Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Sarah Merriam
Judicial Nominee to the U.S. District Court for the District of Connecticut

1. **Prior to your current career you were extremely active in partisan politics. Indeed Senator Murphy once commended your lack of a judicial temperament when working as a political operator. What assurances can you give me that you will put your partisan preferences behind and do equal justice as an Article III judge?**

   Response: My active work in partisan politics ended in 2007, when I became an Assistant Federal Defender. For the past six years I have served as a United States Magistrate Judge. In that role, I have been completely impartial. I have demonstrated judicial temperament. I have scrupulously followed my oath of office, doing equal justice "without respect to persons" and without regard for any past partisan positions. I would continue to do so if confirmed as a District Judge.

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

   Response: I am not familiar with the term "super precedent." Upon receipt of this question, I conducted a Westlaw search for that term in Supreme Court and Second Circuit reported cases, and found no results.

3. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: Only the government may prosecute crimes. "It is a truism, and has been for many decades, that in our federal system crimes are always prosecuted by the Federal Government, not as has sometimes been done in Anglo-American jurisdictions by private complaints." Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 86–87 (2d Cir. 1972); see also Hill v. Didio, 191 F. App'x 13, 14–15 (2d Cir. 2006) ("[W]e have long recognized that crimes are prosecuted by the government, not by private parties.").

4. **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 comments, and I am not aware of her beliefs on the issue. The Constitution has served this country for more than 230 years, and I expect it will continue to do so for many centuries more. I do not subscribe to any particular judicial philosophy such as "living constitutionalism." If I am confirmed as a District Judge, I would interpret the Constitution in accordance with the established precedent of the Supreme Court and the Second Circuit.

5. **Should a judge yield to social pressure when deciding the outcome of cases?**

   Response: No.

6. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

   Response: No. Please see my response to Question 3.

7. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

   Response: In my six years as a Magistrate Judge I have hired law clerks based on their abilities and skills, as revealed by their law school records, their writing samples, the recommendations of those who know their work, and their curriculum vitae, and without consideration of any memberships or affiliations. If I am confirmed as a District Judge, I would continue to hire law clerks based upon ability and record.

8. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

   Response: I was never tasked with this sort of decision-making when I was in private practice, and have no opinion on the issue. I would leave such decisions to the law firm.

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

   Response: I was never tasked with this sort of decision-making when I was in private practice, and have no opinion on the issue. I would leave such decisions to the law firm.

10. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

    Response: No.

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

    Response: Judicial decisions should be based on the law. I am not sure what is meant in this context by "social equity," but a judicial decision should not be based on a judge's personal views on the equities of a situation.

12. **Is it ever appropriate for a judge to publicly profess political positions on campaigns and/or candidates?**

    Response: No.

13. **Is threatening Supreme Court Justices right or wrong?**

Response: It is wrong to threaten a Justice. In fact, it is a crime to threaten any federal judge if the threat is made "with intent to impede, intimidate, or interfere with" the judge "while engaged in the performance of official duties, or with intent to retaliate against" the judge "on account of the performance of official duties[.]" 18 U.S.C. §115(a)(1).

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

    Response: I believe the distinction between an "attack" and a criticism would depend on the specific circumstances, including the language used, and I am unaware of any case law on the question. There is case law providing guidance on the question of whether any particular statement constitutes a "threat" to a sitting judge so as to constitute a criminal offense.

15. **Do you think the Supreme Court should be expanded?**

    Response: This is a policy question, and it is my understanding that it is currently the topic of at least one proposed piece of legislation. As a sitting judge and a nominee it would be improper for me to opine on this question, which is the preserve of the Legislative and Executive Branches.

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

    Response: The sentencing statute directs a sentencing judge to consider "the history and characteristics of the defendant[,]" 18 U.S.C. §3553(a)(1), among other factors, in determining an appropriate sentence.

17. **If the Justice Department determines that the prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain why or why not.**

    Response. I believe this question is currently pending in a federal court outside of my District. Therefore, it would be improper for me to comment, as a sitting judge and a nominee, pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, which prohibits a judge from making "public comment on the merits of a matter pending or impending in any court." I note that the Supreme Court disapproved of the solicitation of amicus briefs by an Appeals Court, under the "principle of party presentation[.]" United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020).

18. **What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?**

    Response: This is an open question in federal law. The Supreme Court has held that, in a class action, "the scope of injunctive relief is dictated by the extent of the violation

established, not by the geographical extent of the plaintiff class." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). More recently, the Court has observed that only where a constitutional violation has been shown to be "systemwide" should the corresponding injunctive relief be given that scope. Lewis v. Casey, 518 U.S. 343, 359 (1996). Justice Thomas has expressed skepticism about whether such injunctions are within the authority of a district court. See Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). He observed, however, that "[a]n injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide." Id. at 2425 n.1. Justice Gorsuch noted last year that the Supreme Court has not yet taken up what he views as "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). If presented with this question, I would apply Supreme Court and Second Circuit precedent to determine the proper scope of any injunction to be issued.

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

    Response: The Supreme Court has not yet articulated the appropriate standard for review of a law that infringes Second Amendment rights; either intermediate or strict scrutiny must be applied. See Rogers v. Grewal, 140 S. Ct. 1865, 1868 (2020) (Thomas, J., dissenting) (noting variety of approaches used by Circuit Courts after District of Columbia v. Heller, 554 U.S. 570 (2008)). The Second Circuit has suggested that two factors should be considered in determining the appropriate level of scrutiny: "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 258 (2d Cir. 2015) (citations and quotation marks omitted). If presented with this question, I would apply Supreme Court and Second Circuit precedent to determine the proper standard of review.

20. **In your view, is a personal philosophical or religious objection to the death penalty on the part of the President a valid justification to abandon the defense of a death sentence on direct appeal?**

    Response: The question of whether to pursue a particular prosecution or appeal can only be decided by the Executive Branch.

21. **In your view, is a personal philosophical or religious objection to the death penalty on the part of a District Judge a valid justification not to impose a death sentence?**

    Response: No. A judge must apply the law regardless of her personal views.

22. **Do you believe potential voter fraud or other election abnormalities are concerns that the Justice Department should take seriously?**

Response: I believe free and fair elections are a cornerstone of our democracy and should be a concern for all Americans. The question of which issues should be prioritized by the Department of Justice is a policy question, which can only be decided by the Executive Branch.

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

Response: The Supreme Court has "identified a host of facts that can bear" on the question of when the acts of a private entity can be considered "state action." Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001). I am unaware of any precedent applying these tests to private schools operating under school-choice programs, under the Americans with Disabilities Act. However, I note that the Court has found that a school that "depended on the State for funds[]" did not become a "state actor" for purposes of 42 U.S.C. §1983, finding that "the school's fiscal relationship with the State is not different from that of many contractors performing services for the government" Rendell-Baker v. Kohn, 457 U.S. 830, 840, 843 (1982). If this issue were presented to me, I would research it thoroughly and apply Supreme Court and Second Circuit precedent to reach a decision.

24. **Does illegal immigration impose costs on border communities?**

Response: I have no personal knowledge of this issue.

25. **When was the last time you visited the U.S.-Mexico border?**

Response: I have never visited the U.S.-Mexico border.

26. **When was the last time you visited the U.S.-Mexico border outside of a port of entry?**

Response: I have never visited the U.S.-Mexico border.

27. **Do Blaine Amendments violate the Constitution?**

Response: The "Blaine Amendment" "would have added to the Federal Constitution a provision similar to the" type of "no-aid" provision challenged in Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020). The Supreme Court has found such state laws, which prohibit aid to certain schools based on their religious character must be subjected to strict scrutiny. The Court has struck down such laws in both Espinoza and Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), as violations of the Free Exercise clause of the First Amendment. If presented with a challenge to a "Blaine Amendment" type law, I would apply Supreme Court and Second Circuit precedent.

28. **Is it possible to turn lead into gold?**

Response: I am not a scientist, but I was taught in school that it is a matter of accepted scientific fact that one element cannot be converted into another element.

29. **Does the sun revolve around the earth?**

Response: I am not a scientist, but I was taught in school that it is a matter of accepted scientific fact that the Earth revolves around the sun.

30. **Are illnesses caused by an imbalance of humors?**

Response: I have never heard this theory, and cannot answer the question.

31. **Is a human embryo something other than a living human being?**

Response: I am not a medical professional or scientist, and I do not believe this question was addressed when I took biology in the 1980s. As a sitting judge, I have never been presented with a case in which this issue would become relevant. However, the question of the status of a human embryo remains the subject of extensive and ongoing debate and litigation. As a sitting judge and as a nominee, it would therefore be inappropriate for me to comment further.

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: I sent a letter to Senator Blumenthal and Senator Murphy in early February 2021, indicating that I would be interested in being considered for the judicial vacancies in the District of Connecticut. I received information from Senator Blumenthal's office by email, including a questionnaire to be completed for review by an Advisory Committee appointed by the Senators. I submitted the questionnaire and other requested materials to the Committee through a member of Senator Blumenthal's office. It is my understanding that the Advisory Committee recommended my nomination to the Senators, though I was never contacted directly by the Advisory Committee. I was contacted by Senator Blumenthal's office to arrange an interview with Senator Blumenthal and Senator Murphy by Zoom, which occurred in March 2021. Senator Blumenthal's office then contacted me to inform me that my name had been provided to the White House Counsel's Office.

I received an email from the White House Counsel's Office on April 18, 2021, and was interviewed by attorneys from that Office on April 20, 2021. On June 15, 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? If so, what was the nature of those discussions?**

Response: No.

a. **Did anyone do so on your behalf?**

Response: No.

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

Response: No.

a. **Did anyone do so on your behalf?**

Response: No.

35. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? 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.

a. **Did anyone do so on your behalf?**

Response: No.

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

Response: No.

a. **Did anyone do so on your behalf?**

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: I was interviewed by attorneys from the White House Counsel's Office on April 20, 2021. I have been in contact with representatives of the White House Counsel's Office and the Office of Legal Policy since April 22, 2021.

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

Response: I received the questions by email on July 21, 2021, and immediately began preparing my responses. In responding to some questions, I referred to my Senate Judiciary Questionnaire. I also conducted research on Westlaw and other online sources regarding particular terms and cases raised by some of the questions. I shared my responses with employees of the Department of Justice, Office of Legal Policy, Judicial Nominations staff, who offered feedback on some of my responses.

Nomination of The Honorable Sarah A. L. Merriam to be
United States District Judge for the District of Connecticut
Questions for the Record
Submitted July 21, 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 Magistrate Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a District Judge, I could continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to either praise or criticize any binding Supreme Court precedent, since I am bound to apply all of them.

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: The Supreme Court has held that there is "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." D.C. v. Heller, 554 U.S. 570, 595 (2008) (emphasis added).

5. **Please describe what you believe to be the Supreme Court's holding in *Greer v. United States*, 593 U.S. _____ (2021).**

   Response: In Greer v. United States, 141 S. Ct. 2090, 2095 (2021), the Supreme Court considered the availability of relief under its recent decision in Rehaif v. United States, 588 U.S. ——, 139 S. Ct. 2191 (2019). Rehaif clarified the mens rea requirement for the offense of unlawful possession of a firearm by a prohibited person, such as a convicted felon. Greer holds that a defendant is only entitled to plain error relief on a claim under Rehaif if the defendant "makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon." Greer, 141 S. Ct. at 2100.

6. **Please describe what you believe to be the Supreme Court's holding in *Terry v. United States*, 593 U.S. _____ (2021).**

   Response: In Terry v. United States, 141 S. Ct. 1858 (2021), the Supreme Court held that the First Step Act does not authorize a sentence reduction for a defendant convicted under 21 U.S.C. §841(b)(1)(C), which carries no mandatory minimum sentence, because the penalties under that subsection were not modified by the Act.

7. **Please describe what you believe to be the Supreme Court's holding in *Jones v. Mississippi*, 593 U.S. _____ (2021).**

   Response: In Jones v. Mississippi, 141 S. Ct. 1307 (2021), the Supreme Court found that a sentencing court need not make either an express or implicit factual finding of "permanent incorrigibility" at sentencing in order to impose a sentence of life without parole on a person under the age of 18 who has been convicted of murder. Id. at 1318.

8. **Please describe what you believe to be the Supreme Court's holding in *Tandon v. Newsom*, 593 U.S. _____ (2021).**

   Response: In Tandon v. Newsom, 141 S. Ct. 1294 (2021), the Court found that COVID restrictions imposed by the State of California treated certain religious gatherings less favorably than some secular activities, and that the restrictions therefore were not content-neutral, triggering strict scrutiny review. The Court found that the restrictions violated the petitioners' free exercise rights, and issued an injunction against the restrictions pending appeal.

9. **Please describe what you believe to be the Supreme Court's holding in *Sanchez v. Mayorkas*, 593 U.S. _____ (2021).**

   Response: In Sanchez v. Mayorkas, 141 S. Ct. 1809 (2021), the Supreme Court found that an immigrant who entered the United States unlawfully, but was later granted "Temporary Protected Status," was not eligible to apply for Legal Permanent Resident status because the Temporary Protected Status does not alter the fact that his initial entry into the United States was not lawful, and only those who enter the country lawfully are eligible for Legal Permanent Resident status.

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

    Response: When I was in private practice, I do not believe I was ever involved in an arbitration, or confronted with the question of whether it would be a good alternative to litigation. As a Magistrate Judge, I regularly preside over settlement conferences, if the parties seek to resolve matters that have already proceeded to litigation, but I have not

had occasion to be involved with arbitration. As a result, I do not have any particular views on arbitration.

11. **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 the questions by email on July 21, 2021. I prepared the responses myself. In responding to some questions, I referred to my Senate Judiciary Questionnaire. I also conducted research on Westlaw and other online resources regarding particular terms and cases raised by some of the questions.

12. **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. I wrote and drafted all of my responses myself. After I drafted my responses, I shared them with employees of the Department of Justice, Office of Legal Policy, Judicial Nominations staff, who offered feedback on some of my responses.

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

Questions for the Record for Sarah Ann Leilani Merriam, to be United States District Judge for the District of Connecticut

I. Directions

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

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

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

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

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

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

II. Questions

1. **You have a long and deep history of partisan political activity. If confirmed, what steps will you take to ensure that you not only follow the judicial oath to be impartial, but that you appear to be impartial?**

   Response: My active work in partisan politics ended in 2007, when I became an Assistant Federal Defender. For the past six years I have served as a United States Magistrate Judge. In that role, I have been completely impartial. I have demonstrated judicial temperament. I have scrupulously followed my oath of office, doing equal justice "without respect to persons" and without regard for any past partisan positions. I would continue to do so if confirmed as a District Judge. In addition to conducting myself in a completely impartial fashion on the bench, I strictly adhere to Canon 5. I ensure that I do not attend events in the community or make public statements that might give rise to any appearance of impartiality.

2. **In 2003, you wrote about several steps the City of Hartford could take to "turn this city around" including increased police presence, DUI checkpoints, parking enforcement, etc. You urged the City to "get serious about law enforcement in Hartford." Do you continue to believe that these recommendations were correct?**

   Response: I continue to believe that those recommendations were correct at the time I made them. At the time I wrote those letters, I lived, worked, and owned a home in downtown Hartford. I have not lived or worked in Hartford for almost 15 years now, so I have no current opinion on the City of Hartford's law enforcement priorities.

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

   Response: No.

4. **Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.**

   Response: I am a trial judge, and if I am confirmed, I will continue to be a trial judge. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties. I understand that when a case comes to federal court, something has gone wrong, and the parties to the dispute, whether civil or criminal, need the Court's assistance in resolving the dispute. I dedicate myself to doing that while honoring the dictates of the Code of Conduct, particularly Canon 3(A), balancing every party's "full right to be heard" with the need to "dispose promptly of the business of the court[,]" while being courteous and respectful to all concerned. There is no individual Justice whose philosophy of judging I have studied carefully enough to know whether it aligns with my own approach. The role of a Supreme Court Justice is so different from the role of a trial judge that it is difficult to analogize the two.

5. **Does the Constitution's meaning evolve and adapt to new circumstances even if the document is not formally amended? If so, when?**

Response: Only in those limited circumstances when the Supreme Court so declares. If I am confirmed as a District Judge, my role would be to apply the Constitution as it has been interpreted by the Supreme Court, and by the Second Circuit. I would faithfully apply that precedent, and honor the limitations it imposes.

6. **Is it ever appropriate to use legislative history when interpreting a law? If so, under what circumstances, and how should that legislative history be used.**

Response: Yes, sometimes. The Supreme Court and the Second Circuit have, in some circumstances, looked to legislative history in interpreting laws, if the plain language of the statute is unclear, and persuasive legislative history is available. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'"). "If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1143 (2018). The Supreme Court has recently confirmed that though it may be useful at times, "legislative history is not the law." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) (citations and quotation marks omitted). Within the broad category of "legislative history," different sources are accorded different weight. See, e.g., Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (describing excerpts from committee testimony as "among the least illuminating forms of legislative history" (citation and quotation marks omitted)). I would use legislative history in interpreting a law only if and when such use is consistent with Supreme Court and Second Circuit precedent.

7. **Please briefly describe the interpretive method often referred to as living constitutionalism.**

Response: Black's Law Dictionary defines "living constitutionalism" as: "The doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." Living Constitutionalism, Black's Law Dictionary (11th ed. 2019).

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

Response: Only the Supreme Court can decide this, and to the best of my knowledge, it has not spoken clearly on this issue, in binding precedent. The Court has debated the use of evidence of current public opinion or understanding, but I am not aware that it has reached a decisive, collective conclusion. See, e.g., Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (disagreeing with majority's use of "public opinion poll results" in consideration of Eighth Amendment issues); but see, e.g., Trop v. Dulles, 356 U.S. 86, 101 (1958) (discussing "evolving standards of decency"). If presented with

the issue, I would consider such public understanding only if and when such consideration is consistent with Supreme Court and Second Circuit precedent.

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

Response: Yes. See District of Columbia v. Heller, 554 U.S. 570 (2008) (describing the right to possess and carry firearms as an individual right).

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

Response: No.

Questions for the Record for Sarah Ann Leilani Merriam
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 Mike Lee
Questions for the Record
Sarah Merriam, D. Conn.

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

Response: I am a trial judge, and if I am confirmed, I will continue to be a trial judge. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties. I understand that when a case comes to federal court, something has gone wrong, and the parties to the dispute, whether civil or criminal, need the Court's assistance in resolving the dispute. I dedicate myself to doing that while honoring the dictates of the Code of Conduct, particularly Canon 3(A), balancing every party's "full right to be heard" with the need to "dispose promptly of the business of the court[,]" while being courteous and respectful to all concerned.

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

Response: I begin with the text of any statute. Next, I would consult Supreme Court and Second Circuit precedent interpreting that statute. If no binding precedent were available, I would turn to precedent interpreting related or analogous statutes, or to persuasive precedent from other Circuits. Ordinarily I expect that would end my inquiry. In the unusual case where the text and the applicable case law were insufficient to resolve the issue, I would look to any other persuasive and reliable sources approved by the Supreme Court and the Second Circuit for interpretation of that or similar statutes, such as legislative history.

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

Response: I would begin with the text of the constitutional provision. Next, I would consult Supreme Court and Second Circuit precedent interpreting that provision. If no binding precedent were available, I would turn to precedent interpreting related or analogous provisions, or persuasive precedent from other Circuits. Ordinarily I expect that would end my inquiry. In the unusual case where the text and the applicable case law were insufficient to resolve the issue, I would look to any other persuasive and reliable sources approved by the Supreme Court and the Second Circuit for interpretation of that or similar provisions.

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

Response: The text controls. Where the Supreme Court or the Second Circuit has indicated that original meaning may be relevant to the interpretation of a particular provision, that is also a relevant consideration.

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

Response: I begin with the text of any statute. I read the statute as a whole, with an eye to its structure, and I give primary weight to the plain meaning of the text.

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

Response: I would strictly follow the guidance of the Supreme Court on this question. The Supreme Court has indicated in some contexts that "our understanding of" particular constitutional provisions "has evolved over time." Gonzales v. Raich, 545 U.S. 1, 15–16 (2005). In other contexts, the Supreme Court has turned to the original meaning of a provision. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1966 (2019) (considering original meaning of Double Jeopardy Clause); Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020) (considering original meaning of Appointments Clause).

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

Response: The "irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citation and quotation marks omitted).

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

Response: As early as the seminal case of M'Culloch v. Maryland, the Supreme Court has held that certain powers are implicitly granted to Congress, specifically, those necessary to carry out its duties under the Constitution: "Even without the aid of the general clause in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted." M'Culloch v. Maryland, 17 U.S. 316, 323–24 (1819). One hundred years later, the Supreme Court held that the question of whether a particular unenumerated power may be attributed to Congress "must depend upon how far such

limited power is ancillary or incidental to the power granted to Congress[.]" Marshall v. Gordon, 243 U.S. 521, 537 (1917).

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

Response: I would begin by evaluating the scope of Congress's power in the relevant area, as delineated in the text of the Constitution. I would then consult Supreme Court and Second Circuit precedent interpreting similar enactments. To the extent the government argued that Congress acted pursuant to some established but unenumerated power, I would evaluate whether the Supreme Court had in fact recognized such a power.

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

Response: The Ninth Amendment protects against the infringement of unenumerated rights, suggesting that those rights must be protected. The Supreme Court has found particular unenumerated rights are protected by the Constitution, including the right to interstate travel, the right to vote, and various "privacy" rights, including those described below in response to Question 10.

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

Response: In 1997, the Supreme Court described the rights it had identified as protected by "substantive due process" as follows: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, ibid.; Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Casey, supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. Cruzan, 497 U.S., at 278–279." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

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

Response: The rights protected by "substantive due process" are delineated by the Supreme Court. If I am confirmed as a district judge, I will apply the precedent of the

Supreme Court and the Second Circuit in determining what types of rights are, or are not, protected under that doctrine.

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

Response: Congress's power under the Commerce Clause is limited to three types of congressional action: "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." Gonzales v. Raich, 545 U.S. 1, 16–17 (2005). The Commerce Clause does not permit Congress "to regulate individuals as such, as opposed to their activities[.]" Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 557 (2012). It can also be limited by other Constitutional provisions. See, e.g., United States v. Martignon, 492 F.3d 140, 149 (2d Cir. 2007) (Copyright Clause); Ry. Lab. Executives' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982) (Bankruptcy Clause).

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

Response: The Supreme Court has held that application of strict scrutiny review is triggered by classifications based on race, national origin, or alienage. Graham v. Richardson, 403 U.S. 365, 372 (1971).

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

Response: The Constitution was designed with the tripartite system of checks and balances to ensure that no one branch oversteps its authority, as a check on the risk of tyranny. Our founders were fearful of centralized government, so they created a system in which one branch writes the laws, one branch enforces the laws, and one branch interprets the laws, with each having authority over the other in various ways (e.g., appointment, advice and consent, judicial review, impeachment, veto). It was a creative solution, and a remarkable system, as evidenced by the fact that few systems have survived and thrived for 230 years, as ours has.

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

Response: I would begin with the text of the Constitution setting out the scope and the limits of that branch's authority, as well as the scope of the authority of the other branches in the disputed area. I would rely upon binding Supreme Court and Second Circuit precedent to evaluate the scope of the authority granted to the branch, and whether its actions were Constitutional.

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

Response: As a sitting Magistrate Judge, I always bear in mind that the parties before me are human. Federal litigation, whether civil or criminal, is often the result of serious harms and can have devastating consequences for all concerned, whether that be individuals, businesses, or governmental entities. I strive to ensure that all parties are heard, that they feel that the Court has given careful consideration to their arguments, and that they are treated with respect. When the Court issues a ruling, it is nearly always the case that at least one party's position is not upheld; my hope is that when the parties understand the process and feel that it was fair, they will be more accepting of the ruling, even if it is unfavorable to them. This promotes the legitimacy of the courts in the eyes of the public, as well as finality in litigation.

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

Response: Either error could cause serious harm, to the parties directly affected and to the integrity of the system itself.

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

Response: I do not know the reasons for this shift. Question 17 presages the upsides and downsides of this trend: The downsides to aggressive judicial review include the risk that constitutional statutes will be struck down, and a perception by the public or the other branches that the judicial branch is overstepping its bounds. The downsides to judicial passivity include the risk that unconstitutional statutes will be permitted to stand, and a perception by the public or the other branches that the judicial branch is abdicating its proper role in the system of checks and balances.

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

Response: Judicial review refers to the power of the court to review and invalidate, if appropriate, the actions of the executive and legislative branches. Judicial supremacy refers to the idea that the Supreme Court's interpretation of the Constitution is binding on the executive and legislative branches, as well as the states.

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

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

Response: As a judge, it is my duty to render decisions that are just, and that accurately apply the laws and the Constitution of this country. A court's duty is always to do justice, in fidelity to the Constitution. I cannot comment on the decisions that elected officials make when confronted with a decision by the highest court of the land that they believe to be unconstitutional.

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

Response: The role of a judge is to decide only the case or controversy presented, and to do so by applying the law as it is set out in the Constitution, statutes and precedent, to the facts established. The limitations of that role must be acknowledged and respected, in order for the system of checks and balances to work properly, and for the public to have full faith in the judiciary.

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

Response: A district court judge's obligation is to apply existing precedent. Any expansion of the scope of precedent must consider carefully whether there is support in the law for such expansion.

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

Response: None. Only those factors set forth in 18 U.S.C. §3553(a) should be considered in sentencing a defendant. As the Sentencing Guidelines state, race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual §5H1.10 (policy statement) (2018).

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

Response: I do not disagree with the definition set forth above, but I would clarify that in my definition, equity is not limited to ensuring justice and fairness to the populations enumerated in that definition, or any other specific group. It entails justice and fairness for all, without limitation. This is consistent with my oath of office, which requires me to do justice "without respect to persons."

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

Response: The difference, under the dictionary definitions, is that the former describes treatment, while the latter describes status. Equity is defined as "justice according to natural law or right, specifically: freedom from bias or favoritism." Merriam-Webster.com online dictionary, accessed July 22, 2021. Equality is defined as "the quality or state of being equal." Id.

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

Response: The 14th Amendment guarantees "equal protection of the laws."

27. **How do you define "systemic racism?"**

Response: I have no personal definition of the term. I believe when that term is used by others, they are referring to the idea that an entire system, and its institutions, are imbued with racism, whether subtle or overt. An online dictionary defines it as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race[.]" Systemic Racism, Cambridge Dictionary online dictionary.

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

Response: I have no personal experience with or training in critical race theory; I do not have a personal definition of the term. I have been unable to identify any single definition that is universally accepted. A law review article says: "Critical Race Theory seeks to remind society how deeply issues of racial ideology and power

continue to matter in American life." Carlo A. Pedrioli, Book Review, 7 Afr.-Am. L. & Pol'y Rep. 93, 96 (2005) (citations and quotation marks omitted). An online encyclopedia states: "Critical race theorists hold that the law and legal institutions in the United States are inherently racist insofar as they function to create and maintain social, economic, and political inequalities between whites and nonwhites, especially African Americans." Critical Race Theory, Britannica.com online encyclopedia.

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

Response: My understanding is that "critical race theory" is an academic and intellectual movement or school of thought, whereas "systemic racism" is a description of a circumstance that may be present in a given system.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 21, 2021

For all nominees:

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.

For all judicial nominees:

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

   Response: I am a trial judge, and if I am confirmed, I will continue to be a trial judge. In that role, I am focused on resolving the disputes that come before me fairly and accurately and with respect and courtesy to all parties. I understand that when a case comes to federal court, something has gone wrong, and the parties to the dispute, whether civil or criminal, need the Court's assistance in resolving the dispute. I dedicate myself to doing that while honoring the dictates of the Code of Conduct, particularly Canon 3(A), balancing every party's "full right to be heard" with the need to "dispose promptly of the business of the court[,]" while being courteous and respectful to all concerned.

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

   Response: I have never described myself as an "originalist." While I am aware that academics and commentators use that term, I have not used it. I believe that, where supported by Supreme Court precedent, interpretation of a Constitutional provision should take into account "the intent of those who prepared it or made it legally binding" and the "meaning that it would have conveyed to a fully informed observer at the time when" it was adopted. Originalism, Black's Law Dictionary (11th ed. 2019). If I am confirmed as a District Judge I will follow the guidance of the Supreme Court and the Second Circuit in interpreting the Constitution.

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

Response: I have never described myself as a "textualist." I do firmly believe that any interpretation of the Constitution, a statute, or a rule, must begin with the plain meaning of the text. That has been my approach as a Magistrate Judge, and would continue to be so if I am confirmed as a District Judge. I follow, and would continue to follow, the guidance of the Supreme Court and the Second Circuit in interpreting the text of the Constitution, a statute, or a rule.

4. **Do you believe the Constitution is a "living" document? Why or why not?**

Response: The Constitution has served this country for more than 230 years, and I expect it will continue to do so for many centuries more. I do not subscribe to any particular judicial philosophy such as "living constitutionalism." If I am confirmed as a District Judge, I would interpret the Constitution in accordance with the established precedent of the Supreme Court and the Second Circuit.

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

Response: There is no individual Justice whose jurisprudence I have studied carefully enough to identify as the one I most particularly admire. When I read a Supreme Court case in my research, I am focused on the holding of the case, rather than the author, and I think of each Supreme Court ruling as embodying the collective wisdom of the majority of the Court, rather than the views of one Justice.

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

Response: As a Magistrate Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a District Judge, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, because I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. That includes Marbury v. Madison, which I do believe was correctly decided.

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

Response: As a Magistrate Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a District Judge, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, because I am bound to apply all such precedent.

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

Response: As a Magistrate Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a District Judge, I would continue to do so. As a sitting

judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, since I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so fundamental and widely accepted that they present an exception to this rule. That includes Brown v. Board of Education, which I do believe was correctly decided.

9. Was Bolling v. Sharpe correctly decided?

Response: Please see my response to Question 7.

10. Was Cooper v. Aaron correctly decided?

Response: Please see my response to Question 7.

11. Was Mapp v. Ohio correctly decided?

Response: Please see my response to Question 7.

12. Was Gideon v. Wainwright correctly decided?

Response: Please see my response to Question 7.

13. Was Griswold v. Connecticut correctly decided?

Response: Please see my response to Question 7.

14. Was South Carolina v. Katzenbach correctly decided?

Response: Please see my response to Question 7.

15. Was Miranda v. Arizona correctly decided?

Response: Please see my response to Question 7.

16. Was Katzenbach v. Morgan correctly decided?

Response: Please see my response to Question 7.

17. Was Loving v. Virginia correctly decided?

Respons: As a Magistrate Judge, I apply Supreme Court precedent without exception or hesitation, and if confirmed as a District Judge, I would continue to do so. As a sitting judge, and as a nominee, it is generally inappropriate for me to comment on the correctness of any binding Supreme Court precedent, because I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so

fundamental and widely accepted that they present an exception to this rule. That includes Loving v. Virginia, which I do believe was correctly decided..

18. Was Katz v. United States correctly decided?

Response: Please see my response to Question 7.

19. Was Roe v. Wade correctly decided?

Response: Please see my response to Question 7.

20. Was Romer v. Evans correctly decided?

Response: Please see my response to Question 7.

21. Was United States v. Virginia correctly decided?

Response: Please see my response to Question 7.

22. Was Bush v. Gore correctly decided?

Response: Please see my response to Question 7.

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

Response: Please see my response to Question 7.

24. Was Crawford v. Marion County Election Bord correctly decided?

Response: Please see my response to Question 7.

25. Was Boumediene v. Bush correctly decided?

Response: Please see my response to Question 7.

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

Response: Please see my response to Question 7.

27. Was Shelby County v. Holder correctly decided?

Response: Please see my response to Question 7.

28. Was United States v. Windsor correctly decided?

Response: Please see my response to Question 7.

29. Was Obergefell v. Hodges correctly decided?

Response: Please see my response to Question 7.

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

Response: Stare decisis generally requires that a Circuit Court have compelling reasons to overturn its own precedent. See, e.g., Wilson v. Cook Cty., 937 F.3d 1028, 1035 (7th Cir. 2019), cert. denied sub nom. Wilson v. Cook Cty., Illinois, 141 S. Ct. 110 (2020). A Circuit Court may reverse its own prior precedent if that precedent has been overruled or undermined by the Supreme Court, by an en banc ruling, or by statute. See In re Sokolowski, 205 F.3d 532, 534–35 (2d Cir. 2000) ("As we have explained, this court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc." (citations and quotation marks omitted)). Thus, an appellate court would be required to reaffirm its own precedent unless that precedent had been brought into question by statute or subsequent rulings of the Supreme Court or of that appellate court acting en banc.

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

Response: Please see my response to Question 30.

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

Response: No. Only those factors set forth in 18 U.S.C. §3553(a) should be considered in sentencing a defendant. As the Sentencing Guidelines state, race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual §5H1.10 (policy statement) (2018).

For Judge Sarah Merriam:

1. Why did you choose to work for the Office of the Federal Defender?

Response: As a law clerk in the District Court, I had an opportunity to observe scores of lawyers. I was impressed with the legal skills and efforts of the small group of attorneys at the Office of the Federal Defender. I was eager to take on a role that involved regular courtroom appearances, independent work, interesting legal issues, and challenging assignments. The Office of the Federal Defender offered all of that in a small office led

by a lawyer I knew and liked, and staffed by some of the most well-respected lawyers in the District.

2. **Were you ever concerned that your work for the Office of the Federal Defender would result in more violent criminals—including gun criminals and sex criminals—being put back on the streets?**

   Response: As an Assistant Federal Defender, it was my job to provide the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments to the Constitution. My focus was on ensuring that the rights of the indigent persons whom I was assigned to represent were protected. In each case, the United States Attorney's Office served its role as an advocate for the prosecution, I served my role as an advocate for the defendant, and the ultimate decisions about the penalties to be imposed were for the District Judge.

3. **At your investiture, Judge Alvin Thompson described you in the following manner: "I believe that in both her professional life and her personal life, she lives out the ideals of justice and fairness as expressed by John Rawls in A Theory of Justice." Do you agree with his sentiment, and do you take it as a compliment?**

   Response: I am sure Judge Thompson intended it as a compliment. The comment was made in the context of Judge Thompson's recounting an occasion, before I became a judge, on which I worked to raise money for a soup kitchen in my hometown of New Haven. However, I have not read Rawls' work, and cannot comment on his views. I do attempt, in my personal and professional life, to promote justice and fairness.

4. **At your investiture, Senator Chris Murphy described you in the following manner: "The period of time in which our lives intersected with the most concentration . . . was a period of her life when she was being paid for showing an absolute lack of judicial temperament." Do you agree with his sentiment, and if so, how has your temperament changed in your role as a judge?**

   Response: I believe Senator Murphy was referring to the fact that during the time when I was in regular contact with him, in the 1990s and again in 2006, I was working as an advocate, including on political campaigns. As an advocate, it was my job to present one side of an issue, and to do so, sometimes, rather vociferously. For the past six years, I have served as a United States Magistrate Judge. As a judge, my role is entirely different. As a judge, I hear from advocates, and then I decide the questions presented to me based on the facts and on the established law. I have no "side" as a judge. I am neutral, unbiased, and independent.

Questions from Senator Thom Tillis
for Sarah Ann Leilani Merriam
Nominee to be United States District Judge for the District of Connecticut

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: Black's Law Dictionary defines "judicial activism" as: "A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." Black's Law Dictionary (11th ed. 2019). I think of judicial activism as describing a practice whereby a judge would have an outcome in mind, based on personal views, rather than determining the outcome based solely on the existing law and facts presented. I do not consider that appropriate. A judge must make decisions based on a faithful application of the law to the facts, rather than an effort to achieve a particular result.

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

   Response: I believe impartiality is not only an expectation for a judge, but in fact a necessity. The oath of office I took when I became a Magistrate Judge requires me to "administer justice without respect to persons[.]" 28 U.S.C. §453. I would uphold that same oath – and the same duty of impartiality – if I am confirmed as a District Judge.

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: A judge must faithfully interpret and apply the law, regardless of the outcome. A judge has no interest in what the outcome is, only in applying the law to the facts presented.

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: I will enforce and apply the Constitution itself, and the Supreme Court's precedential decisions interpreting it. Those decisions include District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 561 U.S. 742 (2010). Taken together, these decisions establish that the individual right to possess firearms is protected by the Second Amendment, and that the right to bear arms is fundamental. If I am confirmed as a District Judge, I will apply Supreme Court and Second Circuit precedent to any matters involving the Second Amendment.

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: I would evaluate such a claim the way I evaluate all claims, by researching and applying the law of the Supreme Court and the Second Circuit. The Supreme Court has offered guidance on issues related to COVID restrictions on constitutionally protected religious activity, in Tandon v. Newsom, 141 S. Ct. 1294 (2021), and Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020). These decisions, as well as the Supreme Court's recent Second Amendment jurisprudence, would guide my decision making. Cases raising issues relating to the ability of a local official to impose COVID restrictions are currently pending in the District of Connecticut. I cannot comment further on the ultimate question, as a sitting judge and a nominee, pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, which prohibits a judge from making "public comment on the merits of a matter pending or impending in any court."

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: A court must grant qualified immunity to law enforcement personnel and departments "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. ... This demanding standard protects all but the plainly incompetent or those who knowingly violate the law." D.C. v. Wesby, 138 S. Ct. 577, 589–90 (2018) (citations and quotation marks omitted). To be "clearly established," the law generally must have been dictated by controlling authority, and the law must apply with specificity to the particular circumstances presented. See, e.g., Mullenix v. Luna, 577 U.S. 7, 12 (2015). If I am confirmed as a District Judge, I will apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

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: Qualified immunity is the law, but the precise contours of its protection are currently and constantly being litigated, and the question is likely to come before me either in my current role, or, if I am confirmed, as a District Judge. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a District Judge, I will apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

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

Response: Qualified immunity is the law, but the precise contours of its protection are currently and constantly being litigated, and the question is likely to come before me either in my current role, or, if I am confirmed, as a District Judge. Pursuant to Canon 3(A)(6) of the Canons of Judicial Conduct, a judge is prohibited from making "public comment on the merits of a matter pending or impending in any court." If I am confirmed as a District Judge, I will apply Supreme Court and Second Circuit precedent to any matters involving claims of qualified immunity.

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: In six years as a Magistrate Judge, I have served in a settlement role in several patent cases, but I have not been required to rule on eligibility issues. As such, I have no particular views on the Supreme Court's patent eligibility jurisprudence. Furthermore, as a sitting judge, it would be inappropriate for me to either praise or criticize the Supreme Court's jurisprudence on this or any issue.

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: A federal court "is without power to give advisory opinions" and will not decide hypothetical issues. Asbury Hosp. v. Cass Cty., N. D., 326 U.S. 207, 213 (1945). As a sitting judge and a nominee, I cannot offer an advisory opinion indicating how I would rule in such a hypothetical case. Were I to offer an opinion on this hypothetical question, that could be perceived as suggesting that I have pre-

judged disputes which may come before me. Furthermore, issues of patent eligibility are currently pending in my District, and any comment by me could be perceived as a violation of Canon 3(A)(6). If I am confirmed, and I am presented with a case or controversy presenting issues of patent eligibility, I will apply Supreme Court and Second Circuit precedent to the facts established in the particular case before me.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: Please see my response to Question 13.a.

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: In six years as a Magistrate Judge, I have not had occasion to consider these issues. My primary involvement in patent cases has been in the context of settlement discussions, and the question of incentives to innovation has not arisen. If I am confirmed, and presented with cases presenting these issues, I would apply the precedent of the Supreme Court and the Second Circuit.