated with me to the United States because of our country's commitment to the rule of law, and I became an attorney because of my faith in our legal system. Nothing is more important to me than upholding the rule of law.

I believe that my 25-year legal career demonstrates my commitment to the rule of law. I began my career clerking for two different appellate judges with different backgrounds. As a practicing attorney, I spent half my career in private practice and half in public interest work. I have litigated as part of a small firm, a large firm, and in-house. I have worked on a broad range of issues from securities law, to breach of contract, to constitutional law. I also have represented a diverse range of clients, including small businesses, major corporations, and individuals. I have endeavored to do my best for each of those clients, regardless of my personal views, and I think that shows that I can see legal issues from many different perspectives. Further, throughout my career, I have advocated within the framework of Supreme Court precedent, always making the best arguments that were available under the facts, as bound by the law.

As an advocate, I wanted to appear before judges who decided cases fairly, regardless of the parties before them or their personal beliefs. That is the kind of judge I wanted for every case I litigated, whether it was a corporate case or a constitutional case. And that is the kind of judge I would be if I were fortunate enough to be confirmed.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Ms. Julie Rikelman
Nominee to be United States Circuit Judge for the First Circuit

1. **During your hearing before the Senate Judiciary Committee, I asked you about a 2007 *Baylor Law Review* article you wrote. In the article, you discussed Fourth Amendment theories under which federal appellate courts have justified the collection of blood samples for DNA testing from convicted criminals and those credibly accused of certain crimes. I asked you why you believed that laws requiring convicted criminals to submit blood samples for DNA testing may not be justifiable under the Fourth Amendment. Here is the beginning of your article, with the section I asked you about highlighted:**

59 Baylor L. Rev. 41

Baylor Law Review
Winter 2007

Articles
Julie Rikelman[a1]

***41 JUSTIFYING FORCIBLE DNA TESTING SCHEMES UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT: A DANGEROUS PRECEDENT**

You told me that your article only argued that such testing may not be justifiable under one exception to the Fourth Amendment. But more than a fifth of your article is devoted to discussing whether any theory justifies DNA testing statutes. In your article, you explicitly state that the Supreme Court "should not uphold the DNA testing statutes under any Fourth Amendment theory. Indeed, it would be hard to square upholding the DNA statutes with the Court's decision in *Edmond*, where the Court refused to uphold suspicionless seizures conducted for law

enforcement purposes." Later in your hearing, you emphasized that your "memory of the article was that it focused on and [you] th[ought] it's title focused on the special needs exemption."

a. **You applied for a lifetime appointment in April 2021. Please explain whether you ever reviewed the entire article before your hearing.**

Response: Thank you for the opportunity to clarify this issue. I briefly reviewed the article before my hearing to remind myself of the topic it addressed and its central thesis. In preparing for the hearing, I reviewed the roughly 1000 pages I submitted to the committee, as well as the decisions and briefs in cases I had litigated during my 25-year career, numerous Supreme Court and First Circuit decisions in areas outside my own practice, and other documents, such as federal statutes and the criminal rules of procedure. I did not focus on this article because I had written it over 15 years ago, and it concerned an area of law that had not been part of my legal practice for almost 20 years. I apologize I did not recall the last few pages of the article during the hearing.

To give additional context for the article, it was well settled at the time the article was published that the government could search an individual to obtain DNA evidence after obtaining a warrant for such a search based on probable cause. However, whether and under what circumstances the government could search an individual to obtain DNA without a warrant or any individualized suspicion was an unsettled area of law. In particular, the article focused on whether, under DNA testing statutes, the government could search an individual to obtain DNA without a warrant or individualized suspicion by relying on the special needs exception to the warrant requirement. At the time, the Supreme Court had applied the special needs exception only when the government conducted a search for reasons other than criminal law enforcement (such as drug tests of student athletes to determine eligibility for school athletics.) The Court also had recently reiterated that the special needs exception did not apply when a search was conducted for ordinary crime-solving purposes. *See Ferguson v. City of Charleston*, 532 U.S. 67, 70-71 (2001). As the article discussed, DNA testing statutes applied in a wide range of circumstances and allowed the government to search individuals, without a warrant or individualized suspicion, to obtain DNA for inclusion in a database for the purpose of future crime-solving. The end of the article predicted that if the Supreme Court were to uphold such statutes, it would do so under a balancing test, rather than the special needs exception, and then briefly discussed which types of DNA testing statutes were more likely to survive such review under existing precedent.

Six years after this article was published, in *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court upheld a Maryland DNA testing statute, which permitted warrantless, suspicionless searches to obtain the DNA of individuals arraigned on serious offenses. The Court upheld the statute by relying on a general balancing test, rather than the special needs exception. *Id.* at 461-466.

Justice Scalia authored the dissent, arguing that the Court should have struck down the search at issue as unconstitutional. In his dissenting opinion, Justice Scalia wrote that the Fourth Amendment's text and previous Supreme Court precedent made clear that "suspicionless searches are never allowed if their principal end is ordinary crime-solving." *Id.* at 469.

Should a case raising these issues come before me as a judge, I will faithfully apply *Maryland v. King* and any other relevant Fourth Amendment precedent of the Supreme Court or the First Circuit.

b. **Please explain whether you reviewed the first page of your article before your hearing.**

Response: Please see my response to 1(a) above.

c. **Please explain whether you reviewed anything beyond the article's title.**

Response: Please see my response to 1(a) above.

2. **You have previously criticized state laws that sought to ban abortions because of genetically inherited diseases or disorders. For instance, in a 2014 NBC News article, you are quoted as suggesting that such laws "wholly disrespect the doctor-patient relationship." In your view, why should it be legal to seek abortions based on desired genetic traits?**

Response: I made this statement in my role as an advocate at the Center for Reproductive Rights about several recent state laws banning pre-viability abortion. Under Supreme Court precedent in effect in 2014, including *Roe v. Wade* and *Planned Parenthood v. Casey*, it was unconstitutional for the government to ban abortion before viability. The Court's precedent provided that, until viability, the decision whether to continue or end a pregnancy was for the individual woman to make, rather than the government.

Under the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, the government can prohibit or restrict abortion at any point in pregnancy, subject only to rational basis review. Should I be confirmed as a judge, I will faithfully follow the Supreme Court's decision in *Dobbs*.

During my time at the Center for Reproductive Rights, the Center also advocated on behalf of people with disabilities, including supporting the right of parents with disabilities to parent their own children.

3. **A report by the Center for Reproductive Rights that you helped to draft portions of suggests that "[p]eople of all gender identities can become pregnant" and that the Center "embraces all people with the capacity for pregnancy." In your view, can men become pregnant?**

Response: I contributed to sections of this report, along with many of my colleagues, as part of my job responsibilities as an advocate and attorney at the Center for Reproductive Rights.

In the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), Justice Gorsuch, writing for the Court, recognized that individuals "identified at birth as women [can] later identify as men." *Id.* at 1749. Other federal courts have also so recognized. *See, e.g.*, *Reprod. Health Svs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021) (stating "[a]lthough this opinion uses gendered terms, we recognize that not all persons who may become pregnant identify as female"). I am aware that issues concerning gender identity continue to be litigated in the federal courts. Were I confirmed to be a judge, I will faithfully and impartially apply all relevant Supreme Court and First Circuit precedent in any case concerning these issues.

4. **Despite suggesting that people of "all gender identities can become pregnant," the report also claims that "laws or policies related to any aspect of reproduction, including contraception, abortion, and giving birth" are "ripe for equal protection challenges" because they fail to "accept[] women's equal ability to make such decisions." If both men and women can make the decisions to become pregnant and give birth, please explain how laws regulating abortion would, in your view, be ripe for challenges under the Equal Protection Clause of the U.S. Constitution.**

   Response: I contributed to sections of this report, along with many of my colleagues, as part of my job responsibilities as an advocate and attorney at the Center for Reproductive Rights. This section of the report discussed previous Supreme Court precedent recognizing historical discrimination against women.

   Were I confirmed as a federal judge, I will faithfully and impartially apply all Supreme Court precedent on abortion, including the Supreme Court's decision in *Dobbs*.

5. **The same report also suggests that international human rights law requires access to abortion.**

   a. **Please describe your understanding of the precedential or persuasive value, if any, that international law has on U.S. law, citing any relevant First Circuit or Supreme Court precedent.**

      Response: The Supreme Court often considers English law, including, for example, in its recent decision in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2140 (2022) (confirming that Court considers English law and history in the late 1600s and 1700s "to be particularly instructive" in interpreting Second Amendment). Otherwise, to my knowledge, the Supreme Court has considered international law only in limited circumstances and only to

confirm its own analysis of U.S. law. Two examples of cases where it has done so are *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), and *Roper v. Simmons*, 543 U.S. 551, 575-578 (2005).

If I were confirmed as a judge, I would faithfully follow Supreme Court precedent on the particular claim before me and decide the case only on that basis.

b. **In your view, what role should international human rights law play in evaluating a claim that a law violates the Fourteenth Amendment of the U.S. Constitution?**

Response: To my knowledge, the Supreme Court has considered non-U.S. law only to confirm its own analysis under domestic law. Two examples of Fourteenth Amendment cases where the Supreme Court has considered international law are *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), and *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2270 & n. 52 (2022). If I were confirmed as a judge, I would faithfully follow Supreme Court precedent on the claim before me and decide the case only on that basis.

6. **Since law school, have you ever appeared before the First Circuit or a federal district court within the Circuit?**

Response: Since law school, as U.S. Litigation Director at the Center for Reproductive Rights, I have supervised attorneys working on cases in district court in the First Circuit, that were pending at the First Circuit, and that were on appeal from the First Circuit. I also have worked on a number of U.S. Supreme Court cases that set precedent for federal law in all federal courts, including courts in the First Circuit. During my time at Harvard Law School, I also interned for the U.S. Attorney's Office in Boston and worked on a criminal trial in the District of Massachusetts.

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

Response: I am not aware of the context in which then-Judge Jackson made this statement or her specific understanding of the term "living constitution." If I were confirmed as a judge, I would interpret the Constitution by following binding Supreme Court and First Circuit precedent on the claims before me. Further, absent amendments, the text of the Constitution remains fixed, although Supreme Court precedent provides that the Constitution is an enduring document that should be applied to new facts and circumstances. For example, in his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia stated that the First Amendment applies to modern forms of communication, the Fourth Amendment applies to modern forms of searches, and the Second Amendment applies to modern forms of bearable arms. *Id.* at 582.

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

   Response: I disagree with this statement. My understanding of the role of a federal judge is to decide cases based on a faithful and impartial application of all relevant Supreme Court and circuit precedent, regardless of a judge's personal values or beliefs.

9. **Judge Stephen Reinhardt once explained that, because the Supreme Court hears a limited number of cases each year, part of his judicial mantra was, "They can't catch 'em all." Is this an appropriate approach for a federal judge to take?**

   Response: I am not aware of the context in which Judge Reinhardt made this statement. If I were confirmed as a circuit judge, my approach in every case would be to apply impartially the relevant Supreme Court and First Circuit precedent to the claims before me, based on the facts as found by the district court.

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

    Response: My judicial philosophy would not be based on a particular Supreme Court decision. Instead, it would be informed by my experience clerking for two different appellate court judges and what they taught me about the limited role of a judge and respect for the rule of law, as well as by my experience representing a wide range of clients in a variety of matters in the federal courts. I would strive to be the type of judge that I wanted for each of my clients: a judge who carefully analyzes the legal and factual issues in the case, impartially applies the law, and treats everyone associated with a case or the court system with respect, whether it be the parties, attorneys, or court staff. Further, as an appellate judge, I would endeavor to work cooperatively and collegially with the other judges in the circuit to draft opinions that are clear and allow the parties and attorneys to understand the basis for the court's ruling.

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

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

12. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

    Response: If a case raising this issue came before me, I would faithfully follow Supreme Court precedent in making that determination, including the Court's decisions in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and *Washington v.*

Glucksberg, 521 U.S. 702 (1997), which *Dobbs* relied on. In *Washington v. Glucksberg*, the Supreme Court stated that the Fourteenth Amendment's "due process clause guarantees more than fair process and the 'liberty' it protects includes more than the absence of physical restraint." *Id.* at 719 (internal citations omitted). Under *Glucksberg*, the Due Process Clause of the Fourteenth Amendment protects those fundamental rights and liberties that 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." *Id.* at 720-21 (internal citations omitted).

13. **Assume that the original public meaning of a statutory or constitutional provision is clear. Under what circumstances would it be appropriate for a federal judge to decline to apply the original public meaning of that provision?**

Response: As a federal circuit judge, I would be bound by any relevant Supreme Court or First Circuit precedent in construing a statutory or constitutional provision in a case before me. Thus, I would begin by carefully reviewing and faithfully applying any such precedent. For instance, if a case raised issues related to Title VII, I would carefully review and apply the Supreme Court's recent decision in *Bostock* about the meaning of that statute's text. If there were no precedent directly on point, I would apply Supreme Court precedent setting out the correct method of analysis for the statute or constitutional provision at issue. For instance, in interpreting the Fourteenth Amendment's due process clause, the methodology required is the one set out in *Washington v. Glucksberg*, as described in my response to No. 12 above. In interpreting the Second Amendment, the original public meaning governs.

14. **Under existing federal law, may a small business owner decline to provide customers with service on the basis of a sincerely held religious belief? Please explain your answer, citing any relevant statutes or Supreme Court precedent.**

Response: The analysis would depend on the particular facts and law at issue. For instance, under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, which applies only to the federal government, if a federal law or action substantially burdens the religion of a "person" as defined in the statute, it is constitutional only if it serves a compelling government interest through the least restrictive means. *See id.*; *see also, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

In addition, both federal and state laws and actions are subject to the requirements of the Free Exercise Clause of the First Amendment. Neutral and generally applicable laws do not violate the Free Exercise Clause under the Court's decision in *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990). However, a law that burdens the exercise of religion and is *either* not neutral or not generally applicable is subject to strict scrutiny. In recent decisions, the Supreme Court has emphasized factors that lower courts must consider in determining if a government action is both neutral and generally applicable. For example, a law is not neutral if it targets religious practice, *see Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022), or if a government official acting in an adjudicative capacity demonstrates any hostility towards religion. *See Masterpiece*

Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018). And a law is not generally applicable if it provides for individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if it treats religious exercise less favorably than any comparable secular activity, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

15. **How do you decide when text is ambiguous?**

Response: I would begin by consulting any relevant Supreme Court or First Circuit precedent interpreting the meaning of the text in question, whether that text be constitutional, statutory, or regulatory. In most cases, that would be dispositive. If there were no relevant precedent regarding the text in question, I would consider the text's plain meaning, including common understanding of the terms in the text, as well as the meaning of any terms of art. Only if the plain meaning were reasonably susceptible to different constructions would I conclude that the text was ambiguous.

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

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

Response: Yes. Although it is generally inappropriate for me as a judicial nominee to comment on the merits of binding Supreme Court precedent when related issues are currently pending or could come before me, *Brown v. Board of Education*'s holding that racial segregation in public schools violates the Fourteenth Amendment is extremely unlikely to be re-litigated in the federal courts. For that reason, I believe that I can answer, consistent with the Code of Conduct for United States Judges, that I believe *Brown* was correctly decided.

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

Response: Yes. Although it is generally inappropriate for me as a judicial nominee to comment on the merits of binding Supreme Court precedent when related issues are currently pending or could come before me, *Loving v. Virginia*'s holding that bans on interracial marriage violate the Fourteenth Amendment is extremely unlikely to be re-litigated in the federal courts. For that reason, I believe that I can answer, consistent with the Code of Conduct for United States Judges, that I believe *Loving* was correctly decided.

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

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

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

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

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

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

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

Response: Please see my response to No. 11 (c) above.

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

Response: Please see my response to No. 11 (c) above.

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

Response: Please see my response to No. 11 (c) above.

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

Response: Please see my response to No. 11 (c) above.

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

Response: Please see my response to No. 11 (c) above.

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

Response: Please see my response to No. 11 (c) above.

17. **Please explain your understanding of 18 U.S.C. § 1507 and what conduct it prohibits.**

Response: Section 1507 provides that "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or

near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both."

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

    Response: I am not aware of any Supreme Court precedent addressing if Section 1507 or a state analog statute is constitutional on its face. Under the Code of Conduct for United States Judges, which provides guidance to judicial nominees, it would be inappropriate for me to prejudge a matter that could come before the federal courts. If I were confirmed as a judge and a case concerning Section 1507 or a state analog statute came before me, I would carefully evaluate the parties' specific claims and arguments in the case and resolve those claims by faithfully applying any relevant Supreme Court or First Circuit precedent to the facts as found by the district court.

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

    Response: In April 2022, I spoke to Senator Warren's staff to express my interest in being considered for a Massachusetts vacancy that had been announced recently on the United States Court of Appeals for the First Circuit. On April 25, 2022, I interviewed with Senators Markey and Warren for vacant positions on both the District of Massachusetts and on the First Circuit, after first interviewing for the district court position with the state's bi-partisan selection committee. On May 3, 2022, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On August 1, 2022, my nomination was submitted to the Senate.

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

    Response: I have spoken briefly with Robert Raben several times about the judicial nomination process and what to expect at various steps of the process.

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

    Response: No.

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

    Response: Yes, I spoke to attorneys associated with the American Constitution Society about the judicial selection and nomination process and what to expect at various steps in the process.

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

    Response: No.

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

    Response: No.

25. **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, and/or Jen Dansereau?**

       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, and/or Jen Dansereau?**

       Response: No.

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

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

    Response: No.

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

    Response: No.

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

    Response: I had one conversation with Nan Aron at Alliance for Justice about the judicial nomination process.

27. **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.

28. **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: Not to my knowledge.

29. **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.

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

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

       Response: No.

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

       Response: No.

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

       Response: Please see my response to No. 20 above.

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

    Response: On September 28, 2022, the Office of Legal Policy forwarded these questions to me. I then drafted the responses, re-reading Supreme Court decisions, federal statutes, and regulations as needed and confirming citations. The Office of Legal Policy provided limited feedback before I finalized the responses. All the answers are my own.

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

1. How would you describe your judicial philosophy?

Response: My judicial philosophy would be informed by my experience clerking for two different appellate court judges and what they taught me about the rule of law and the limited role of a judge, as well as by my experience representing a wide range of clients in a variety of matters in the federal courts. I would strive to be the type of judge that I wanted for each of my clients: a judge who carefully analyzes the legal and factual issues in the case, impartially applies the law, and treats everyone associated with a case or the court system with respect, whether it be the parties, attorneys, or court staff. Further, as an appellate judge, I would endeavor to work cooperatively and collegially with the other judges in the circuit to draft opinions on a timely basis that are clear and allow the parties and attorneys to understand the basis for the court's ruling.

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

Response: In deciding a case that turned on the interpretation of a federal statute, I would first evaluate if there were any Supreme Court or First Circuit precedent squarely on point. If not, I would consult other controlling precedent about that statute for guidance. If there were no relevant precedent, I would endeavor to decide the case based on the plain meaning of the statute's text. If the text were ambiguous, I would consider other interpretative tools, as permitted by the Supreme Court and circuit precedent, including the canons of construction, the structure of the statute as a whole, and reliable forms of legislative history, such as committee reports.

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

Response: In deciding a case that turned on the interpretation of a federal constitutional provision, I would first evaluate if there were any Supreme Court or First Circuit precedent squarely on point. If not, I would consult other controlling precedent about that provision for guidance. If there were no relevant precedent, I would decide the case based on the legal standards or interpretive methodology the Supreme Court has set out for the constitutional provision at issue.

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

Response: As a federal circuit judge, I would be bound by any relevant Supreme Court or First Circuit precedent in evaluating a federal constitutional provision in a case before me, which undoubtedly would discuss the text and original meaning of the provision. Thus, I would begin by carefully reviewing and faithfully applying any

such precedent. If there were no precedent directly on point, I would apply Supreme Court precedent setting out the correct interpretive methodology for the constitutional provision at issue. For instance, in interpreting the Fourteenth Amendment's due process clause, the methodology required is the one set out in *Washington v. Glucksberg*, as described in my response to No. 9 below. In interpreting the Second Amendment, the original public meaning governs. *See, e.g.*, *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

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: As a federal circuit judge, I would be bound by any relevant Supreme Court or First Circuit precedent in evaluating a statutory provision in a case before me. Thus, I would begin by carefully reviewing and faithfully applying any such precedent. For instance, if a case raised issues related to Title VII, I would carefully review and apply the Supreme Court's recent decision in *Bostock v. Clayton Cnty*., 140 S. Ct. 1731 (2020), about the meaning of that statute's text. If there were no precedent directly on point, I would follow *Bostock*'s instruction that the ordinary public meaning of the statute's text, as understood at the time it was enacted, should govern. *See id.* at 1738.

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

  Response: The plain meaning of a statute should generally be understood based on the ordinary public meaning of its text at the time of enactment. *See Bostock*, 140 S. Ct. at 1738. For constitutional provisions, the interpretive methodology depends on the constitutional provision at issue. Please see my response to No. 4 above.

6. What are the constitutional requirements for standing?

Response: Article III of the Constitution limits the judicial power to cases and controversies. The Supreme Court has explained that Article III standing requires that the plaintiff demonstrate (1) an injury in fact that is concrete and particularized, and actual or imminent; (2) that the injury was fairly traceable to the challenged action of the defendant, and (3) that the injury would likely be redressed by the relief requested. *See*, *e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

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

Response: Under the "necessary and proper clause" of Article 1, Section 8 of the Constitution, Congress also has the power to "make all laws which shall be necessary and proper for the carrying into Execution [its enumerated] Powers, and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Supreme Court recognized the role of the necessary and proper clause in *McCullough v. Maryland*, 17 U.S. 316 (1819), and interpreted "necessary" to mean appropriate and legitimate.

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

Response: I would evaluate that law based on Supreme Court and First Circuit precedent, as well as the parties' specific arguments regarding Congressional authority. The fact that Congress did not refer to a specific enumerated power would not undermine its authority to enact the law if in fact it has that authority under the Constitution.

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

Response: If a case raising this issue came before me, I would faithfully follow Supreme Court precedent in making that determination, including the Court's decisions in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and *Washington v. Glucksberg*, 521 U.S. 702 (1997), which *Dobbs* relied on. In *Washington v. Glucksberg*, the Supreme Court stated that the "due process clause guarantees more than fair process and the 'liberty' it protects includes more than the absence of physical restraint." *Id.* at 719 (internal citations omitted). Under *Glucksberg*, the Due Process Clauses of the Fifth and Fourteenth Amendments protect those fundamental rights and liberties that 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." *Id.* at 720-21 (internal citations omitted).

10. What rights are protected under substantive due process?

Response: The Supreme Court has recognized a number of fundamental rights as part of its substantive due process jurisprudence, including the right to direct the upbringing of one's children, the right to refuse unwanted medical care, the right to contraception, and the right to marriage. *See also* my response to No. 9 above.

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

Response: If any case concerning substantive due process were to come before me, I would follow all relevant Supreme Court and First Circuit precedent in deciding the case. That relevant precedent includes *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which abrogated *Lochner*, and the Supreme Court's recent decision in *Dobbs*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.

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

Response: Under the commerce clause, Congress can regulate (i) the channels of interstate commerce, (ii) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (iii) activities that substantially affect interstate commerce, which includes intrastate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). However, Congress does not have the power to force an individual to "become active in commerce by purchasing a product." *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 552 (2012).

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

Response: To date, the Supreme Court has recognized race, religion, national origin and alienage as suspect classes. In the past, the Court has considered whether a group qualifies as a suspect class by considering factors such as whether the group has an immutable characteristic determined solely by birth or is subject to a history of purposeful unequal treatment or political powerlessness that it should qualify for additional protection. *See, e.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

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

Response: Checks and balance and separation of powers are bedrock principles of our Constitution. Each branch is critical to protecting our democracy and the rights guaranteed by the Constitution. In particular, the Constitution provides for an independent judiciary that focuses on preserving the rule of law, rather than on political considerations. *See Declaration of Independence* (noting that the King of Great Britain had refused "to Assent to Laws for establishing Judiciary powers [and had] made Judges dependent on his Will alone, for the tenure of their offices . . . .").

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

Response: I would apply the most relevant Supreme Court and First Circuit precedent in deciding such a case.

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

Response: Judges should decide cases based on the law and the record of the particular case before them. But courtesy towards those interacting with the court helps to increase confidence in the judiciary, including that judges' rulings are fair and based on the law.

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

Response: Both would be equally undesirable outcomes because they would undermine the rule of law.

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

Response: I have not studied this data and potential underlying reasons for it, although I could posit that many more federal statutes were enacted in the second time period as compared to the first time period. As a circuit judge, I would review federal statues based on existing Supreme Court and First Circuit precedent and follow that precedent impartially, without a predisposition to uphold or strike down federal statutes.

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

Response: Judicial review refers to courts evaluating laws and government action, as part of a case or controversy, for their consistency with the Constitution and other federal authority; judicial supremacy refers to the principle that the Supreme Court has the final word on the meaning of the Constitution.

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: The rule of law and the federal system of government depend on each person respecting duly rendered judicial decisions of the Supreme Court on issues resolved by those decisions, whether they agree or disagree with those decisions. Further, Article VI of the Constitution requires that all elected officials, as well as all judicial officers, "shall be bound by Oath or Affirmation, to support this Constitution."

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: This principle reflects that courts cannot easily and regularly enforce every judgment they issue; instead, courts rely, in large part, on the people accepting those judgments and willingly conforming their behavior accordingly. That willing compliance requires that the people retain their faith in the fairness and impartiality of the judiciary, and trust that courts are judging, not merely enforcing their personal views.

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: Under the principle of vertical stare decisis, the decisions of higher courts are always binding on lower court judges. But a judge reviewing precedent that does not speak to the issue at hand may, while acting fairly and impartially, conclude that the present case is distinguishable on the facts from that prior precedent and seek to resolve the case by researching and applying the most analogous precedent addressing the record before the court.

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 of those factors are listed in the federal statute governing the determination of a fair sentence. *See* 18 U.S.C. § 3553(a).

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: The Administration's definition appears to be a policy statement. I am not familiar with court decisions interpreting equity as a legal principle. If I were confirmed as a judge, my role would be limited to deciding particular claims related to equality or discrimination on the record before me. As such, in any case that was brought under the 14th Amendment's Equal Protection Clause or an anti-discrimination statute, I would faithfully apply the relevant law on what constitutes discrimination under that particular claim to the factual findings of the district court.

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

Response: Please see my response to No. 24 directly above.

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

Response: The Equal Protection Clause protects against intentional discrimination. In any case before me raising federal equal protection claims, I would apply the relevant precedent to the specific equal protection claim before me.

27. How do you define "systemic racism?"

Response: My general understanding of systemic racism is that it refers to how historical discrimination against people of color, in particular slavery and de jure segregation, may impact current conditions in our society.

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

Response: My general understanding of critical race theory is that it examines the relationship between laws and racial equality and analyzes those laws with a racial justice lens. If I were confirmed as a judge, my decisions would be based on case law, statutes and the facts as found by the district court, not on a legal theory.

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

Response: Please see my responses to Nos. 28 and 29 above.

30. When did you first become aware that you were being considered for a position on the First Circuit Court of Appeals? When did you first speak with the Biden administration about being nominated to this position?

Response: On May 3, 2022, I interviewed with attorneys for the White House Counsel's Office; that was my first contact with the Biden administration. I became aware that I was being considered by the Biden administration for a position on the First Circuit Court of Appeals shortly after that date.

31. You helped to draft a report published by the Center for Reproductive Rights entitled "The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the 14th Amendment." The publishing date for this report is July 21, 2022. Were you aware that you were being considered for a judicial nomination on or before the publication date of this report? Had you spoken with anyone from the Biden Administration or the offices of Senators Warren or Markey about your potential nomination?

Response: In my role as an attorney at the Center for Reproductive Rights, I did not have decision-making authority regarding the precise timing of the organization's publications; those decisions were made by my supervisors and our Communications team. My substantive contributions to sections of this Report, which were part of my job responsibilities at the Center, were completed months before its publication date.

On May 3, 2022, I interviewed with attorneys from the White House Counsel's Office and became aware that I was being considered for a judicial nomination shortly thereafter. I interviewed with Senators Warren and Markey in late April 2022.

32. Following the Supreme Court's decision in *Dobbs*, you told Axios News on June 24, 2022 that "we are on the verge of what may be the biggest public health crisis that we have seen in decades." In your hearing, you defended this statement by saying that is was done in your role as an advocate; however, it is an ethical obligation for all lawyers to base their advocacy on facts and data. What data did you rely upon to assert that the *Dobbs* decision would bring about the "biggest public health crisis that we have seen in decades"?

Response: I relied on several different sources of data, which I discuss below.

The brief that I submitted on behalf of my clients in the *Dobbs* case, as well as several amicus briefs filed in the case, discussed the harms women would face if the Court were to overturn *Roe v. Wade*. As one example of such harm, the brief discussed the risks to women's health and lives if they were forced to continue a pregnancy and go through labor and delivery against their will. As the brief explained, childbirth is generally 14 times more likely than legal abortion to result in a woman's death. *See* Respondents Br. at 28. Further the "comparative risk is even higher in Mississippi, where it is about 75 times more dangerous to carry a pregnancy to term than to have an abortion. As in the United States generally, Black women in Mississippi disproportionately bear that risk." *Id.* The Respondents' brief relied on Mississippi Department of Health reports about the state's own public health data. *See id.* at nn. 7-8. It also relied on an amicus brief filed by major medical organizations, including the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG), for the statistic that childbirth is 14 times more dangerous for a woman than a legal abortion. Amicus Br. of ACOG *et al*. at 18.

The AMA and ACOG amicus brief submitted in *Dobbs* further stated that forcing a woman to continue a pregnancy and deliver against her will was especially dangerous in the United States currently, given the rise in the maternal mortality rate in recent decades. *Id.* The brief also discussed that forced pregnancy and childbirth entail other substantial health risks for women that could impact the remainder of their lives, either by exacerbating underlying health conditions or by causing new conditions, such as diabetes and damage to pelvic organs. *Id.* at 19; *see also, e.g.*, Amicus Br. of Social Science Experts at 24-25 (discussing harms to women of being

denied access to abortion, including increased risk of death from childbirth and increased risk of intimate partner violence); Amicus Br. of Reproductive Justice Scholars at 32-34 (discussing that maternal morbidity "is also a crisis in this nation," and that abortion bans will increase incidence of severe maternal morbidity, including need for life-saving medical procedures such as hysterectomy, blood transfusion, or mechanical ventilation). Finally, the AMA and ACOG amicus brief discussed that abortion bans like Mississippi's did not sufficiently protect women's health, including in emergencies that may arise during a pregnancy, and instead would require a pregnant patient's health to deteriorate substantially before medical professionals could provide needed care, contrary to best medical practice. Amicus Br. of ACOG *et al*. at 24-25

33. Were you aware that you were being considered for a judicial nomination or had you spoken to anyone in the Biden Administration or Senator Warren's or Senator Markey's office on June 24, 2022?

Yes: Please see my response to Nos. 30 and 31 above.

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

Questions for the Record for Julie Rikelman, Nominee to the United States Court of Appeals 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. Racial discrimination is wrong and also prohibited under federal and state law. For example, intentional racial discrimination is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

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

Response: If a case raising this issue came before me, I would faithfully follow Supreme Court precedent in making that determination, including the Court's decisions in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) and *Washington v. Glucksberg*, 521 U.S. 702 (1997), which *Dobbs* relied on. In *Washington v. Glucksberg*, the Supreme Court stated that the "due process clause guarantees more than fair process and the 'liberty' it protects includes more than the absence of physical restraint." *Id.* at 719 (internal citations omitted). Under *Glucksberg*, the Due Process Clauses of the Fifth and Fourteenth Amendments protect those fundamental rights and liberties that 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." *Id.* at 720-21 (internal citations omitted).

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

Response: I admire many current and former Justices of the U.S. Supreme Court. My judicial philosophy would be informed, however, by my experience clerking for two different appellate court judges and what they taught me about the rule of law and the limited role of a judge, as well as by my experience representing a wide range of clients in a variety of matters in the federal courts. I would strive to be the type of judge that I wanted for each of my clients: a judge who carefully analyzes the legal and factual issues in the case, impartially applies the law, and treats everyone associated with a case or the court system with respect, whether it be the parties, attorneys, or court staff. Further, as an appellate judge, I would endeavor to work cooperatively and collegially with the other judges in the circuit to draft opinions on a timely basis that are clear and allow the parties and attorneys to understand the bases for the court's ruling.

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

Response: Although the meaning of "originalism" has changed over time, I generally understand originalism to stand for the view that the Constitution should be interpreted based on the ordinary, public meaning of its text at the time that text was adopted. So, for example, an originalist interpretation of the Second Amendment would consider the ordinary, public meaning of that Amendment's text at the time of its ratification in 1791.

If I were confirmed as a judge, I would not subscribe to any particular label in deciding cases. Instead, as a circuit judge, I believe my role is to follow faithfully Supreme Court

and circuit precedent on the particular claim before me and apply that precedent impartially, including the interpretive methodology required by that precedent, to the factual findings of the district court.

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

Response: Although the term "living constitutionalism" may be understood differently by different people, I generally understand it to stand for the view that the Constitution should be interpreted based on current circumstances, including society's evolving understanding of underlying constitutional values. If I were confirmed as a judge, I would not subscribe to any particular label in deciding cases. Instead, as a circuit judge, I believe my role is to follow faithfully Supreme Court and circuit precedent on the particular claim before me and apply that precedent impartially, including the interpretive methodology required by that precedent, to the factual findings of the district court.

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: I would be bound by Supreme Court precedent and First Circuit precedent on the interpretive methodology or standard required in evaluating such a claim, even if the particular issue raised was one of first impression. For example, if faced with a liberty claim under the Due Process Clause of the 5th or 14th Amendments, I would be bound by Supreme Court precedent set out in my response to Question No. 2 above.

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: In most circumstances it would not be, unless the statute had just been enacted or, in the case of a constitutional provision, the Supreme Court's precedent makes current understanding relevant. For example, the Supreme Court has indicated that current community standards are relevant to some areas of First Amendment and Eighth Amendment jurisprudence. *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

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

Response: No, I do not believe the meaning of the Constitution's text changes, absent the Article V amendment process. Supreme Court precedent does provide that the Constitution is an enduring document, and its text should be applied to contemporary facts and circumstances. For example, in his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia explained that the First Amendment applies to modern forms of communication, the Fourth Amendment applies to modern forms of searches, and the Second Amendment applies to modern forms of bearable arms. *Id.* at 582.

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

Response: Yes, it is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: *Dobbs* is binding on all federal courts, and I would faithfully apply it if I were confirmed. As a judicial nominee, I am guided by the Code of Conduct for United States Judges, *see* Commentary to Canon 1. Under the Code of Conduct, it is generally inappropriate for me to comment any further on the merits of binding Supreme Court decisions if related issues could come before the federal courts.

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

Response: Yes, it is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: *Bruen* is binding on all federal courts, and I would faithfully apply it if I were confirmed. As a judicial nominee, I am guided by the Code of Conduct for United States Judges, *see* Commentary to Canon 1. Under the Code of Conduct, it is generally inappropriate for me to comment any further on the merits of binding Supreme Court decisions if related issues could come before the federal courts.

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

Response: Yes, it is binding Supreme Court precedent.

a. **Was it correctly decided?**

Response: Yes. Although it is generally inappropriate for me as a judicial nominee to comment on the merits of binding Supreme Court precedent when related issues are currently pending or could come before me, *Brown v. Board of Education*'s holding that racial segregation in public schools violates the Fourteenth Amendment is extremely unlikely to be re-litigated in the federal courts. For that reason, I believe that I can answer, consistent with the Code of Conduct for United States Judges, that I believe *Brown* was correctly decided.

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

Response: In the federal criminal system, a presumption in favor of pretrial detention is triggered if the person was previously convicted of specified offenses, including, for example, an offense for which the maximum sentence is life imprisonment or death, and no more than five years has elapsed since the date of the conviction for that offense or the release of the person from imprisonment, whichever is later. *See* 18 U.S.C. § 3142(e)(2). In addition, Section 3142(e)(2) triggers this presumption if a judge finds that there is probable cause to believe that the defendant committed a drug offense carrying a maximum term of imprisonment of ten years or more or certain other offenses, including, for example,

offenses involving minors.

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

Response: I am not aware of any Supreme Court or First Circuit precedent describing the policy rationale underlying these presumptions.

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

Response: Yes. Government actions that impact religious organizations or small businesses operated by observant owners would be subject to review by courts, if challenged, under several different principles. For instance, under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, if a federal law or action substantially burdens the religion of a "person" as defined in the statute, it is constitutional only if it serves a compelling government interest through the least restrictive means. *See id.*; *see also, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

In addition, both federal and state laws and actions are subject to the requirements of the Free Exercise Clause of the First Amendment. Neutral and generally applicable laws do not violate the Free Exercise Clause under the Court's decision in *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990). However, a law that burdens the exercise of religion and is *either* not neutral or not generally applicable is subject to strict scrutiny. In recent decisions, the Supreme Court has emphasized factors that lower courts must consider in determining if a government action is both neutral and generally applicable. For example, a law is not neutral if it targets religious practice, *see Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022), or if a government official acting in an adjudicative capacity demonstrates any hostility towards religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). And a law is not generally applicable if it provides for individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if it treats religious exercise less favorably than any comparable secular activity, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

Response: Actions by states or the federal government that specifically target religious practice for unique burdens or that treat religious activity less favorably than comparable secular activity are subject to strict scrutiny under the First Amendment's Free Exercise Clause. *See, e.g.*, *Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Additionally, actions by the federal government that substantially burden religious exercise are also subject to strict scrutiny under the Religious Freedom Restoration Act. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

15. **In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different**

restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court found that the religious organizations were entitled to a preliminary injunction of the executive order at issue, pending an appeal and the disposition of any petition for certiorari. *Id.* at 65. After evaluating the state's actions, the Court found that they were not neutral and "of general applicability," and that the Executive Order should therefore be subject to strict scrutiny. *Id.* at 67. Under this standard, the Court concluded that all the factors for a preliminary injunction were satisfied, including a strong showing that the organizations were likely to succeed on the merits of their Free Exercise claim, that they would suffer irreparable harm absent the injunction, and that granting relief would not harm the public. *Id.* at 66-67.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court granted an injunction pending appeal and the disposition of any petition for a writ of certiorari of a California policy that limited at home religious gatherings to no more than 3 households. *Id.* at 1296. The Court concluded that the policy was subject to strict scrutiny under the Free Exercise Clause because it was not neutral and generally applicable, given that it treated some comparable secular activities more favorably. *Id.* at 1296-97. Applying strict scrutiny, the Court concluded the policy was likely unconstitutional because the government had failed to show that it could not have addressed its interest in reducing the spread of Covid-19 with less restrictive measures, and that the lower court's fact-finding to the contrary was not sufficiently particularized enough to these applicants. *Id.* at 1297. Accordingly, a preliminary injunction was warranted because the applicants had shown they were likely to succeed on the merits of their claim, they would be irreparably harmed by the loss of free exercise rights for even short periods of time, and the State had not shown that "'public health would be imperiled' by employing less restrictive measures." *Id.*

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

Response: Yes.

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

Response: In *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), a baker had refused to design a custom cake for a same-sex couple's wedding on the basis that doing so would violate his religious beliefs. The Supreme Court held that the Commission's order finding that the plaintiff had infringed the state's anti-discrimination law was invalid and violated the Free Exercise Clause because of religious animus demonstrated by a Commission member. *See id.* at 1724, 1730. As the Court explained, the government is not acting in a neutral fashion and does not get the benefit of rational basis review for neutral and generally applicable laws that impinge on religious exercise, as described in *Employment Division v. Smith*, if religious animus is shown by the adjudicatory

body responsible for applying that law. *See id.* at 1729-30. The Court found that the Commission's consideration of the case was inconsistent with the state's obligation of religious neutrality, as well as with the prohibition on government action that presupposes the illegitimacy of religious beliefs, and its order was therefore invalid. *See id.* at 1731-32. The Court did not reach the plaintiff's Free Speech claim.

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

Response: Yes, the Supreme Court has made clear in multiple cases that an individual's religious beliefs are protected if they are sincere, and that it is not the job of the courts to determine if those religious beliefs are reasonable. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) ("federal courts have no business addressing [] whether the religious belief asserted in a RFRA case is reasonable []"); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989) ("[we] reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization").

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

Response: Please see my Response to No. 19 above; sincere religious beliefs are protected.

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

Response: Please see my Response to No. 19 above; sincere religious beliefs are protected.

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

Response: As a judicial nominee, it is generally not appropriate for me to comment on the official position of a religion.

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

Response: In *Our Lady of Guadulupe School v. Morrison-Berru*, 140 S. Ct. 2049 (2020), the Supreme Court held that the ministerial exception in the First Amendment's religion clauses barred lay teachers' employment discrimination claims under federal anti-discrimination statutes against religious schools because the teachers performed "vital religious duties." *Id.* at 2066. This case relied on and expanded upon a previous Supreme Court decision that had recognized the "ministerial exception," which prohibits courts from

intervening in employment disputes between religious institutions and certain of their employees. *Id.* at 2062. The Court's previous decision had applied the exception to a teacher at a religious school with the title of "minister." *Id.* In *Our Lady of Guadulupe*, the Court concluded that the fact that these plaintiffs did not hold the title "minister" was not dispositive, and that the ministerial exception applied because their duties included religious instruction of students. *Id.* at 2066-68.

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

Response: In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that Philadelphia's refusal to contract with the plaintiff for the provision of foster care services, based on a local anti-discrimination law, violated the Free Exercise Clause. The Court found that the City's actions were subject to strict scrutiny because they were not generally applicable under *Employment Division v. Smith*, given that the City was able to grant individualized exemptions to its policies. As the Court explained, where the government has a system of individualized exemptions, it cannot refuse to extend the exemption to cases of religious hardship without compelling reasons. *See id.* at 1877. The Court found that the City failed to show that its actions in this case were narrowly tailored to serve a compelling interest. *See id.* at 1881-82. The Court did not reach the Free Speech claim.

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

Response: In *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that Maine's restriction on parents using public tuition assistance benefits to pay for tuition at religious private schools violates the Free Exercise clause, when such funds can be used to pay for tuition at non-religious private schools. *Id.* at 2002. As the Court explained, Maine's program had allowed use of tuition for private religious schools before 1981. *Id.* at 1994. The law changed based on state officials' understanding of the requirements of the Establishment Clause. *See id.* The Court found that the Maine law should be subject to strict scrutiny because it treated religious exercise less favorably than comparable secular activity, and it found that it failed such scrutiny because imposing greater separation between church and state than the United States Constitution requires is not a compelling government interest. *Id.* at 1997-98. The Court's decision makes clear that states violate the Free Exercise Clause when they exclude religious observers from otherwise available public benefits.

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

Response: In *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022), the Supreme Court held that the coach plaintiff was entitled to summary judgment on his Free Exercise and Free Speech claims. *See id.* at 2433. The Court found that quiet prayer on the field after a public-school football game is personal, protected, religious expression, and the school

district's suspension of the coach for that religious expression was neither neutral nor generally applicable action under the Free Exercise Clause. *See id.* The Court reiterated that, under the Free Exercise Clause, a government action is not neutral if it specifically targets religious practice, and it is not generally applicable if it treats any comparable secular activity more favorably (in this case, the Court found comparable secular activities included other coaches taking personal phone calls after a football game). *See id.* at 2423. Further, the Court found that under the Free Speech Clause, the coach's speech was private because he did not offer prayers while acting within the scope of his school duties. *See id.* at 2425. Finally, the Court rejected the school district's defense that its actions were required under the Establishment Clause, stating that the *Lemon* test had been "abandoned," and that the lower court erred in not construing the Establishment Clause with reference to historical practices. *Id.* at 2427-2428.

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

Response: In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated a state court judgment and remanded to the Court of Appeals of Minnesota for further consideration in light of its ruling in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). Justice Gorsuch wrote a separate concurring opinion to provide his views about the state court's errors in applying the Religious Land Use and Institutionalized Persons Act. For example, Justice Gorsuch stated that the state court had failed to give "due weight to exemptions other groups enjoy," noting that the state had treated the religious group at issue less favorably than secular groups engaging in similar activities. *Id.* at 2432.

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

Response: Section 1507 provides that "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both." If a case concerning Section 1507 came before me that involved First Amendment claims, I would apply all relevant Supreme Court and First Circuit precedent to analyze those claims, based on the particular facts of the case as found by the district court.

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

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: No.

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

Response: I am not aware of any such trainings, and in my experience as a law clerk and practicing attorney, a strong work ethic and the ability to work independently have been valued.

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

Response: Yes.

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

Response: I am not aware of all laws that may govern the discretion of a President in making a political appointment. If confirmed, I would carefully analyze and impartially apply any relevant Supreme Court or First Circuit precedent.

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

Response: That would be a question for policy makers to answer. If confirmed as a judge, I would faithfully apply all relevant Supreme Court and First Circuit precedent and carefully consider the facts as found by the district court in analyzing any particular claim of racial discrimination that may come before me.

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

Response: That would be a question for Congress to answer because the Constitution does not provide for a fixed number of Supreme Court Justices. Regardless of the size or composition of the Supreme Court, I would faithfully follow all Supreme Court precedent if I were confirmed as a circuit judge.

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

Response: No. All were confirmed by the United States Senate after being nominated by the President of the United States, as required by the Constitution.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for lawful purposes, including to keep a usable handgun in the home for self-defense. *Id.* at 629. In *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court further concluded that the Second Amendment's individual right to keep and bear arms for lawful purposes includes the right to carry a gun for self-defense outside the home. *See id.* at 2122.

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

Response: Under *Bruen*, when the Second Amendment's plain text covers an individual's conduct, that conduct is presumptively constitutional. *See* 142 S. Ct. at 2126. Further, to justify a firearm regulation, the government must show that the regulation is analogous to regulations that were in place at the time of the amendment's ratification or is otherwise consistent with the nation's historical tradition of firearm regulation. *See id.* The Supreme Court has also stated that certain types of regulations, such as laws prohibiting possession of firearms by those convicted of a felony or laws forbidding the carrying of firearms in sensitive places, are constitutional. *See Heller*, 554 U.S. at 626.

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

Response: Yes. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for lawful purposes, including to keep a usable handgun in the home for self-defense, and struck down a D.C. law to the contrary. *Id.* at 629.

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

Response: I am not aware of Supreme Court case law that directly compares the different level of protection for different individual rights, but the Supreme Court has made clear in cases like *Heller* and *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the individual right to keep and bear arms is not a second-class right.

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

Response: Please see my response to No. 36 above.

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

Response: Under current Supreme Court precedent, the Executive Branch generally has "absolute discretion" to decide whether to initiate civil or criminal enforcement proceedings. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). If confirmed as a judge, I would follow all Supreme Court and First Circuit precedent on such issues.

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

Response: Generally, prosecutorial discretion refers to decisions by law enforcement officials about whether to initiate a prosecution under current law. A substantive administrative rule change would change current law and requires compliance with the Administrative Procedures Act.

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

Response: The President would have no authority over state laws imposing the death penalty. A federal statute, 18 U.S.C. § 3591, authorizes the federal death penalty. The President cannot amend or abolish federal statutes unilaterally; Congress must first pass legislation amending a statute.

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

Response: This case concerned a nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention during the Covid-19 pandemic. The district court had concluded that the moratorium should be vacated but stayed its own ruling, therefore allowing the moratorium to remain in place while any appeal was pending. On the application to vacate the district court's stay of its own ruling, the Supreme Court concluded that the applicants were "virtually certain" to succeed on the merits of their claim that the moratorium exceeded the CDC's statutory authority, and that the equities did not justify continuing the stay. Accordingly, the Court lifted the stay, which resulted in the district court's judgement vacating the moratorium taking effect. *See Alabama Assoc. of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2486, 2489 (2021).

42. **Why did you describe pregnancy resource centers as "*faux-clinics*" that exist to *"trick" or "mislead"* women, and that these centers cause women to "*suffer concrete harms to their health, including exposure to the risk of sexually transmitted disease*"?**

Response: This question appears to combine words and phrases that were not originally used in one sentence, without the context in which the words and phrases were used.

As an advocate, on behalf of my clients, I submitted an amicus brief to the Supreme Court in *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). The case concerned a consumer protection

law enacted by California in response to concerns raised by women who felt misled about the types of services available at some pregnancy centers and reported the harms such experiences had on their health; the California law was designed to ensure that women were able to receive accurate information so that they could make the best decisions for themselves about their medical care.

In my role as an advocate in the case, I was asked to contribute to a December 2017 SCOTUSblog symposium on *NIFLA v. Becerra*. In the article I submitted to the symposium, I wrote: "No one contends that the CPCs and their staff lack First Amendment protection for their views or that they cannot seek to persuade others to share those views through lawful means." I then described federal legislative reports that had concluded that some pregnancy centers purposefully mislead women. As I further explained, California enacted the consumer protection law at issue in the *NIFLA* case to ensure that "women who are seeking time-sensitive reproductive health care services" can obtain it. Further, I quoted several of the California legislature's findings in enacting the law. Those legislative findings included that some pregnancy centers "pose as full-service women's health clinics" and use "intentionally deceptive advertising and counseling practices that often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." It was in this context that I wrote in the SCOTUSblog article that women who do not receive timely and accurate information about reproductive health care can "suffer concrete harms to their health, including exposure to the risk of sexually transmitted disease if they do not receive timely contraception, delays in ending a pregnancy that increase health risks and costs, and inability to obtain the prenatal care they need at the time they need it."

43. **Does the federal government need to, as Senator Warren called for, "crack down on pregnancy resource centers?"**

Response: I am not familiar with the context of Senator Warren's statement or any legislation on this issue she may have proposed. Whether federal legislation is warranted on any particular issue is a decision that should be made by policy makers, not federal judges or judicial nominees.

44. **Georgia Democratic gubernatorial candidate Stacey Abrams recently said, "there is no such thing as a heartbeat at six weeks. It is a manufactured sound designed to convince people that men have the right to take control of a woman's body away from her." Do you agree with her statement?**

Response: I am not familiar with the full context of Ms. Abrams' statement. To the extent she was referring to Georgia's abortion laws, factual issues related to state abortion laws that are raised in federal court should be resolved at the district court level in accordance with the federal rules of evidence. The role of a circuit judge would be limited to reviewing those factual findings to determine if they were clearly erroneous.

45. **At what point do you believe that the state's interest in protecting the life of an unborn child prevails?**

Response: Under the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, laws banning or restricting abortion at any point in pregnancy are subject to rational basis review.

a. **Do you believe this state interest in protecting the life of an unborn child is greater when the child is capable of feeling pain?**

Response: Under the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the government may ban or restrict abortion at any point in pregnancy, subject to rational basis review.

46. **In a 2014 article, you criticized laws that ban abortions because of genetically inherited diseases or disorders. Do believe women should be able to abort a child solely on the basis of the child having Down syndrome?**

Response: I made this statement in my role as an advocate at the Center for Reproductive Rights about several recent state laws banning pre-viability abortion and related litigation. Under Supreme Court precedent in effect in 2014, including *Roe v. Wade* and *Planned Parenthood v. Casey*, it was unconstitutional for the government to ban abortion before viability. The Court's precedent provided that, until viability, the decision whether to continue or end a pregnancy was for the individual woman to make, rather than the government.

Under the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, laws banning or restricting abortion at any point in pregnancy are subject to rational basis review. Should I be confirmed as a judge, I will faithfully follow the Supreme Court's decision in *Dobbs*.

During my time at the Center for Reproductive Rights, the Center also advocated on behalf of people with disabilities, including supporting the right of parents with disabilities to parent their own children.

47. **Should women be able to abort a child for being a boy when the parents really wanted a girl?**

Response: Under the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the government may ban or restrict abortion at any point in pregnancy, subject to rational basis review.

a. **Or vice versa?**

Response: Under the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the government may ban or restrict abortion at any point in pregnancy, subject to rational basis review.

b. **Should women be able to abort a child based on the race of the father**?

Response: Under the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the government may ban or restrict abortion at any point in pregnancy, subject to rational basis review.

Senator Ben Sasse
Questions for the Record for Julie Rikelman
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 21, 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: My judicial philosophy would be informed by my experience clerking for two different appellate court judges and what they taught me about the rule of law and the limited role of a judge, as well as by my experience representing a wide range of clients in a variety of matters in the federal courts. I would strive to be the type of judge that I wanted for each of my clients: a judge who carefully analyzes the legal and factual issues in the case, impartially applies the law, and treats everyone associated with a case or the court system with respect, whether it be the parties, attorneys, or court staff. Further, as an appellate judge, I would endeavor to work cooperatively and collegially with the other judges in the circuit to draft opinions that are clear and allow the parties and attorneys to understand the basis for the court's ruling.

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

   Response: If I were confirmed as a judge, I would not subscribe to any particular label in deciding cases. Instead, as a circuit judge, I believe my role is to faithfully follow Supreme Court and circuit precedent on the particular claim before me and impartially apply that precedent, including the interpretive methodology required by that precedent, to the factual findings of the district court.

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

   Response: As a circuit judge, I would always begin by faithfully following Supreme Court and First Circuit precedent on the particular constitutional provision, statute or regulation before me and apply that precedent impartially to the factual findings of the district court. But the text is always the starting point in such interpretation. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (interpreting text of Title VII).

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

   Response: If I were confirmed as a circuit judge, my role would be limited to interpreting the Constitution by following binding Supreme Court and First Circuit precedent on the particular claims before me. Further, absent amendments, the text of the Constitution remains fixed, although Supreme Court precedent provides that the Constitution is an enduring document, and its provisions should be applied to contemporary facts and circumstances. For example, in his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia explained that the First Amendment applies to modern forms of communication, the Fourth Amendment applies to modern forms of searches, and the Second Amendment applies to modern forms of bearable arms. *Id.* at 582.

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

   Response: I admire many of the Supreme Court Justices who have served on the Court in the past 70 years, but most importantly, I respect the institution of the Court and its critical role in upholding the rule of law. As a circuit judge, I would view my role as following all Supreme Court decisions faithfully, regardless of the particular justice or justices who authored those decisions.

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: First Circuit precedent provides that, under "'the law of the circuit' doctrine, a prior panel decision shall not be disturbed 'absent either the occurrence of a controlling intervening event (e.g. a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling) or, in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course." *U.S. v. Lewko*, 269 F.3d 64, 66 (1st Cir. 2001) (internal citations omitted). *See also, e.g.*, *United States v. Santiago-Colon*, 917 F.3d 43, 57-58 (1st Cir. 2019). Accordingly, in "extremely rare circumstances," a panel of the circuit may reconsider a previous panel decision if subsequent authority, even if not directly controlling, "nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." *Santiago-Colon*, 917 F.3d at 58.

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

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

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: The Supreme Court has made clear that statutory interpretation must always begin with the text and should focus on the text's ordinary public meaning; legislative history can be used to resolve ambiguity in the text, but not to create it. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). General principles of justice should not play a role in 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: No. The sentencing of an individual defendant should be based only on the particular circumstances of that individual's case. The specific factors that should be evaluated in determining an appropriate sentence are laid out in 18 U.S.C. § 3553(a), and they include, for example, the nature and seriousness of the offense at issue.

Senator Josh Hawley
Questions for the Record

Julie Rikelman
Nominee, U.S. Court of Appeals for the First Circuit

1. **You have lobbied Congress for the past four years in favor of the so-called "Women's Health Protection Act," a pro-abortion bill, according to the materials you submitted to the Committee. As many commentators have pointed out, that bill, if passed, would eliminate many state laws against partial-birth abortion, including the laws in Missouri and Georgia. What input or influence did you have on drafting the text of the bill?**

   Response: I was not involved in drafting the text of the bill.

   My understanding is that federal law has banned the procedure you reference in every state for more than 15 years, and that the text of the Women's Health Protection Act explicitly leaves that federal ban in place. *See* Women's Health Protection Act of 2022, H.R. 8296, § 5(b)(3) (stating that the "provisions of this Act shall not supersede or apply to . . . the procedure described in section 1531(b)(1) of title 18, United States Code").

2. **In 2019, you issued a press statement saying, "Politicians should never take medical options off the table for pregnant patients." Do you oppose laws that prohibit obtaining an abortion when the sole reason for doing so is because of the baby's race or sex?**

   Response: I made this statement in my role as an advocate at the Center for Reproductive Rights about the Center's litigation challenging an Oklahoma state law that imposed criminal penalties on physicians for providing their patients with the most common and safest method of pre-viability abortion. The quote was not referring to laws that banned pre-viability abortion for a particular reason. Under Supreme Court precedent in effect in 2019, including *Roe v. Wade* and *Planned Parenthood v. Casey*, it was unconstitutional for the government to ban abortion before viability, including banning the most common method of abortion. The Court's precedent provided that, until viability, the decision whether to continue or end a pregnancy was for the individual woman to make, rather than the government.

   Under the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, laws

banning or restricting abortion are subject only to rational basis review. Should I be confirmed as a judge, I will faithfully follow the Supreme Court's decision in *Dobbs*.

3. **Have you ever been involved in litigation challenging a state law regulating or prohibiting partial-birth abortion? If so, identify each case by number and explain your involvement.**

   Response: No.

4. **Has the Center for Reproductive Rights ever been involved in litigation challenging a state law regulating or prohibiting partial-birth abortion during your time at that organization? If so, identify each case by number.**

   Response: Over twenty years ago, when I worked at the Center for Reproductive Rights as a Fellow, its most junior litigation attorney position, the Center litigated cases concerning that procedure, including *Stenberg v. Carhart*, 530 U.S. 914 (2000). I was not involved in any of that litigation.

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

   a. **Do you agree with that philosophy?**

      Response: I am not familiar with the context in which Justice Marshall made that statement, but I view the role of a circuit judge as faithfully applying all relevant Supreme Court and circuit precedent to the facts as found by the district court.

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

      Response: The judicial oath requires judges to "faithfully and impartially discharge and perform all [of their] duties" as required "under the Constitution and the laws of the United States." 28 U.S.C. § 453. I would fully and wholeheartedly follow this oath if confirmed as a judge.

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

   Response: Yes, it is binding Supreme Court precedent.

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

Response: There are a number of different abstention doctrines. *Younger* abstention requires federal courts to abstain from hearing cases that are already pending in state court. *Younger v. Harris*, 401 U.S. 37 (1971). Although *Younger* originally applied in the criminal context, Supreme Court precedent instructs that it also applies in some civil cases. *See Huffman v. Pursue*, *Ltd.*, 420 U.S. 592, 607 (1975). The First Circuit has ruled that *Younger* abstention should be analyzed under the following factors: (1) if there is an ongoing state proceeding; (2) that implicates an important state interest; and, (3) the state proceeding provides an adequate opportunity for the federal plaintiff to pursue his or her federal constitutional claim. *See Rossi v. Gemma*, 489 F.3d 26, 34-35 (1st Cir. 2007).

Pullman abstention requires federal courts to abstain when "difficult and unsettled questions of state law" must be resolved before the court can reach the federal constitutional question. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). If state law permits, federal courts will sometimes certify state law questions to the state's highest court. In the First Circuit, *Pullman* abstention applies when there is "substantial uncertainty" over the meaning of a state law at issue, and state court clarification would eliminate the need for a federal constitutional ruling. *See Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001).

The *Rooker-Feldman* doctrine provides that lower federal courts should not exercise appellate jurisdiction over final state-court judgments. *See Lance v. Dennis*, 546 U.S. 459, 463 (2006). That is because final state court judgements are reviewable only by the U.S. Supreme Court, which will consider if the judgment is based on an independent and adequate state ground, which would prevent federal court review. In the First Circuit, courts should abstain under the *Rooker-Feldman* doctrine when the losing party in state court thereafter files suit in federal court, essentially seeking a second bite at the apple and review of that state court judgment. *See Federacion de Maestros v. Junta de Relaciones del Trabajo*, 410 F.3d 17, 23-24 (1st Cir. 2005).

Colorado River abstention provides that federal courts may stay federal proceedings when there are simultaneous federal and state court cases addressing the same subject matter. Under the case for which the doctrine is named, in deciding whether to stay the federal case, the federal court should consider factors such as conservation of judicial resources and comprehensive disposition of the litigation. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The First Circuit has developed a balancing test to decide when to stay a federal case under the *Colorado River* doctrine; the test considers numerous factors, including whether either court has assumed jurisdiction over a res; the relative inconvenience of the federal forum; the goal of avoiding piecemeal litigation; the order in which the cases were filed; whether state or federal law controls; the adequacy of the state forum to

protect the parties' interests; whether the federal claim is contrived to obtain federal jurisdiction; and, respect for the principles underlying removal jurisdiction. *See Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 27-28 (1st Cir. 2010).

Finally, *Burford* abstention arises in cases where federal adjudication could interfere with a complex administrative scheme. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In the First Circuit, *Burford* abstention applies narrowly and depends on whether a federal court might "in the context of the state regulatory scheme, create a parallel, additional, federal 'regulatory review,'" which could significantly increase the difficulty of administering the state's regulatory framework. *Forty Six Hundred LLC v. Cadence Educ.*, *LLC*, 15 F.4th 70, 75 (1st Cir. 2021).

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

   Response: As an advocate, I submitted an amicus brief on behalf of clients in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The amicus brief made the argument that the Supreme Court could resolve the case by giving effect both to the right to religious freedom and to women's right to access contraception.

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

      Response: In the case, I was co-counsel for our clients, who were legal scholars. I assisted in drafting the amicus brief filed with the Supreme Court. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (amicus brief in support of petitioners in No. 13-354 and respondents in No. 13-356, 2014 WL 334442).

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

   Response: In interpreting a particular constitutional provision, I would be bound by Supreme Court and First Circuit precedent on the interpretive methodology or standard required for evaluating that specific provision. The Supreme Court has made clear, for example, that the original public meaning of the Second Amendment must guide all interpretation of that Amendment. For some First Amendment claims, the Supreme Court has indicated that current community standards must be considered. *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002).

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

Response: If I were confirmed as a judge, I would begin any interpretation of legal text by analyzing any relevant Supreme Court or First Circuit precedent. If that does not answer the question posed in the case, and the text is ambiguous, the Supreme Court has held that legislative history may be considered if other tools of statutory interpretation cannot clear up any ambiguity. But the Court has been clear that legislative history can be consulted only to resolve ambiguity, not to create it. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

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

Response: The Supreme Court has indicated that committee reports are one of the more instructive forms of legislative history, and that "passing comments" by individual legislators rarely should have any bearing. *See Garcia v. 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: Domestic law governs in interpreting the Constitution. The Supreme Court has also frequently considered English law in interpreting our Constitution, including in its recent decision in *New York Rifle & Pistol Assoc. Inc. v. Bruen*, 142 S. Ct. 2111, 2140 (2022).

11. 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: In *Nance v. Ward*, 142 S. Ct. 2214 (2022), the Supreme Court recently held that such a claim can succeed only if the petitioner demonstrates that the method of execution presents "a substantial risk of serious harm," and he can identify an alternative method that is "feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *See id.* at 2220 (internal citations omitted).

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

Response: Yes.

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

Response: Not to my knowledge.

14. 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.

15. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a 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: Under the Free Exercise clause of the First Amendment, state laws that burden religious exercise but are facially neutral and generally applicable receive only rational basis review, whereas a law that is not neutral or not generally applicable receives strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). In recent decisions, the Supreme Court has set out factors that lower courts must consider in determining if a state government action is both neutral and generally applicable. For example, a law is not neutral if it targets religious practice, *see Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022), or if a government official acting in an adjudicative capacity demonstrates any hostility towards religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). And a law is not generally applicable if it provides for individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if it treats religious exercise less favorably than any comparable secular activity, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

16. 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 No. 15 above.

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

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

18. 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: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for lawful purposes, including to keep a usable handgun in the home for self-defense, and struck down a D.C. law to the contrary. *Id.* at 629.

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, I have never been a judge.

19. 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: In this part of his dissenting opinion in *Lochner*, Justice Holmes was referring to an economic treatise to illustrate his view that ordinary economic regulation should be subject to limited review under the due process clause of the 14th Amendment. I understand that current law in fact

requires economic regulation to be reviewed only under rational basis, and I will follow that precedent.

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

Response: *Lochner* has not been good law for nearly a century and was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed as a judge, I would follow current Supreme Court precedent.

20. 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: The only opinion of which I am aware that may fall into this category is the Supreme Court's decision in *Korematsu v. United States*, 323 U.S. 214 (1994). Several years ago, a majority of the Supreme Court described *Korematsu* as "overruled in the court of history," and as a decision that "has no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2432 (2018). If I were confirmed as a judge, I would faithfully follow all Supreme Court precedent, including the precedent that makes clear that only the Supreme Court itself can overrule one of its previous decisions, and that lower courts cannot predict such overruling.

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

Response: Yes.

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

a. Do you agree with Judge Learned Hand?

Response: If confirmed as a circuit judge, I would faithfully follow all Supreme Court and First Circuit precedent on what constitutes a monopoly. I have no other view on the quote by Judge Hand.

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

Response: Please see my response directly above.

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

In previous cases, the Supreme Court has found that companies with two-thirds of the market share or greater can constitute monopolies, particularly when there are no readily available alternatives. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (finding evidence that party holds more than 80% market share with no readily available alternatives to be sufficient for a finding of monopoly power and citing older cases where more than two-thirds of market share was deemed sufficient).

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

Response: Under *Erie v. Tompkins*, 304 U.S. 64 (1938), there is no *general* federal common law. However, the Supreme Court has recognized that federal common law can exist in certain "limited enclaves," such as admiralty cases. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

23. 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: It would be rare for a federal judge to interpret a state constitutional provision. But, as a general matter, federal judges are bound to interpret state law issues that are properly before them as would the highest court of that state. Accordingly, I would follow the precedent of that state's highest court on the appropriate interpretive methodology for its constitutional provisions.

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

Response: In general, a judge should always begin with the text of a statute, regulation, or constitutional provision, but each text must be interpreted in accordance with controlling precedent regarding that text.

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

Response: State law cannot violate the federal Constitution, under the Constitution's Supremacy Clause. Whether a state constitutional provision provides greater protection than a similar federal provision is ultimately a

question of state law, based on that state's constitutional history and jurisprudence.

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

Response: Yes. Although it is generally inappropriate for me as a judicial nominee to comment on the merits of binding Supreme Court precedent when related issues are currently pending or could come before me, *Brown v. Board of Education*'s holding that racial segregation in public schools violates the Fourteenth Amendment is extremely unlikely to be re-litigated in the federal courts. For that reason, I believe that I can answer, consistent with the Code of Conduct for United States Judges, that I believe *Brown* was correctly decided.

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

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

Response: When nationwide injunctions are appropriate is an issue that federal courts are considering right now. Generally, Federal Rule of Civil Procedure 65 governs the issuance of injunctions by the federal courts. When a party requests injunctive relief, federal courts must tailor such relief to provide an appropriate remedy for the harm found and must not make injunctions broader than necessary.

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

Response: A nationwide injunction may be necessary when blocking a portion of a federal statute or federal regulation or if a nationwide class has been certified. *See also* my response to No. 25 (a) directly above.

26. 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: That would depend on the particular claim before the court. But if a court finds that a particular portion of a statute is unconstitutional or violates other federal law, or if it concludes that a portion of a regulation violates the Administrative Procedures Act, a nationwide injunction may be appropriate. *See also* my response to No. 25 above.

If confirmed as a judge, I would faithfully apply all relevant and most current precedent on the propriety and scope of nationwide injunctions.

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

Response: Federalism is a bedrock principle in our Constitution and system of government. Under our Constitution, we are one Nation, with federal law the supreme law of the land. *See* U.S. Const., Art VI. At the same time, the Constitution limits the role of the federal government. Federalism permits states to have their own law, including regulatory, statutory and constitutional, and indeed leaves much of the law that governs people's daily lives in local control. The principles of federalism are rooted in many sections of the U.S. Constitution, including in the Tenth Amendment, which states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

28. 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 No. 7 above.

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

Response: If confirmed as a circuit judge, my role would be limited to reviewing the relief granted by the district court, based on the relief requested by the parties in the particular case before me. Damages awards and injunctions have different standards that must be met before such relief can be awarded and serve different purposes. Injunctions are generally awarded to prevent ongoing and future harm; the types and amount of damages that are legally available depends on the particular law at issue.

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

Response: The Supreme Court has considered the scope of substantive due process in many cases during the past century, including most recently in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Under the Court's precedent, the "due process clause guarantees more than fair process and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (internal citations omitted). *Glucksberg* instructs that the Due Process Clauses of the Fifth and Fourteenth Amendments protect those

fundamental rights and liberties that 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." *Id.* at 720-21 (internal citations omitted). Under this standard, the Court has recognized, *inter alia*, the right to direct the upbringing of one's children, the right to marry, and the right to contraception. *Id.* at 720.

31. 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: Both federal and state laws and actions are subject to the requirements of the Free Exercise Clause of the First Amendment. Neutral and generally applicable laws do not violate the Free Exercise Clause under the Court's decision in *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990). However, a law that burdens the exercise of religion and is *either* not neutral or not generally applicable is subject to strict scrutiny. In recent decisions, the Supreme Court has emphasized factors that lower courts must consider in determining if a government action is both neutral and generally applicable. For example, a law is not neutral if it targets religious practice, *see Kennedy v. Bremerton*, 142 S. Ct. 2407, 2422 (2022), or if a government official acting in an adjudicative capacity demonstrates any hostility towards religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). And a law is not generally applicable if it provides for individualized exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021), or if it treats religious exercise less favorably than any comparable secular activity, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

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

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

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

Response: Under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, if a federal law or action substantially burdens the religion of a "person" as defined in the statute, it is constitutional only if it serves a compelling government interest through the least restrictive means. *See id.*; *see also, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). In *Hobby Lobby*, the Supreme Court considered several factors that supported its conclusion that the regulation at issue substantially burdened the plaintiffs' exercise of their religion, including that non-compliance with the regulation would lead to substantial economic consequences for the plaintiffs, and that plaintiffs sincerely believed that compliance would violate their religious beliefs. *See* 573 U.S. at 720, 723.

Under the Free Exercise Clause, a court would need to follow the precedent outlined in my response to No. 31 (a) above.

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

Response: The Supreme Court has made clear in multiple cases that an individual's religious beliefs are protected if they are sincere, and that it is not the job of the courts to determine if those religious beliefs are reasonable. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) ("federal courts have no business addressing [] whether the religious belief asserted in a RFRA case is reasonable []"); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989) ("[w]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

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: Under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, if a federal law or action substantially burdens the religion of a "person" as defined in the statute, it is constitutional only if it serves a compelling government interest through the least restrictive means. *See id.*; *see also, e.g.*,

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). Accordingly, a court considering a plaintiff's claim that another federal law violates RFRA would first evaluate whether that law has substantially burdened the plaintiff's religious practice and, if so, then evaluate whether the law serves a compelling interest through the least restrictive means.

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, I have never been a judge.

32. 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 the full context of this quote, but I believe it refers to the notion that a judge who faithfully and impartially follows the law in every case will at times reach a result that may be different from the judge's own view of what would be a fair outcome in that particular case. This is why judges must uphold the rule of law, above all else.

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

Response: Yes, in my role as an attorney and advocate at the Center for Reproductive Rights, I have litigated a number of cases challenging the constitutionality of state and federal laws. The most significant of those cases is listed in my SJQ.

a. If yes, please provide appropriate citations.

Response: Please see my response directly above.

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

Response: No, I am not on social media.

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

Response: I believe America is a great country. I am deeply grateful that my parents immigrated to the United States with me in 1979 to escape Communism and anti-Semitism. Their decision has allowed me and my two children to grow up in a democracy, with a Constitution that values individual freedom and the rule of law.

If I were confirmed as a judge, I would address racial discrimination only in the context of individual cases, with specific records, and only if such claims were raised. In all such cases, I would faithfully apply Supreme Court and First Circuit precedent on the relevant claim. Other issues concerning racism are for policymakers to decide, not judges.

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

Response: Yes.

37. How did you handle the situation?

Response: As an attorney who has worked in both public and private practice, for law firms and in-house, I have represented a wide range of clients in a variety of matters. In each matter, I took very seriously my ethical duty to provide the best possible representation to my client within the bounds of the law. I put my personal views aside, investigated the facts, and then endeavored to present the best legal arguments on behalf of my clients.

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

Response: Yes.

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

Response: My view of the law has not been shaped by any particular Federalist Paper. Instead, I look to the Constitution itself for the best guidance about the principles of our country's legal and political structure.

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

Response: In the context of abortion, the Supreme Court held in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), that the government can pursue its interest in embryonic and fetal life by banning abortion at any point in pregnancy. The Court also stated that its decision in *Dobbs* was not based on "any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.* at 2284. As a

judicial nominee, it would be inappropriate for me to provide any personal comments on an issue that could come before the courts.

41. 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: Not to the best of my recollection.

42. 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.

43. 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.

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

Response: I have never authored a brief that was filed in court without my name on it. In my role as U.S. Litigation Director at the Center for Reproductive Rights, I have provided review of briefs on cases litigated by my colleagues; that review would have been limited to line editing and correcting any substantive legal errors, if any.

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

Response: Please see my response directly above.

45. Have you ever confessed error to a court?

Response: Not to the best of my recollection.

a. If so, please describe the circumstances.

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

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

Questions from Senator Thom Tillis
for Julie Rikelman
Nominee to be United States 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. Under the judicial oath, all federal judges must endeavor to put any personal views aside and decide all cases before them by fairly and impartially applying the law. *See* 28 U.S.C. § 453. The rule of law depends on judges following precedent, rather than their personal views. I commit to fulfilling this oath without reservation if I were fortunate enough to be confirmed as a circuit judge. In every case, I would faithfully and impartially apply Supreme Court and First Circuit precedent to the particular claims before me, based on the factual findings of the district court.

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

   Response: Although different people may use the term "judicial activism" to mean different things, I understand it to mean a judge who decides cases based on his or her personal views, rather than the law. This is not appropriate, violates the judicial oath, and undermines the rule of law itself. If I were confirmed as a circuit judge, nothing would be more important to me than upholding the rule of law. My parents immigrated with me to the United States because of its commitment to the rule of law, and it would be a profound privilege to serve my country by upholding the rule of law.

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

   Response: Impartiality is an expectation. Our legal system depends on judges impartially deciding every case that comes before them, based on a fair review of the record and a faithful application of the relevant precedent.

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

   Response: No, judges should never decide cases from an outcome-driven perspective. Instead, in reviewing state or federal laws, judges must impartially apply the relevant precedent to the particular claims and record in the case before them, including applying the appropriate levels of judicial scrutiny for that claim.

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

   Response: I understand this question to mean that a faithful application of precedent may sometimes lead to a result that a judge may not view as fair in a particular case. In my view, a faithful application of the law to the facts of a case is always the desired outcome,

because upholding the rule of law and upholding the impartiality of the judiciary should the most important and desirable outcome for every federal judge.

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

   Response: No. A judge's role is limited to applying precedent fairly and impartially to the record in the particular case before the court.

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

   Response: I will faithfully apply all Supreme Court and First Circuit precedent on the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for lawful purposes, including to keep a usable handgun in the home for self-defense. *Id.* at 629. In *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court further concluded that the Second Amendment's individual right to keep and bear arms for lawful purposes includes the right to carry a gun for self-defense outside the home. *See id.* at 2122.

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

   Response: Individuals retain their constitutional rights during a pandemic. A court evaluating a government policy during a pandemic would need to consider the government's asserted interest and how its pandemic-related policy furthers that interest. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). If a case like the one described above came before me, I would decide it by applying all relevant Supreme Court and First Circuit precedent, including the Supreme Court's recent Second Amendment precedent. Under *Bruen*, to justify a firearm regulation, the government must show that the regulation is analogous to regulations that were in place at the time of the amendment's ratification or is otherwise consistent with the nation's historical tradition of firearm regulation. *See* 142 S. Ct. at 2126.

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

   Response: I would follow all Supreme Court and First Circuit precedent if confirmed as a judge. The Supreme Court has decided numerous cases concerning qualified immunity. In a recent case, it reiterated that government officials have the benefit of qualified immunity from civil damages liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."

Mullenix v. Luna, 577 U.S. 7, 11 (2015) (internal citations omitted). A right is "clearly established" only if it is "sufficiently clear" that "every reasonable official" would have understood that his or her conduct violated that right. *Id.* (internal citations omitted).

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

Response: Whether qualified immunity jurisprudence provides sufficient protection for law enforcement officers is a question that should be decided by policy makers. Were I confirmed as a judge, I would faithfully apply all qualified immunity precedent to any case that raised that issue.

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

Response: The proper scope of qualified immunity protections for law enforcement is a question that should be decided by policy makers. Were I confirmed as a judge, I would faithfully apply all qualified immunity precedent to any case that raised that issue.

12. 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: As in-house litigation counsel for NBC Universal, Inc., I worked on several cases that raised copyright issues.

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

Response: I do not recall working on a case related to the Digital Millennium Copyright Act during my legal career.

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

Response: I do not recall working on a case related to such intermediary liability.

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 substantial experience addressing First Amendment and free speech issues, as well as experience addressing free speech and copyright issues. I litigated cases involving these issues, as well as defamation claims, during my more than five years as in-house litigation counsel at NBC Universal, Inc. I also have litigated First Amendment and free speech issues during my time as an attorney at the Center for Reproductive Rights.

13. 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 judge, I would be bound to apply all statutes as written to the particular record before me. The Supreme Court recently confirmed that statutes generally should be interpreted based on their ordinary public meaning at the time they were enacted, and that legislative history can be consulted to clear up ambiguity in the text, but not to create it. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738, 1749 (2020). However, if the plain meaning of statutory text is ambiguous on the particular issue raised in the litigation, courts can look to other interpretive tools, including legislative history (though certain types of legislative history are regarded as more authoritative than others by the Supreme Court). *See, e.g.*, *Milner v. Department of the Navy*, 562 U.S. 562, 572-74 (2011). Should Congress determine as a policy matter that current judicial decisions interpreting the text of the DMCA do not accurately reflect its intent under the DMCA, it could consider amending the law.

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: An agency's formal, reasonable interpretation of a statute it administers is entitled to deference under the factors laid out in *Chevron*, *U.S.A, Inc. v. Nat. Res. Def. Council*, *Inc.*, 467 U.S. 837 (1984), and its analysis of its own regulations is entitled to deference under the factors most recently discussed in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). If an agency is merely providing "advice" on the meaning of a statute through, for example, a policy statement, then the deference discussed in *Chevron* and *Kisor* would not apply. Instead, courts should follow the agency's policy statement "only to the extent it has the 'power to persuade.'" *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (internal citations omitted).

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: In deciding any case raising such issues, I would carefully review the record and apply the relevant Supreme Court and First Circuit precedent on these issues.

14. 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: If confirmed as a judge, I would be bound to apply laws like the DMCA as written to the particular record before me. The Supreme Court recently held that statutes should generally be interpreted based on their ordinary public meaning at the time of the statute's enactment. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). However, if statutory text is ambiguous on the particular issue raised in the litigation, courts can rely on other interpretive tools, including canons of construction and legislative history. Should Congress determine as a policy matter that the text of the DMCA as written does not sufficiently take into account today's digital environment, it could consider amending the law.

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: The legal principles and standards set out in precedent can continue to be applied to new and contemporary circumstances, as the Supreme Court has noted. In addition, if precedent becomes sufficiently undermined by subsequent legal or factual developments, both Supreme Court and First Circuit jurisprudence provides standards for overruling prior decisions. If confirmed as a judge, I would apply all binding Supreme Court and First Circuit precedent.

15. 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: If I were confirmed as a judge, my role would be limited to determining if, under all relevant precedent, the court had jurisdiction to decide the particular case before it and if the case had been filed in the appropriate venue. Other concerns related to "judge shopping" or "forum shopping" would be policy issues for policy makers to address.

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

Response: Please see my answer to No. 15(a) directly above.

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

Response: If confirmed, I can certainly commit not to take such steps. I see the proper role of a judge as limited to deciding the particular cases that come before the court on which the judge sits.

16. 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 studied this issue and am not aware of all the factors that may have led to this concentration of litigation, but it appears to be an important issue for policy makers to consider.

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

Response: Please see my response to No. 16, directly above.

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: Please see my response to No. 16(b) above.

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

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

Response: I am not aware of the particular facts or context to which this question refers and therefore it would be extremely difficult to analyze the legal or other issues that may be involved. District court judges, however, are duty bound to follow the law of the circuit in which they sit, regardless of their personal agreement or disagreement with the circuit's binding decisions.

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

Response: Please see my answer to No. 17(a) directly above.

18. I am concerned about your comments calling Crisis Pregnancy Centers "faux clinics." Just this year, there was an attack on Mountain Area Pregnancy Services in Asheville, where attackers scrawled statements such as "if abortions aren't safe neither are you!"

a. Given your comments, if confirmed, how would you be able to rule impartially on cases involving crisis pregnancy centers?

Response: Vandalism, threats, and trespass on private property are illegal and never appropriate. Further, I commit to impartially applying any relevant law in a case that came before me concerning pregnancy centers, or any other party.

Throughout my career as an advocate, I have defended the rights of individuals and organizations to freedom of speech; freedom of speech is a bedrock principle in our Constitution. The only time I have taken a position on crisis pregnancy centers was in my role as an advocate on behalf of my clients. In particular, I represented clients in filing an amicus brief in *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), in support of a California consumer protection law that the state legislature had enacted in response to concerns raised by women who felt misled about the types of services available at some pregnancy centers; the California law was designed to ensure that women were able to receive accurate information so that they could make the best decisions for themselves about their medical care. In speaking about this case at the time, I made clear that "[n]o one contends that the CPCs and their staff lack First Amendment protection for their

views or that they cannot seek to persuade others to share those views through lawful means."

Finally, my parents immigrated to the United States with me from the former Soviet Union to escape a country that did not protect their freedom of speech or religion. Were I confirmed as a judge, nothing would be more important to me than upholding our Constitution, including its protections for freedom of speech and religion.

19. In 2013, while I was Speaker of the House, North Carolina passed a law which prohibited sex-selection abortions and prevented taxpayer funding of abortions through the state health care exchange. You called this a "vicious assault on the health and rights of North Carolina" and called my colleagues and I "hostile politicians."

a. Can you please explain to me how enacting sensible pro-life policies is a vicious assault on North Carolinians?

Response: The press release containing this statement was issued by the Center for Reproductive Rights and included a statement from me in my role as an advocate and attorney at the Center. The press release focused on the actions of the North Carolina Senate and responded to a very specific set of events that had just taken place: the decision of the state Senate to pass a package of restrictions on pre-viability abortion without any public notice or debate, after attaching those restrictions for the first time the previous night to an unrelated bill. That package of Senate restrictions included more restrictions than those referenced in the question above; it also included restrictions on very early medication abortion and laws that could have shut down clinics throughout the state. The Supreme Court precedent in effect in 2013 prohibited bans on pre-viability abortion and restrictions of pre-viability abortion that imposed an undue burden on a woman's ability to access the procedure.

b. If confirmed, do you believe that you could impartially rule on abortion cases? How would you separate your strongly held political views from your ability to rule impartially?

Response: Yes, I am confident that I can rule impartially on abortion cases. My most strongly held view is my deep respect for our legal system and the rule of law. Throughout my 25-year legal career, first as an appellate law clerk and then as an attorney in both public and private practice, I have worked within the binding precedent of the court in which I have appeared. Further, for more than two decades, on behalf of a diverse group of clients in a wide variety of cases ranging from securities law, to breach of contract, to constitutional law, I have relied on federal judges throughout the country to apply the law fairly and impartially regardless of their previous work experience or personal views. That is the type of judge I wanted

to appear before in every case, that is the type of judge I wanted for each of my clients, and that is the type of judge I commit to be if I were confirmed.