Senator Chuck Grassley, Ranking Member
Questions for the Record
Samantha Dowd Elliott
Judicial Nominee to the United States District Court for the District of New Hampshire

1. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

   Response: I have not encountered the term "super precedent." If confirmed, I would faithfully apply all binding Supreme Court and First Circuit precedent.

2. **You can answer the following questions yes or no:**
   a. **Was *Brown v. Board of Education* correctly decided?**

      Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

      I am willing to make an exception to this general belief with respect to *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954) because its holding, that "separate but equal" educational facilities based on race violate the Equal Protection Clause of the Fourteenth Amendment, is so integral to our modern equal protection law and so well established that it is hard to conceive of the issue coming before me or any other court. On those grounds, I can answer that the case was correctly decided.

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

      Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

I am willing to make an exception to this general belief with respect to *Loving v. Virginia*, 388 U.S. 1 (1967) because its holdings, that race-based distinctions are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment and that the freedom to marry a person of another race is protected by the Due Process Clause, are so integral to our modern understanding of constitutional law and so well established that it is hard to conceive of the issues coming before me or any other court. On those grounds, I can answer that the case was correctly decided.

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

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

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

Response: My response to Question No. 2(c) applies to this question.

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

Response: My response to Question No. 2(c) applies to this question.

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

Response: My response to Question No. 2(c) applies to this question.

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

Response: My response to Question No. 2(c) applies to this question.

h. **Was *Sturgeon v. Frost* correctly decided?**

Response: My response to Question No. 2(c) applies to this question.

i. **Was *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* correctly decided?**

Response: My response to Question No. 2(c) applies to this question.

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

   Response: I am not familiar with Judge Jackson's statement or its context so I cannot say that I agree or disagree with her. If confirmed, I would not consider myself bound to any particular interpretive ideology, such as "originalism" or "living constitutionalism," but rather to the method of interpretation, and the interpretation, established by the Supreme Court and First Circuit precedent applicable the particular constitutional issue in any case.

4. **Should paying clients be able to influence which pro bono clients engage a law firm?**

   Response: The ethical rules regarding conflicts will often determine whether a law firm is able to accept a new client, whether that client is a paying client or a pro bono client.

5. **While participating in a September 2020 panel, you acknowledged that you found it "challenging" to "remain impartial" when you got on the bench. Given that difficulty, what assurances do we have that you will remain impartial if you are confirmed?**

   Response: I have never been "on the bench," and I do not recall stating or believing that I have had difficulty remaining impartial in any environment requiring impartiality. I am confident that, if confirmed, I would effectively make the transition from an advocate to an impartial jurist because of my history representing both plaintiffs and defendants in state and federal courts in a diverse array of cases, which I believe is ample evidence of my ability to fulfill my role within the judicial system impartially and without personal bias.

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

   Response: Judicial decisions should be based on the application of the law to the facts. "Social 'equity'" should only be considered if the controlling law requires such consideration.

7. **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. If confirmed, I would faithfully apply First Circuit and Supreme Court precedent regarding the interpretation of the Constitution. My own "independent value judgments" would have no place in my analysis.

8. **Is whether a specific substance causes cancer in humans a scientific question?**

   Response: Whether a specific substance "causes" cancer in the context of legal liability is a matter of evolving study and public debate. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

9. **Is when a "fetus is viable" a scientific question?**

   Response: Whether a "fetus is viable" under the law is a matter of evolving study and public debate. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

10. **Is when a human life begins a scientific question?**

    Response: When the law recognizes human life for the purposes of legal rights is a matter of evolving study and public debate. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

11. **Can someone change his or her biological sex?**

    Response: The extent to which the law recognizes gender transitions for purposes of legal rights or classifications tied to a person's sex is a matter of public debate. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

12. **Under existing Supreme Court precedent, what are the legal contours of the president's ability to remove executive-branch employees?**

    Response: This question is likely a fact-specific inquiry that would depend on the circumstances of a given employee, including whether they were a career employee or a

political appointee. Generally speaking, I am aware that in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court described the President's removal power as "unrestricted" and struck down for-cause removal restrictions for the head of the Consumer Financial Protection Bureau. The Supreme Court acknowledged two exceptions to the President's removal power, the first for a multimember group of principal officers of an expert agency, balanced along party lines and without executive power, and the second for inferior officers with "limited duties and no policymaking or administrative authority." The Supreme Court held that neither exception applied to the Director.

13. **Is it possible that removing someone—as is the President's power—can be for wholly apolitical reasons?**

Response: The President's authority to remove "someone" would likely be governed by applicable constitutional, statutory, and regulatory provisions, as well as any applicable caselaw. If faced with a case involving the President removing a senior official from office, I would apply the applicable law to the record in the case before me, including *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) and *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010).

14. **Is a social worker qualified to respond to a domestic violence call where there is an allegation that the aggressor is armed?**

Response: Questions regarding who possesses the qualifications to best respond to domestic violence calls under certain circumstances are matters of ongoing public debate and are policy questions ultimately reserved for policymakers. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

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

Response: Public policies such as social distancing mandates and gathering limitations related to COVID-19, and their enforcement, are matters of ongoing public debate and involve policy questions ultimately reserved for policymakers. If a question involving such issues in the context of religious exercise were to come before if I were confirmed, I would faithfully apply First Circuit and Supreme Court precedent, including *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), in which the Supreme Court held that Courts must

apply strict scrutiny to any law that is not "neutral and generally applicable" because it treats "any comparable secular activity more favorably than religious exercise."

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

Response: The allocation of resources is a matter of ongoing public debate and is ultimately reserved for policymakers. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

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

Response: The allocation of resources is a matter of ongoing public debate and is ultimately reserved for policymakers. As a judicial nominee, I believe that it would be inappropriate for me to express opinions regarding such matters to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

18. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

Response: If confirmed, I would follow Supreme Court precedent, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010), and apply the standard adopted by the First Circuit in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *cert. denied*, 141 S. Ct. 108 (U.S. June 15, 2020). Under that approach, I would first determine whether the challenged regulation or legislation burdens conduct protected by the Second Amendment, which is generally understood to be conduct that was considered within the scope of the Second Amendment at the time of ratification. If the challenged law does burden conduct falling within the scope of the Second Amendment, then I would determine what level of scrutiny applies and whether the challenged law satisfies that level of scrutiny. In order to determine what level of scrutiny applies, I would consider "how closely [the challenged law] approaches the core of the Second Amendment right and how heavily it burdens that right." *Id.* at 670-71. The First Circuit has established "that the core of the Second Amendment right is limited to self-defense in the home" by "responsible, law-abiding individuals." *Id.* at 670. If the core of the right is heavily burdened, I would analyze the challenged law under strict scrutiny. If the core of the right is not substantially burdened or if the challenged law fails to implicate the core of the right, I would analyze the challenged law under intermediate scrutiny. *Worman v. Healey*, 922 F.3d 26, 38 (1st Cir. 2019).

19. **Do state school-choice programs make private schools state actors for the purposes of the Americans with Disabilities Act?**

    Response: I am not aware of any First Circuit or Supreme Court precedent that would determine the answer to this question. As a judicial nominee, I believe that it would be inappropriate for me to express an opinion without specific facts before me to avoid the appearance that I have prejudged any issue that might come before me if confirmed. Moreover, if confirmed, I would faithfully apply all Supreme Court and First Circuit precedent that might develop in the interim.

20. **Do you agree with Thomas Jefferson that the First Amendment erects "a wall of separation between Church & State"?**

    Response: The First Amendment explicitly states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." The extent to which government actions and religious activities or entities can overlap is a fact-specific inquiry depending on the circumstances. For instance, the "ministerial exception" recognized in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) exempts certain employees of religious institutions from certain employment discrimination protections. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), for example, the Supreme Court held that the state cannot exclude a religious school from a state tax credit scholarship program if it does so solely because of the religious character of the school. A "wall of separation between Church and State" does not permit the State to deny a religious program generally available public benefits without surviving strict scrutiny.

21. **Does a law restrict abortion access if it requires doctors to provide medical care to children born alive following failed abortions?**

    Response: Depending on the nature of the specific law and claim, I would evaluate the issue under Supreme Court precedent concerning the nature and scope of the substantive due process protections at issue. Under *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), a court is required to weigh the legislative findings and the asserted benefits against the burdens and determine whether the law presents a substantial obstacle in the path of a woman seeking an abortion before viability.

22. **Under the Religious Freedom Restoration Act the federal government cannot "substantially burden a person's exercise of religion."**
    a. **Under current Supreme Court and First Circuit precedent, who decides whether a burden exists on the exercise of religion, the government or the religious adherent?**

Response: Under current precedent, a plaintiff asserting a Religious Freedom Restoration Act claim bears the burden of showing that the government substantially burdened "a sincere religious exercise." *Perrier-Bilbo v. U.S.*, 954 F.3d 413, 431 (1st Cir. 2020).

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

Response: The First Circuit has cautioned that "not every imposition or inconvenience rises to the level of a 'substantial burden.'" *Perrier-Bilbo v. U.S.*, 954 F.3d 413, 432 (1st Cir. 2020). In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court applied a two-part analysis to determine that there was a substantial burden on the plaintiffs in violation of the Religious Freedom Restoration Act. First, non-compliance with the challenged law would impose "severe" economic costs. Second, compliance would force the plaintiffs to violate their sincere religious beliefs. 573 U.S. at 720-26.

23. **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 familiar with Judge Reinhardt's statement or its context so I cannot say whether his alleged approach is appropriate for a federal judge. If confirmed, I would apply First Circuit and Supreme Court precedent faithfully and impartially, striving to render decisions consistent with that precedent rather than at odds with it.

24. **Do you believe that "[t]here is no such thing as a non-racist or race-neutral policy"?**

Response: No, I do not.

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

Response: Under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), "fighting words" fall under the category of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." However, even fighting words are protected if they are restricted based on the viewpoints expressed. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Likewise, symbolic speech does not constitute fighting words and the words themselves must contain "a direct personal insult or an invitation to exchange fisticuffs." *Texas v. Johnson*, 491 U.S. 397 (1989).

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

Response: "True threats," which are "statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals," are not protected speech under the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

27. **Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."**
    a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

       Response: No.

28. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

       Response: No.

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

       Response: No.

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

Response: No.

29. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

    Response: I have not had contact with anyone associated with the organization or its subsidiaries.

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

    Response: No.

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

    Response: No.

30. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

    Response: No.

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

Response: No.

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

Response: No.

31. **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.

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

Response: After Judge Paul Barbadoro took senior status on March 1, 2021, I emailed a letter and my resume to Senators Shaheen and Hassan on March 17, 2021, expressing my interest in applying for the vacancy. On April 20, 2021, Senator Shaheen's staff contacted me to set up an interview with both senators' staff members, which took place on April 30, 2021. On May 11, 2021, I submitted to members of Senator Shaheen's staff via email my responses to a questionnaire. On June 15, 2021, I interviewed with Senators Shaheen and Hassan, and members of their staffs. On June 17, 2021, I submitted additional

information to both senators. On June 29, 2021, Senator Shaheen informed me that my name would be submitted to the White House for consideration for nomination to the District Court of New Hampshire. On July 7, 2021, the White House Counsel's Office contacted me to schedule a meeting, which occurred the next day. Since July 12, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 29, the White House Counsel's Office informed me that President Biden intended to nominate me. On September 30, 2021, my nomination was submitted to the Senate.

33. **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.

34. **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. On or about April 1, 2021, a representative from the New Hampshire chapter of the American Constitution Society called me to say that he had heard that I had submitted my name to Senators Shaheen and Hassan for consideration and asked me for a copy of my resume. I supplied a copy. We had no further contact.

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

    Response: No.

36. **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.

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

    Response: My response to Question No. 32 applies to this question.

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

Response: I received these questions on November 10, 2021. I prepared answers based on my own knowledge and legal research, including information I had studied in preparation for my nomination hearing. I submitted my draft answers to the Office of Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on November 15, 2021.

Nomination of Samantha D. Elliott
to be United States District Judge for the District of New Hampshire Questions for the Record
Submitted November 10, 2021

QUESTIONS FROM SENATOR COTTON

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

   Response: No.

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

   Response: No.

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

   Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

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

   Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's rights to keep and bear arms, unconnected to service in the militia.

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

Response: In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court held that Courts must apply strict scrutiny under the Free Exercise Clause to any law that is not "neutral and generally applicable" in that it treats "any comparable secular activity more favorably than religious exercise."

6. **Please describe what you believe to be the Supreme Court's holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).**

   Response: In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court held that noncitizens mandatorily detained under the Immigration and Nationality Act are not explicitly or implicitly entitled to periodic bond hearings under 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c).

7. **Please describe what you believe to be the Supreme Court's holding in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).**

   Response: In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court concluded that President Donald Trump's Presidential Proclamation 9645, 82 Fed. Reg. 45161 (2017), restricting entry to the United States by nationals of eight foreign states, did not violate the Immigration and Nationality Act or the Establishment Clause. The Court held that the proclamation did not exceed the President's statutory authority because the Immigration and Nationality Act grants him "broad discretion" to suspend entry of noncitizens. The Court held that it did not violate the Establishment Clause because it found that the proclamation did not favor or disfavor any particular religion on its face, and was persuaded that it was not based on anti-Muslim animus given the religious make-up of countries that were included in and excluded from the restrictions.

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

   Response: As a judicial nominee, I have no opinion about arbitration as a litigation alternative. I will faithfully follow the law and First Circuit and Supreme Court precedent with respect to the enforceability of arbitration clauses in any case that might come before me.

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

   Response: I received these questions on November 10, 2021. I prepared answers based on my own knowledge and legal research, including information I had studied in preparation for my nomination hearing. I submitted my draft answers to the Office of

Legal Policy for feedback, and after receiving that feedback, I finalized my answers for submission on November 15, 2021.

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

    Response: No.

Senator Josh Hawley
Questions for the Record

Samantha Elliott
Nominee, U.S. District Court for the District of New Hampshire

1. **Justice Thurgood 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: No.

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

    Response: I believe that the judicial oath requires judges to faithfully and impartially apply Supreme Court and other controlling laws and precedent, without regard to their own personal views.

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

Response: Younger abstention requires federal courts to refrain, with limited exceptions, from issuing injunctions that interfere with ongoing state-court criminal proceedings (or civil proceedings that are akin to criminal prosecutions and those regarding the enforcement of orders and judgment of state courts) that implicate an important state interests and provide an opportunity for the federal plaintiff to advance his constitutional challenge. *Sirva Relocation, LLC v. Richie*, 794 F.3d 185 (1st Cir. 2015). Before abstaining, the court must consider whether any of the exceptions to the Younger doctrine apply: the state proceeding is brought in bad faith, the state forum provides inadequate protection of federal rights, or the statute in question violates express constitutional prohibitions. *Id.*

The Pullman abstention doctrine allows a federal court to stay a case in order to avoid resolving a "significant federal constitutional question" by giving a state court the opportunity to interpret ambiguous state law when "substantial uncertainty exists over the meaning of the state law in question." *Batterman v. Leahy*, 544 F.3d 370, 373 (1st Cir. 2008).

The Burford abstention doctrine is a narrow doctrine that allows federal courts to abstain from reviewing decisions by state regulatory agencies if such review risks creating, in the context of a state regulatory scheme, "a parallel, additional, federal, 'regulatory review' mechanism, the existence of which would significantly increase the difficulty of administering the state regulatory scheme." *Bath Mem'l Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988).

The Rooker-Feldman doctrine deprives the federal court of subject-matter jurisdiction when a federal plaintiff seeks direct review of a state-court judgment, unless such review is authorized by Congress, because 28 U.S.C. § 1257 limits such review to the United States Supreme Court. *See Tyler v. Supreme Judicial Court of Massachusetts*, 914 F.3d 47 (1st Cir. 2019); *Federación de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 24 (1st Cir. 2005).

The Colorado River abstention doctrine requires federal courts to retain jurisdiction over concurrent litigation except in "exceptional" circumstances. The federal court must consider several factors, including: (1) whether either court has assumed jurisdiction over a res; (2) the geographical inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) the adequacy of the state forum to protect the parties' interests; (7) the vexatious or contrived nature of the federal claim; and (8) respect for the principles underlying removal jurisdiction. *Rio Grande Community Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 71–72 (1st Cir. 2005).

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

Response: The Supreme Court has already interpreted the majority of the provisions of the Constitution. If confirmed, I would be bound to apply faithfully the method of interpretation, and the interpretation, established by Supreme Court and First Circuit precedent applicable the particular constitutional provision at issue in any case. For instance, the Supreme Court and the First Circuit have both used original meaning to interpret the Second Amendment. If confirmed, I would be bound by all precedent, whether it relies original meaning or not.

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

Response: If the language of a statute is clear and ambiguous, I would apply the statute's plain meaning, as that is presumed to be the clearest evidence of congressional intent. If the language of a statute is ambiguous, I would first look to Supreme Court and First Circuit precedent with respect to its interpretation. If none existed, I would turn to

accepted canons of statutory interpretation, including semantic, syntactic, and contextual canons. If ambiguity remained, I would look to reliable evidence of congressional intent in the manner permitted by applicable binding precedent, which could include legislative history. However, I would be mindful that some evidence described as "legislative history" is a less reliable indication of congressional intent than is other evidence similarly described.

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

Response: Some legislative history may be more probative of legislative intent than other legislative history. For instance, evidence surrounding the context of enactment, such as clear evidence that a statute was enacted in response to a court decision, may be more reliable than evidence that can be modified after legislation is introduced, especially statements of individual advocates as to the intent of a particular provision.

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

Response: I do not believe that it is appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution.

5. 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: Whether an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment would be governed by *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). I am not aware of any First Circuit precedent relevant to this issue. The inmate must show (1) a "feasible and readily implemented" alternative execution method that would "significantly reduce a substantial risk of severe pain" and (2) that the State has refused to adopt it without a legitimate penological reason. *Baze v. Rees*, 553 U.S. 35, 52 (2008). In *Glossip v. Gross*, 135 S. Ct. 824 (2015), the Supreme Court clarified that the standard first enunciated in *Baze* applies to all execution protocol claims under the Eight Amendment.

6. 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.

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

   Response: I am not aware of any First Circuit precedent relevant to this issue. In *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Supreme Court held that a state prisoner had no constitutional right to obtain post-conviction access to the state's DNA evidence against him and deferred to the legislative branch to establish rules by which convicts can obtain such evidence post-conviction.

8. **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. I intend to faithfully and impartially apply the law.

9. **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 Supreme Court and First Circuit precedent, whether a facially neutral state governmental action is a substantial burden on the free exercise of religion could be evaluated under the Free Exercise Clause of the First Amendment, as well as statutes like the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

   The limits imposed by the First Amendment have been explored and delineated by the Supreme Court. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)), the Supreme Court held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Facial neutrality is not dispositive. *Id.* at 533. If a challenged law treats secular activities more favorably than religious activities, it is not deemed neutral and generally applicable and must survive strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). A facially neutral law can also violate the Free Exercise Clause if the administrative body overseeing its enforcement uses hostility towards religion or religious views as a basis for enforcement. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

The limits imposed by statute have also been delineated by the Supreme Court. For instance, under the RFRA, the federal government "shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless the government demonstrates that the application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. §§ 2000bb-1(a), (b). In *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Supreme Court analyzed the Affordable Care Act (ACA) contraception provision requirements under the RFRA and held that the requirements substantially burdened the for-profit and religious employers' free exercise of sincere religious beliefs and were not the least restrictive way to further a compelling government interest. Thus, they violated the RFRA.

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

Response: My response to Question No. 9 applies to this question. In addition, the Supreme Court has held that state governmental action that disqualifies otherwise eligible recipients from a public benefit solely because of their religious character must survive strict scrutiny. *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

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

Response: A person asserting a sincerely-held belief need not prove that his belief is a tenet of an established religious sect. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989). Rather, the belief must only be sincerely held. Moreover, the court is permitted to evaluate the sincerity alone and not the validity of the asserted belief. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018).

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

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

Response: I believe that Justice Holmes meant to express his belief that the Constitution does not espouse any particular economic policy and that the purpose of judicial review is not to enact economic policy.

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

Response: *Lochner v. New York*, 198 U.S. 45 (1905) was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and its progeny. *See Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423 (1952). I would not apply it as precedent.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that a good judge faithfully and impartially applies the law, without preference for any particular outcome in a specific case.

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

a. What do you understand this statement to mean?

Response: I understand this statement to mean that the role of a judge is to faithfully and impartially apply existing law to the narrow issue in each case, and not to create law.

b. Do you agree or disagree with this statement?

Response: I generally agree with this statement.

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

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

Response: I understand this statement to mean that a judge faithfully and impartially applies the law, without preference for any particular outcome in a specific case.

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

Response: I agree that a judge must faithfully and impartially apply the law, without preference for any particular outcome in a specific case.

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

Response: I understand the phrase was used to support two points. First, it was a way to acknowledge further the widespread belief that *Korematsu* "was gravely wrong the day it was decided" even though it was never actually overruled. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Second, it was a way to emphasize the majority's opinion the two cases are distinguishable. *Id.*

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

Response: If confirmed, I will faithfully apply all precedent. It would not be for me to decide that any Supreme Court opinion is no longer good law unless it was formally overruled. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents.")

a. If so, what are they?

Response: None.

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

Response: I do.

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

a. Do you agree with Judge Learned Hand?

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express an opinion regarding the percent of market share that may constitute a monopoly. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them. If confirmed, I

would faithfully apply all Supreme Court and First Circuit precedent to the facts in the record.

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

Response: My response to Question No. 18(a) applies to this question.

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

Response: My response to Question No. 18(a) applies to this question.

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

Response: My understanding is that "federal common law" refers to the limited body of law developed by federal courts in their own decisions rather than by statute. An example would be the law determining the preclusive effect of a federal-court judgment. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

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

Response: State courts are entitled to interpret their constitutional provisions differently than they or federal courts interpret identical provisions in the federal Constitution. State constitutions may provide greater protections than those provided by the federal Constitution, but cannot be interpreted to restrict or deny rights afforded by the federal Constitution. States may also rely on interpretations of the federal Constitution as persuasive authority.

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

Response: My response to Question No. 20 applies to this question.

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

Response: My response to Question No. 20 applies to this question.

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

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

I am willing to make an exception to this general belief with respect to *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954) because its holding, that "separate but equal" educational facilities based on race violate the Equal Protection Clause of the Fourteenth Amendment, is so integral to our modern equal protection law and so well established that it is hard to conceive of the issue coming before me or any other court. On those grounds, I can answer that the case was correctly decided.

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

Response: I have never opposed the merits of a party's religious liberty claim in litigation.

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: My response to Question No. 22 applies to this question.

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

Response: Nationwide injunctions are equitable remedies evaluated under Rule 65 of the Federal Rules of Civil Procedure and associated precedent regarding the availability of equitable relief. Nationwide injunctions bind the federal government, even with respect to nonparties. The legal authority to issue such injunctions is currently a matter of dispute. If confirmed and faced with a request for a nationwide injunction, I would carefully review the legal grounds for such relief and faithfully apply all Supreme Court and First Circuit precedent.

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

Response: My response to Question No. 23 applies to this question.

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

Response: My response to Question No. 23 applies to this question.

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

Response: Pursuant to the Tenth Amendment, any right not specifically granted to the federal government is reserved for the states.

25. 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.

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

Response: My response to Question No. 2 applies to this question.

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

Response: Relief is determined by the particular facts and claims of each particular case. In confirmed, I would faithfully apply controlling law, including Rule 65 of the Federal Rules of Civil Procedure and the common law standard governing injunctive relief, to the facts of the case to determine whether injunctive relief is appropriate.

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

Response: The Supreme Court has held that the due process clauses of the Fifth and Fourteenth Amendments protect rights in addition to those specifically enumerated, iincluding the right to marital privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)); to use contraception (*Griswold*; and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)); and to abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)); to raise one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); and to bodily integrity (*Rochin v. California*, 342 U.S. 165 (1952)).

In *Washington v. Glucksberg*, the Supreme Court explained that substantive due process rights are "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. 702, 721 (1997) (citations and quotation marks omitted). It also stated that any such rights must be carefully described. *Id.*

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

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

Response: The First Amendment's right to free exercise of religion is a fundamental right afforded to all citizens under the Constitution. I will faithfully follow Supreme Court and First Circuit precedent with respect to the scope of this right.

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

Response: The Free Exercise Clause protects both freedom of worship and the free exercise of religion. Freedom of worship contains the right to hold certain beliefs and attend religious services. The free exercise of religion is a broader right that includes rights to embody and act on religious belief in the ways that one lives (to discuss religion publicly, maintain and attend religious schools, evangelize, violate laws for religious reasons, etc.).

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: If confirmed, I would faithfully and impartially follow First Circuit and Supreme Court precedent, including the precedent established in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

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

Response: A person asserting a sincerely-held belief need not prove that his belief is a tenet of an established religious sect. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989). Rather, the belief must only be sincerely

held. Moreover, the court is permitted to evaluate the sincerity alone and not the validity of the asserted belief. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018).

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: My understanding is that Congress enacted the Religious Freedom Restoration Act in response to the Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that a facially-neutral law that is generally applicable is not subject to strict scrutiny, even if it incidentally affects religious practice. *Id.* at 878-79. By its terms, the RFRA applies to all federal laws, including those governing employment and education. *See* 42 U.S.C. 2000bb-3.

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 am not currently a judge and have not issued any opinions.

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

Response: I do not conceive of the constitutional requirement that the government prove every element of a criminal offense beyond a reasonable doubt as capable of identification on a numeric scale. Rather, reasonable doubt is determined in light of the weight of all of the evidence, using reasonable and common sense. Even if a trier of fact thought of reasonable doubt in numeric terms, each person would need to determine for himself how many percentage points create reasonable doubt in his own mind.

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

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

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express an opinion on this issue. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent to the facts in the record

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

Response: My response to Question No. 31(a) applies to this question.

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

Response: My response to Question No. 31(a) applies to this question.

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

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

Response: As a nominee to the District Court, I do not believe that it is appropriate for me to comment on the fitness of Courts of Appeals procedure.

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

Response: My response to Question No. 32(a) applies to this question.

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

Response: Unpublished First Circuit opinions, orders, judgments, or other written dispositions may be cited for their persuasive value, but not as binding precedent.

See Fed. R. App. P. 32.1; 1st Cir. R. 32.1.0(a); *United States v. Stepanian*, 570 F.3d 51, 57 n. 10 (1st Cir.2009).

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

Response: I do not believe that this is inconsistent with the rule of law because unpublished opinions may still provide persuasive value.

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

Response: My response to Question No. 32(c) applies to this question.

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

Response: If I were confirmed, I would study the applicable court rules and confer with colleagues about common practices and protocols and why they exist.

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

Response: My response to Question No. 32(g) applies to this question.

33. In your legal career:

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

Response: I have tried three cases to verdict as first chair. I have tried additional cases as first chair that settled during trial.

b. How many have you tried as second chair?

Response: I have tried two cases to verdict as second chair. I have tried additional cases as second chair that settled during trial.

c. How many depositions have you taken?

Response: I do not know the exact number of depositions I have taken, but I have taken many during my fifteen years in practice, at least dozens.

d. How many depositions have you defended?

Response: I do not know the exact number of depositions I have defended, but I have defended many during my fifteen years in practice, at least dozens.

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

Response: None. All of my federal appellate cases were decided without oral argument.

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

Response: Approximately ten. Others were decided without oral argument.

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

Response: None that I can recall.

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

Response: Dozens.

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

Response: Dozens.

34. 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: Nationwide injunctions are equitable remedies evaluated under Rule 65 of the Federal Rules of Civil Procedure and associated precedent regarding the availability of equitable relief. Nationwide injunctions bind the federal government, even with respect to nonparties. The legal authority to issue such injunctions is currently a matter of dispute. If confirmed and faced with a request for a nationwide injunction, I would carefully review the legal grounds for such relief and faithfully apply all Supreme Court and First Circuit precedent.

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

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

Response: I have not retained precise annual totals, but I estimate that I billed approximately 1900 hours.

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

Response: If board service on behalf of legal aid organizations is included in the definition of "pro bono," approximately 10% of those hours were dedicated to pro bono work.

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

Response: I do not recall taking such a position in any litigation or a publication.

a. If yes, please provide appropriate citations.

Response: I do not recall taking such a position in any litigation or a publication

37. What were the last three books you read?

Response: *TransAtlantic*, by Colum McCann, *Circe*, by Madeline Miller, and *The Whiz Mob and the Grenadine Kid*, by Colin Meloy.

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

Response: I am aware that social scientists have been studying the concept and that it is a matter of public debate. I do not possess the information that I would presume to be necessary in order to draw that conclusion about America. If confirmed, I would work diligently to faithfully, and impartially apply the law to the record before me without regard to race. If faced with a claim based on racial disparity, I would evaluate the claim based on the applicable law and the record before me.

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

Response: I have developed close friendships with a number of my clients and have been most proud to have been their trusted advisor and advocate during some of their most troubling times.

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

Response: Yes.

a. How did you handle the situation?

Response: As an advocate, it is my duty to represent my client's position as zealously as the law and ethical standards will permit, and without regard to my personal views on the subject.

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

Response: Yes.

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

Response: I do not read any law professors' works regularly. Rather, I am generally driven by an interest or need to understand a particular area of the law as the result of a case I am handling.

42. 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.

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

Response: I cannot recall any particular judicial opinion, law review article, or other legal opinion that made me change my mind though I am sure there have been some.

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

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express an opinion regarding whether an unborn child is a human being. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent to the facts in the record

45. 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's rights to keep and bear arms, unconnected to service in the militia.

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 am not currently a judge and have not issued any opinions.

46. 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 that I recall.

47. 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.

48. 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.

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

Response: I may have assisted a senior associate or partner with a brief that I cannot now recall when I was a new lawyer, but I believe that my name would have been included with the name of the more senior attorney. All briefs that I can recall have included my name.

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

Response: None to my knowledge.

50. Have you ever confessed error to a court?

Response: Not that I can recall.

a. If so, please describe the circumstances.

Response: None that I can recall.

51. 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: Nominees testify under oath before the Senate Judiciary Committee and have a duty to answer all questions truthfully, including questions regarding their judicial philosophy.

Questions for the Record for Samantha Dowd Elliott
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

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

   Response: No.

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

   Response: No.

Senator Ben Sasse
Questions for the Record
for Samantha Elliott
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
November 03, 2021

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. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

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

   Response: If confirmed, I anticipate that my judicial philosophy would evince a commitment to impartiality, the rule of law, and access to justice. I would approach each case with care and an open mind, recognizing its importance and identifying the specific issue before me. I would diligently research, analyze, and faithfully and impartially apply all controlling laws and precedent. I would meticulously review the record and be attentive to witnesses and the parties. I would reach a well-reasoned decision and write it in a way that is clear and useful to the parties and to the public.

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

   Response: If confirmed, I would not consider myself bound to any particular interpretive ideology, such as "originalism," but rather to the method of interpretation, and the interpretation, established by Supreme Court and First Circuit precedent applicable the particular constitutional provision at issue in any case. For instance, the Supreme Court and the First Circuit have both used original meaning to interpret the Second Amendment. If confirmed, I would be bound by all precedent, whether it relies original meaning or not.

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

   Response: If confirmed, I would not consider myself bound to any particular interpretive ideology, such as "textualism," but rather to the method of interpretation, and the interpretation, established by Supreme Court and First Circuit precedent applicable the particular constitutional provision at issue in any case. That said, if the language of a

statute is clear and ambiguous, I would apply the statute's plain meaning and not delve further into judicial construction.

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

   Response: If confirmed, I would not consider myself bound to any particular interpretive ideology, such as "originalism" or "living constitutionalism," but rather to the method of interpretation, and the interpretation, established by Supreme Court and First Circuit precedent applicable the particular constitutional provision at issue in any case. For instance the Supreme Court has recognized that constitutional provisions can be broad enough to apply to circumstances not existing at the time of ratification. *See*, *e.g. Riley v. California*, 573 U.S. 373 (2014) (holding that warrantless searches of digital information stored on cell phones ordinarily violates the Fourth Amendment).

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

   Response: I could not identify a particular Justice whose jurisprudence I most particularly admire.

8. **Was Marbury v. Madison correctly decided?**

   Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

   I am willing to make an exception to this general belief with respect to *Marbury v. Madison*, 5 U.S. 137 because its holding, which established the principle of judicial review, is so integral to our modern understanding of constitutional law and separation of powers and so well established that it is hard to conceive of the issue coming before me or any other court. On those grounds, I can answer that the case was correctly decided.

9. **Was Lochner v. New York correctly decided?**

   Response: *Lochner v. New York*, 198 U.S. 45 (1905) was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and its progeny. *See Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423 (1952). I would not apply it as precedent.

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

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

I am willing to make an exception to this general belief with respect to *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954) because its holding, that "separate but equal" educational facilities based on race violate the Equal Protection Clause of the Fourteenth Amendment, is so integral to our modern equal protection law and so well established that it is hard to conceive of the issue coming before me or any other court. On those grounds, I can answer that the case was correctly decided.

11. Was Bolling v. Sharpe correctly decided?

Response: My response to Question No. 10 applies to this question.

12. Was Cooper v. Aaron correctly decided?

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

13. Was Mapp v. Ohio correctly decided?

Response: My response to Question No. 12 applies to this question.

14. Was Gideon v. Wainwright correctly decided?

Response: My response to Question No. 12 applies to this question.

15. Was Griswold v. Connecticut correctly decided?

Response: My response to Question No. 12 applies to this question.

16. Was South Carolina v. Katzenbach correctly decided?

Response: My response to Question No. 12 applies to this question.

17. Was Miranda v. Arizona correctly decided?

Response: My response to Question No. 12 applies to this question.

18. Was Katzenbach v. Morgan correctly decided?

Response: My response to Question No. 12 applies to this question.

19. Was Loving v. Virginia correctly decided?

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

I am willing to make an exception to this general belief with respect to *Loving v. Virginia*, 388 U.S. 1 (1967) because its holdings, that race-based distinctions are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment and that the freedom to marry a person of another race is protected by the Due Process Clause, are so integral to our modern understanding of constitutional law and so well established that it is hard to conceive of the issues coming before me or any other court. On those grounds, I can answer that the case was correctly decided.

20. Was Katz v. United States correctly decided?

Response: My response to Question No. 12 applies to this question.

21. Was Roe v. Wade correctly decided?

Response: My response to Question No. 12 applies to this question.

22. Was Romer v. Evans correctly decided?

Response: My response to Question No. 12 applies to this question.

23. Was United States v. Virginia correctly decided?

Response: My response to Question No. 12 applies to this question.

24. Was Bush v. Gore correctly decided?

Response: My response to Question No. 12 applies to this question.

25. Was District of Columbia v. Heller correctly decided?

Response: My response to Question No. 12 applies to this question.

26. Was Crawford v. Marion County Election Board correctly decided?

Response: My response to Question No. 12 applies to this question.

27. Was Boumediene v. Bush correctly decided?

Response: My response to Question No. 12 applies to this question.

28. Was Citizens United v. Federal Election Commission correctly decided?

Response: My response to Question No. 12 applies to this question.

29. Was Shelby County v. Holder correctly decided?

Response: My response to Question No. 12 applies to this question.

30. Was United States v. Windsor correctly decided?

Response: My response to Question No. 12 applies to this question.

31. Was Obergefell v. Hodges correctly decided?

Response: My response to Question No. 12 applies to this question.

32. 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 Constitution?

Response: The First Circuit follows the "law of the circuit rule," which dictates that prior panel decisions should not be disturbed, but has two recognized, "extremely narrow exceptions." *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010). The Circuit is not bound by the prior precedent if (1) a decision of the authoring court en banc, a Supreme Court opinion directly on point, or new legislation subsequently contradicts it, or (2) in the "rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its

collective mind." *Id.* (quoting *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir.1995)). If confirmed as a district court judge, I will be bound to apply all First Circuit and Supreme Court precedent and will not be responsible for deciding whether the First Circuit should reaffirm its own precedent.

33. 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: My response to Question No. 32 applies to this question.

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

Response: If the language of a statute is clear and ambiguous, I would apply the statute's plain meaning, as that is presumed to be the clearest evidence of Congressional intent. If the language of a statute is ambiguous, I would first look to Supreme Court and First Circuit precedent with respect to its interpretation. If none existed, I would turn to accepted canons of statutory interpretation, including semantic, syntactic, and contextual canons. If ambiguity remained, I would look to reliable evidence of Congressional intent in the manner permitted by applicable binding precedent, which could include legislative history. However, I would be mindful that some evidence described as "legislative history" is a less reliable indication of Congressional intent than is other evidence similarly described.

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

Response: The specific factors to be considered when imposing a sentence are enumerated in 18 U.S.C. § 3553(a) and include consideration of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). Thus, any alleged disparity would be a relevant factor to consider in a particular case along with the other statutory factors, the sentencing guidelines, and whether to vary from the guideline range as authorized by *U.S. v. Booker*, 543 U.S. 220 (2005).

Questions from Senator Thom Tillis
for Samantha Dowd Elliott
Nominee to be United States District Judge for the District of New Hampshire

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

   Response: Yes.

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

   Response: I do not use the term "judicial activism" because it has been defined differently over time and by different groups. If it is defined as a judge ignoring precedent in favor of her own personal views about public policy and a preference for a particular outcome, I do not consider that appropriate. It is in direct opposition to the proper role of a judge. If confirmed, I would faithfully and impartially apply the law to the facts of the case before me, paying close attention to the narrow issue before me and the limited jurisdiction of the District Court.

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

   Response: It is an expectation.

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

   Response: No.

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

   Response: Yes. If confirmed, I would reconcile that reality by acknowledging that a judge must scrupulously follow the law, wherever it may lead, so that the rule of law itself prevails.

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

   Response: No.

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

   Response: If confirmed, I would faithfully and impartially apply Supreme Court and First Circuit precedent interpreting the Second Amendment, including *District of Columbia v.*

Heller, 554 U.S. 570 (2008), *McDonald v. Chicago*, 561 U.S. 742 (2010), and *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *cert. denied*, 141 S. Ct. 108 (U.S. June 15, 2020).

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: If confirmed and called upon to evaluate such a claim, I would consider the precedent cited in response to Question 7, any applicable statutes governing the Sheriff's duties to process handgun purchase permits, and any applicable precedent regarding the effect of crises on constitutional and statutory rights, including *Tandon v. Newsom,* 141 S. Ct. 1294 (2021) and *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

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: If confirmed, I would faithfully and impartially apply Supreme Court and First Circuit precedent governing qualified immunity, including *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and *Alfano v. Lynch*, 847 F.3d 71 (1st Cir. 2017). The qualified immunity analysis requires two steps. First, the court must determine whether the plaintiff has alleged a violation of his constitutional rights. *Alfano*, 847 F.3d at 75. Second, the court must determine whether the right at issue was clearly established at the time of the alleged violation. *Id.* This second step consists of two components, which can be taken in any order. *Id.* One focuses on the clarity of the law at the time of the alleged violation, and the other focuses on whether an objectively reasonable person in the defendant's position, with the information known to him at the time, would have understood that his conduct violated the plaintiff's constitutional rights. *Id.*

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

    Response: The standard set forth in response to Question No. 9 is controlling precedent. If confirmed, I would apply that standard faithfully and impartially unless a different standard were enacted by Congress or the Supreme Court issued superseding precedent.

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

    Response: The standard set forth in response to Question No. 9 is controlling precedent. If confirmed, I would apply that standard faithfully and impartially unless a different standard were enacted by Congress or the Supreme Court issued superseding precedent.

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

Response: As a nominee to the District Court, I generally believe that it would be inappropriate for me to express opinions regarding Supreme Court precedent, whether my opinions were in favor of or critical of that precedent. I believe so because, if confirmed, I would be bound to apply precedent faithfully and to respect the obligation to do so, regardless of my personal view. I also believe that it is essential to the actual and perceived integrity of the judiciary that judges refrain from giving the impression that they have prejudged cases that might come before them as the result of political or legal debate. If confirmed, I would faithfully apply all Supreme Court and First Circuit precedent.

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

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

Response: With all due respect, I agree with other judicial nominees who have declined to analyze hypothetical scenarios during the confirmation process. If confirmed, I would decide each case by applying controlling Supreme Court and First Circuit precedent to the specific record before me. Answering a hypothetical could suggest that I have prejudged cases or issues that might come before me if confirmed. This could undermine the actual and perceived integrity of the judiciary.

b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

Response: My response to Question No. 13(a) applies to this question.

c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered

alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?

Response: My response to Question No. 13(a) applies to this question.

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

Response: My response to Question No. 13(a) applies to this question.

e. ***Natural Laws and Substances, Inc.*** **specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

Response: My response to Question No. 13(a) applies to this question.

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

Response: My response to Question No. 13(a) applies to this question.

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

Response: My response to Question No. 13(a) applies to this question.

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

Response: My response to Question No. 13(a) applies to this question.

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

Response: My response to Question No. 13(a) applies to this question.

j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?

Response: My response to Question No. 13(a) applies to this question.

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: My response to Question No. 12 applies to this question.

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

a. What experience do you have with copyright law?

Response: Though some of my many commercial litigation matters have touched on copyright issues, I have no significant, substantive experience litigating copyright law.

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

Response: None.

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

Response: None.

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

Response: I have represented municipalities in a number of cases involving First Amendment and free speech claims. None of the cases have involved the intersection of free speech and intellectual property.

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

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

Response: If the language of a statute is clear and ambiguous, I would apply the statute's plain meaning, as that is presumed to be the clearest evidence of Congressional intent. If the language of a statute is ambiguous, I would first look to Supreme Court and First Circuit precedent with respect to its interpretation. If none existed, I would turn to accepted canons of statutory interpretation, including semantic, syntactic, and contextual canons. If ambiguity remained, I would look to reliable evidence of Congressional intent in the manner permitted by applicable binding precedent, which could include legislative history. However, I would be mindful that some evidence described as "legislative history" is a less reliable indication of Congressional intent than is other evidence similarly described.

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: In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the Supreme Court held that an agency's interpretation of a statute contained in an opinion letter, policy statement, agency manual, or enforcement guideline does not warrant *Chevron-style* deference. They are instead "entitled to respect" under *Skidmore v. Swift*, "but only to the extent that those interpretations have the 'power to

persuade.'" *Christensen*, 529 U.S. at 587 (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

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: If confirmed and called upon to evaluate such an issue, I would interpret the Digital Millennium Copyright Act in a manner consistent with the interpretation methodology described in response to Question No. 16(a) and faithfully apply any relevant First Circuit and Supreme Court precedent.

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

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

Response: If confirmed, I would be bound to apply the law as it exists unless and until Congress passed new laws that may be better able to contend with today's digital environment.

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 Supreme Court has the power to overrule its own precedent if it concludes that prior decisions are no longer aligned with technological and economic reality. *See*, *e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096-99 (2018). If confirmed, I would be bound to apply First Circuit and Supreme Court precedent and any laws enacted by Congress unless and until Congress passes new laws or the Supreme Court overrules its own precedent.