

**Senator Dick Durbin**  
**Chair, Senate Judiciary Committee**  
**Written Questions for Judge Gustavo Gelpi**  
**Nominee to the Court of Appeals for the First Circuit**  
**June 30, 2021**

1. Since your appointment to the District of Puerto Rico in 2006, you have presided over more than 2,100 civil cases and nearly 1,300 criminal cases. Notably, you have presided over 62 jury trials, including 37 criminal trials, and another seven bench trials. And you've issued more than 880 written opinions.

**How do you think your experience as a federal district court judge will inform your approach to serving on the First Circuit?**

Response: If confirmed, my fifteen-year experience as a district judge presiding over a considerable number of civil and criminal cases provides me with the unique perspective of personally and fully understanding what the record on appeal consists of. I have come to deeply value that in each case -no matter how complex or simple - to every party, the outcome thereof is the most important matter. I also understand the rights of every criminal defendant to due process and counsel, as well as that of the government in representing the people of the United States. Equally important, I recognize the quintessential constitutional role district judges as well as juries play in our system of justice. As an appellate judge, in reviewing the record below for errors of law, I would always be extremely mindful of all these principles.

As a district judge, I have handled complex civil and criminal litigation in multiple areas of the law, such as constitutional law, search and seizure, sentencing, civil rights, environmental matters, antitrust, police reform, contract, torts, insurance, bankruptcy, and copyright. My experience in such a wide range of areas allows me to confidently address the myriad of appellate issues that may come before me.

Above all, as I stated during my opening statement before the Judiciary Committee on June 23, 2021, if confirmed to the Court of Appeals for the First Circuit, I will continue to apply the Constitution and laws of the United States to all cases before me with the same passion and commitment as I have faithfully done as a district judge.

**Senator Grassley, Ranking Member**  
**Questions for the Record**  
**Judge Gustavo Gelpi**  
**Nominee to be United States Circuit Judge for the First Circuit**

1. During Senator Cruz’s questioning, you stated that you believed the *Insular Cases* were wrongfully decided, and that *Brown v. Board of Education* was correctly decided, but you refused to answer whether the decisions in *DC v. Heller* or *Citizens United v. FEC* were correctly or incorrectly decided.

You seemed to defend your refusal to give a view on *Heller* or *Citizens United* based on them being subject to litigation today. But as you said in response to one of my questions, the *Insular Cases* are currently being litigated in the Tenth Circuit and yet you have said that you think they were wrongly decided. In many ways the *Insular Cases* present a more sensitive situation in that no one is seriously seeking to overturn *Heller* or *Citizens United*—it’s merely their application that’s being litigated—whereas the continued validity of the *Insular Cases* is frequently challenged.

- a. Was *Heller* correctly decided?
- b. Was *Citizens United* correctly decided?

Response: *Citizens United* and *District of Columbia v. Heller* are binding Supreme Court precedent and if confirmed as a Circuit Judge, I must follow the same whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge it is generally inappropriate under the Code of Conduct for United States Judges to comment on the merits of said Supreme Court decisions.

2. **If you won’t answer why *Heller* or *Citizens United* was correctly decided, on what basis is it acceptable under Canon 3 to give an opinion on the correctness of the *Insular Cases* but not on those cases?**

Response: Prior judicial nominees over the years have made a few exceptions to the practice of avoiding comments on the merits of certain Supreme Court decisions, such as *Brown v. Board of Education*, which is referenced in the premise of Question 1. The holding in *Brown v. Board of Education*, as that in *Marbury v. Madison*, is beyond dispute and so firmly established that it is unlikely to come before the Supreme Court again.

I have expressed academic criticism on the *Insular Cases* doctrine in my book THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT), and other academic articles which were all written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 94 (2007). I then proceed to summarize and discuss those

concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 267-268 (1985); *see also* *Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See* *Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

**3. In response to one of my questions you said that you have frequently applied the Constitution and laws regarding Puerto Rico in ways that “may be adverse to Puerto Rico’s citizens or status.” Please provide me with some examples.**

Response: In *United States v. Pedro-Vidal*, 371 F. Supp. 3d 57 (D.P.R. 2019), *aff’d* 991 F.3d 1 (1st Cir. 2021), a criminal case involving Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3598, the defendant sought to strike the death penalty on the ground that Puerto Ricans were disfranchised. I held that U.S. citizens in Puerto Rico could not rely on said argument to avoid the applicability of federal laws.

In *Club Gallístico de Puerto Rico Inc. v. United States*, 414 F. Supp. 3d 191 (D.P.R. 2019), *aff’d sub nom. Hernández-Gotay v. United States*, 985 F.3d 71 (1st Cir. 2021), I rejected the plaintiffs’ claim that Congress, under the Commerce Clause, could not regulate and ban cockfighting events, practiced in Puerto Rico since the late eighteenth century. In said case, I held that Congress had the authority to so legislate and that regardless of the enormous adverse economic impact to the island’s economy as a judge I was not a “super-legislator” who may review and repeal the work of Congress.

In *Consejo de Salud de Puerto Rico, Inc. v. United States*, 450 F. Supp. 3d 103 (D.P.R. 2020), *reconsideration denied*, Civil No. 18-1045, 2020 WL 1934447 (D.P.R. Apr. 22, 2020), I rejected the Government of Puerto Rico’s Spending Clause challenge to congressional Medicaid funding and held that the precise sum of such assignment was the sole prerogative of Congress in legislating over its territories.

4. A different example is *United States v. Vaello-Madero*. In that case you concluded that the status of Puerto Rico constituted “a citizenship apartheid.” This is consistent with how Justice Estrella described the views in your book according to a report: “[Estrella] [a]firmó que Gelpí reconoció que Puerto Rico constituye un ‘apartheid’ territorial, por el trato dado por el gobierno federal.”

**a. Was Justice Estrella correct that you recognized that Puerto Rico constitutes a territorial “apartheid” because of its treatment by the federal government?**

Response: The direct quote in Question 4 comes from the newspaper article *Juez Gelpí analiza la historia de los territorios en su libro* published in *El Vocero* by Melissa Correa Velázquez on February 24, 2018. The same is press coverage from the presentation of my book, *The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898 - Present)*, which was written as a “scholarly presentation[] made for purposes of legal education” as provided in Canon 3A(6).

It is correct that I used the term “citizenship apartheid” in *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 215 (D.P.R. 2019), *aff’d on other grounds*, 956 F.3d 12 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1462 (2021). To the best of my knowledge, the characterization that “Puerto Rico” constitutes a citizenship or political “apartheid” was first coined and used by the late Judge Juan R. Torruella in both his academic publications and judicial opinions. See Juan R. Torruella, *The Insular Cases: The Establishment of A Regime of Political Apartheid*, 29 U. Pa. J. Int’l L. 283, 347 (2007)(“The Supreme Court, as it did with Plessy, must step forward to correct the wrong it created by sanctioning the Insular Cases and their progeny. The continued vitality of these cases represents a constitutional antediluvian anachronism that has created a de jure and de facto condition of political *apartheid* for the U.S. citizens that reside in Puerto Rico and the other territories.”) (emphasis added); see also *United States v. Cotto-Flores*, 970 F.3d 17, 50 n. 24 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 1121 (2021) (Torruella, J., concurring); *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 854 n. 12 (1st Cir. 2019), *rev’d and remanded sub nom. Fin. Oversight and Mgt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020). Puerto Rico Supreme Court Justice Luis F. Estrella Martínez has also used said term in both his academic publications and judicial opinions. See Luis F. Estrella Martínez, *Puerto Rico: la evolución de un apartheid territorial*, 52 Rev. Jur. UIPR 425, 425 (2017); see also *Pueblo v. Torres Rivera*, 204 D.P.R. 288, 309 (P.R. 2020) (Estrella, J., dissenting)

I further note that Justice Estrella and the late Judge Torruella both presented my book in the event reported in the newspaper article referenced in Question 4.

**b. Given that public interpretation of your writings on the subject by another judge, do you think the United States Government should have been surprised when you concluded that its treatment of citizens in Puerto Rico constituted “apartheid” when the issue came before you?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to comment as to how a party, litigating before me, reacted to my ruling. As mentioned in the preceding question, the term “apartheid” has also been used by Judge Torruella and Justice Estrella in academic publications and judicial opinions.

5. You once said, regarding your book, in an interview with the Puerto Rican newspaper *El Vocero*, “Constitucionalmente, hay un déficit democrático porque estamos a la merced de que el Congreso nos ayude. Muchas veces nos ayuda de manera bien benévola, otras veces

nos ayuda de otras maneras, otras veces nos discrimina. Pero, el problema es que aquí no tenemos participación en las altas esferas del gobierno federal como lo tienen los estados.”

- a. **In which case has Congress helped Puerto Rico “in a very benevolent way”?**
- b. **In what ways has Congress “discriminated” against Puerto Rico?**

Response: The direct quote in Question 5 comes from the newspaper interview titled *Libro de juez recoge historia de los territorios de EE. UU.* published in El Vocero by Melissa Correa Velázquez on December 27, 2017. The same was an interview I gave about my book, *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, which was written as a “scholarly presentation[] made for purposes of legal education” as provided in Canon 3A(6). In all interviews in connection to the promotion of my book, I reviewed and was exclusively guided by the Code of Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably Committee on Codes of Conduct Advisory Opinion, No. 114: Promotional Activity Associated with Extrajudicial Writings and Publications (November 2014).

As to Questions 5(a) and (b), Chapter IX of my book provides examples to said questions. There I stated that: “Examples of notable and creative uses of this power [under the Territorial Clause] are discussed, such as the ability of a territory’s laws to supplant uniform federal maritime laws, the establishment and subsequent relinquishment of sovereignty over the territory located within another nation’s borders, and the transformation of an Article I court to an Article III court, absent formal statehood.” *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)* 271-72 (2017). I also noted that the same power “on the other hand, has allowed Congress to discriminate against the territory. For example, just as in any state, workers and employers in Puerto Rico are subject to the federal payroll tax, which funds Social Security and Medicare. However, U.S. citizens residing in Puerto Rico are eligible for fewer benefits under said program.” *Id.*

6. **In that same interview you said, “Un ejemplo que vimos ahora es el efecto del huracán María, que la comisionada residente (Jenniffer González) está haciendo el trabajo de cinco congresistas y dos senadores y si aquí ahora mismo esto fuera un estado con esa participación congresional estoy seguro que aquí habría mucho más ayuda y más beneficios.” As a sitting federal judge what was your basis for assuming that Puerto Rico, as a State, “would have received much more help and benefits” than it did in the wake of Hurricane Maria?**

Response: The direct quote in Question 6 comes from the newspaper interview titled *Libro de juez recoge historia de los territorios de EE. UU.* published in El Vocero by Melissa Correa Velázquez on December 27, 2017. The same was an interview I gave about my book *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, which was written as a “scholarly presentation[] made for purposes of legal education” as provided in Canon 3A(6). In all interviews in connection to the promotion of my book, I reviewed and was exclusively guided by the Code of

Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably Committee on Codes of Conduct Advisory Opinion, No. 114: Promotional Activity Associated with Extrajudicial Writings and Publications (November 2014).

It is a fact that Puerto Rico only has one non-voting congressional representative, while States in contrast have two senators as well as representatives for each congressional district.

- 7. Now-Senator Rick Scott has said of that tragic event, “As Governor and now as Senator, I have stood with the Puerto Rican community, both in Florida and on the Island, and worked to provide every resource available to aid in their recovery.” Do you agree with his assessment of his political efforts? If not, why not?**

Response: Personally, I am not familiar with the quoted statement. As a citizen affected by Hurricane María, I appreciate the efforts of every person and organization that aided the Puerto Rican community, including then-Florida Governor and now-Senator Rick Scott.

- 8. Senator Marco Rubio wrote to President Trump in the wake of that tragic event, saying, “It is critical that the federal government continue our commitment to help our fellow American citizens in Puerto Rico recover in the aftermath of Hurricane Maria. We must ensure the stability of displaced Puerto Ricans, affording them the opportunity to return if they wish, or the prospects to work and provide for their families on the mainland. Therefore, I urge your administration’s continued attention to their plight, so the island can continue to receive the vital assistance it needs to recover.” Do you agree that Senator Rubio sought to ensure help and benefits for the people of Puerto Rico following Hurricane Maria?**

Response: Personally, I am not familiar with the quoted statement. As a citizen affected by Hurricane María, I appreciate the efforts of every person and organization that aided the Puerto Rican community, including Senator Marco Rubio.

- 9. The article in *El Vocero* continues: “Asimismo, el juez federal indicó que si Puerto Rico fuera una nación independiente tendría la facultad de hacer tratados internacionales con otros países de Latinoamérica y de Europa. ‘Podríamos echar para un lado o para el otro y ante la situación territorial en la que estamos, no nos permite ni fu ni fa’, puntualizó.”**

Response: The direct quote in Question 9 comes from the newspaper interview titled *Libro de juez recoge historia de los territorios de EE. UU.* published in *El Vocero* by Melissa Correa Velázquez on December 27, 2017. The same was an interview I gave about my book, *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, which was written as a “scholarly presentation[] made for purposes of legal education” as provided in Canon 3A(6). In all interviews in connection to the promotion of my book, I reviewed and was exclusively guided by the Code of

Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably Committee on Codes of Conduct Advisory Opinion, No. 114: Promotional Activity Associated with Extrajudicial Writings and Publications (November 2014).

- a. **As “a federal judge,” what “other Latin American and European countries” did you have in mind as ones Puerto Rico could enter into treaties with as an independent country?**

Response: This was a general comment to the effect that independent nations, like the United States, can enter into treaties with other nations.

- b. **When you “pointed out” in that context, “We could go to one side or the other,” which sides did you have in mind?**

Response: In addition to the territorial status, that phrase referred to the historically and legally recognized status options, which would be to become a State, or attain sovereign status. I did not, however, advocate for any particular political status.

- c. **Who’s “we”?**

Response: The people of Puerto Rico.

- 10. During my questioning at your hearing, you would not commit to recusing yourself in cases that involve issues you have previously expressed opinions on in your written scholarship, in particular Puerto Rico’s status. In what situations do you believe recusal would be appropriate when faced with an issue similar to those for which you advocate in your writings?**

- a. **If a case involving an issue similar to those presented in the *Insular Cases* comes before you on the First Circuit, will you commit to recusing yourself?**

Response: As I stated during my confirmation hearing on June 23, 2021, and have done for the past 20 years as a federal judge, I will follow the Code of Judicial Conduct for United States Judges and 28 U.S.C. § 455 concerning the legal standards that pertain to recusal, to determine, on a case-by-case basis, whether recusal is warranted.

- b. **If you will not commit to recusing yourself, will you commit to faithfully applying the *Insular Cases* as precedent?**

Response: Yes. Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent and, if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular*

*Cases doctrine).*

- 11. If the People of Puerto Rico and Congress were to agree in the future to grant Puerto Rico independence (as happened with Cuba in 1901 and the Philippines in 1946) or to enter into a free association (as has happened in 1986 with the Republics of Micronesia and the Marshall Islands, and in 1994 with the Republic of Palau), what effect would this have on life tenure for Puerto Rico’s judges under Article III?**

Response: This is a hypothetical situation that has no precedent in history, as Congress neither established a federal court in Cuba (while a U.S. protectorate) or the Philippines (while a territory and Commonwealth). Nor has Congress established a federal court in any of the free-associated states (Republics of Micronesia, Marshall Islands, and Palau). The only other former territory to have a federal court was the Panama Canal Zone, however, the judges who sat there were originally non-life tenured Article IV judges and later visiting Article III judges. As such, the situation described in the hypothetical Question 11 did not arise when the court was abolished following the 1979 treaty between the United States and Panama reverting the Canal Zone to the latter.

As a pending judicial nominee and a sitting federal judge, it would be inappropriate, under the Code of Conduct for United States Judges for me to opine as to the hypothetical legal question as to the effect that independence for Puerto Rico would have for Article III judges in the District of Puerto Rico.

- 12. Currently income earned in Puerto Rico enjoys special tax status under § 933 of the Internal Revenue Code.**

- a. Wouldn’t a change in Puerto Rico’s political status have an effect on § 933?**
- b. If so, shouldn’t any judges who enjoy the tax benefits conferred by § 933 recuse themselves from cases involving Puerto Rico’s political status?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate, under the Code of Conduct for United States Judges for me to opine as to the hypothetical legal question that “a change in Puerto Rico’s political status [would] have an effect on § 933.” I do recognize that § 933 is a federal law and as such Congress has the authority to amend or repeal the same.

As I stated during my confirmation hearing on June 23, 2021, and have done so for the past 20 years as a federal judge, I will follow the Code of Judicial Conduct for United States Judges and 28 U.S.C. § 455 concerning the legal standards that pertain to recusal, to determine, on case-by-case basis, whether recusal is warranted.

- 13. During your hearing, you stated that there is no Supreme Court precedent granting the courts the authority to admit new states into the Union. As a matter of first impression, do you believe the courts have this authority?**

Response: As I stated during my confirmation hearing on June 23, 2021, the text of the Constitution, specifically Article IV Section 3 provides that: “New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.” U.S. Const. Art. IV, § 3. I have consistently recognized this constitutional provision in my rulings. *See, e.g. United States v. Pedro-Vidal*, 371 F. Supp. 3d 57, 59 (D.P.R. 2019), *aff’d* 991 F.3d 1 (1st Cir. 2021) (“It is not within the Article III purview and whim of federal courts to order Puerto Rico admitted to the Union as a State or have its commonwealth status changed in any form so that a more democratic form of government ensue. This lies within the political process.”).

**14. Assuming, for the sake of argument, that Puerto Rico’s territorial status is truly “apartheid,” wouldn’t the Supreme Court be abetting this injustice if it failed to make Puerto Rico a State?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate, under the Code of Conduct for United States Judges for me to opine as any given action or inaction by the Supreme Court.

**15. I asked you at your hearing about the different approach taken between you and Judge Pérez-Giménez as it relates to anticipating developments in Supreme Court doctrine. I noted how in *Vaello-Madero* you set aside a Supreme Court judgment that Congress could prevent Social Security Disability payments to Puerto Rico by saying your court “cannot simply bind itself to the legal status quo of 1980, and ignore important subsequent developments in the constitutional landscape.” But at the same time, Judge Pérez-Giménez responded to one of those same developments in the Puerto Rico gay marriage case by saying that he “cannot see how any ‘doctrinal developments’ at the Supreme Court change the outcome of [prior Supreme Court precedent] or permit a lower court to ignore it.” You didn’t answer because your case is currently before the Supreme Court.**

**But I didn’t ask you about your case. I asked you about Judge Pérez-Giménez. Again, he waited for the Supreme Court to overturn its precedent; he didn’t do it at the trial court. Was Judge Pérez-Giménez wrong to wait?**

Response: Judge Pérez-Giménez ruled on the validity of same-sex marriage before the Supreme Court decided *Obergefell*. While his ruling was on appeal before the First Circuit, the Supreme Court issued the *Obergefell* decision. Accordingly, the First Circuit, vacated and remanded said ruling. *See Conde-Vidal v. García-Padilla*, 54 F. Supp. 3d 157 (D.P.R. 2014), *vacated and remanded sub nom. Conde-Vidal v. Rius-Armendariz*, Case No. 14-2184, 2015 WL 10574261 (1st Cir. July 8, 2015), *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

As a pending judicial nominee and a sitting federal judge, it would be inappropriate, under the Code of Conduct for United States Judges for me to opine on whether or how another district judge should or should have not issued a ruling in a particular matter.

**16. As a general matter, if a judge encounters unsettled Supreme Court precedent, should he anticipate where the Supreme Court will end up, or simply do his best to apply what the Supreme Court has already held?**

Response: Having served as a federal judge for 20 years, it is not my role to resolve cases predicting how exactly the Supreme Court will rule on a future matter not yet before its consideration. If confirmed as a Circuit Judge, I must continue to apply binding Supreme Court precedent. As a pending judicial nominee and a sitting federal judge, it would be inappropriate, under the Code of Conduct for United States Judges for me to opine as to the hypothetical scenario without any factual context.

**17. At your hearing you repeatedly defended your analysis of the *Insular Cases* by referencing the racist attitudes of some of the Supreme Court Justices who heard the cases. At one point you referenced that it was the same Court (more or less) that issued the infamous *Plessy v. Ferguson* decision. Many Americans surely held racist attitudes at the turn of the 20th Century and I do not defend those views. But this same Court also issued the decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), which held that the Fourteenth Amendment granted birthright citizenship to the son of Chinese aliens born in the United States.**

- a. Was *Wong Kim Ark* correctly decided?**
- b. Is the doctrine of birthright citizenship—like that of unincorporated territories—flawed because it was first articulated by the same Court that handed down *Plessy v. Ferguson*?**

Response: *Wong Kim Ark* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. The Tenth Circuit recently considered *Wong Kim Ark* in *Fitisemanu v. United States*, Case No. 20-4017, 2021 WL 2431586 (10th Cir. June 15, 2021) in regard to persons born in American Samoa. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

I have expressed academic criticism on the *Insular Cases* doctrine in my book *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, and other academic articles which were all written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” *THE CONSTITUTIONAL*

EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 267-268 (1985); *see also* *Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

18. Substantially the same Court that handed down *Plessy* and the *Insular Cases* handed down *Swift & Co. v. United States*, 196 U.S. 375 (1905), implicitly overturning *E.C. Knight* and upholding the ability of Congress to regulate interstate monopolies under the Commerce Clause when President Roosevelt and Attorney General Knox went after the “beef trust.”
- a. **Was *Swift* correctly decided?**
  - b. **Is the doctrine of federal competition law—like that of unincorporated territories—flawed because it was first articulated by the same Court that handed down *Plessy v. Ferguson*?**

Response: *Swift* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

I have expressed academic criticism on the *Insular Cases* doctrine in my book THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT), and other academic articles which were all written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 267-268 (1985); *see also* *Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in

part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

19. Substantially the same Court that handed down *Plessy* and the *Insular Cases* handed down *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), holding that mandatory vaccination was within the purview of the plenary police powers of States.

- a. Was *Jacobson* correctly decided?
- b. Is the doctrine of police power, which underlies almost all public health regimes—like that of unincorporated territories—flawed because it was first articulated by the same Court that handed down *Plessy v. Ferguson*?

Response: *Jacobson* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

I have expressed academic criticism on the *Insular Cases* doctrine in my book THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT), and other academic articles which were all written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 267-268 (1985); *see also Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

20. Substantially the same Court that handed down *Plessy* and the *Insular Cases* handed down *Muller v. Oregon*, 208 U.S. 412 (1908), holding that certain state labor laws capping the number of hours women could work didn't violate the Fourteenth Amendment.

a. Was *Muller* correctly decided?

b. Is the constitutionality of state labor laws—like that of unincorporated territories—flawed because it was first articulated by the same Court that handed down *Plessy v. Ferguson*?

Response: *Muller* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

I have expressed academic criticism on the *Insular Cases* doctrine in my book THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT), and other academic articles which were all written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 267-268 (1985); *see also* *Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

21. When the American Samoa Government relies on the *Insular Cases* to defend U.S. law (as it has in the D.C. and Tenth Circuits), is that racist?

Response: As I stated during my confirmation hearing on June 23, 2021, *Fitisemanu v. United States*, Case No. 20-4017, 2021 WL 2431586 (10th Cir. June 15, 2021), in which the American Samoa Government relied on the *Insular Cases*, is a pending case. As a judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said decision.

**22. Do you believe that all district and circuit court judges must apply Supreme Court precedent, regardless of their personal opinions on that precedent?**

Response: Yes.

**23. Throughout your book, you make reference to existing precedent establishing the distinction between incorporated and unincorporated U.S. territories being “pure judicial invention, with...no basis in the Constitution and...contrary to all judicial precedent.” In fact, in your *Consejo* opinion, you go as far as to say that “Congress...is no longer justified in treating Puerto Rico as an unincorporated territory of dissimilar traditions and institutions, when the Constitutional reality is otherwise.” Are you attempting to say that existing Supreme Court precedent is no longer valid?**

Response: Only the Supreme Court can overturn its own precedent and decide it is “no longer valid.” Therefore, notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

I note as a recent example that in two 2020 rulings, issued subsequent to *Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22 (D.P.R. 2008) referenced in the premise of Question 23, I held that: “The parties devote much of their arguments to the constitutional status of Puerto Rico vis-à-vis the United States. It is unnecessary to address the same at this time. The Commonwealth, whether incorporated or unincorporated is nonetheless a territory. It is not the fifty first member of the Union within the constitutional definition of the term ‘State.’ Cf. *United States v. Maldonado-Burgos*, 844 F. 3d 339 (1st Cir. 2018). As such, the Commonwealth’s assignment of Medicaid funds is the sole prerogative of Congress. That is, because constitutionally speaking, Congress is not legislating for one of the States, but rather, as to a territory.” *Consejo de Salud de Puerto Rico, Inc. v. United States*, 450 F. Supp. 3d 103, 104-05 (D.P.R. 2020), *reconsideration denied*, Civil No. 18-1045, 2020 WL 1934447 (D.P.R. Apr. 22, 2020); see also *Consejo de Salud de Puerto Rico, Inc. v. United States*, Civil No. 18-1045, 2020 WL 1934447, at \*1 (D.P.R. Apr. 22, 2020) (“[It is] the constitutional reality that Puerto Rico in 2020 remains a territory of the United States, albeit [it] be incorporated or unincorporated. When the Court decided the original *Consejo* case in 2008 and 2009 the Supreme Court had not yet decided *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016). As such, the Court relied on existing Circuit precedent, to wit primarily, *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F. 2d 36 (1st Cir. 1981). Back then, the constitutional landscape permitted the Commonwealth’s argument. Not now.”)

**24. What other Supreme Court precedents are no longer valid?**

Response: Only the Supreme Court can overturn its own precedent and decide it is “no longer valid.” Therefore, if confirmed as a Circuit Judge, I would continue to adhere to binding Supreme Court precedents.

**25. What is the constitutional basis for the “undue burden” test established in *Planned Parenthood v. Casey*?**

Response: In *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the constitutional protection of a woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.

**26. What was the constitutional basis of the “trimester framework” established in *Roe v. Wade*?**

Response: In *Roe v. Wade*, 410 U.S. 113 (1973) the Supreme Court held that the constitutional protection of a woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.

**27. What is the constitutional basis for the Exclusionary Rule found in *Weeks v. United States*?**

Response: In *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court held that in a federal prosecution the Fourth Amendment bars the use of evidence secured by virtue of a warrantless search of a private residence.

**28. What is the constitutional basis for Qualified Immunity found in *Pierson v. Ray*?**

Response: In *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that the Civil Rights Act of 1871, codified by 42 U.S.C. § 1983, provides qualified immunity to government officials who reasonably believe they are acting under a valid law.

**29. If a case comes before you in the First Circuit, will you apply existing Supreme Court precedent, which creates the distinction between incorporated and unincorporated territories, even though you have previously stated that you believe such a distinction has no basis in the Constitution?**

Response: Yes. If confirmed as a Circuit Judge, I would continue to adhere to binding Supreme Court precedent distinguishing incorporated and unincorporated territories. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

I note as a recent example that in two 2020 rulings, issued subsequent to *Consejo de Salud Playa de Ponce v. Rullán*, 586 F. Supp. 2d 22 (D.P.R. 2008) referenced in the premise of Question 23, I held that: “The parties devote much of their arguments to the

constitutional status of Puerto Rico vis-à-vis the United States. It is unnecessary to address the same at this time. The Commonwealth, whether incorporated or unincorporated is nonetheless a territory. It is not the fifty first member of the Union within the constitutional definition of the term ‘State.’ Cf. *United States v Maldonado-Burgos*, 844 F. 3d 339 (1st Cir. 2018) (distinguishing commonwealth status from a legislative intent perspective). As such, the Commonwealth’s assignment of Medicaid funds is the sole prerogative of Congress. That is, because constitutionally speaking, Congress is not legislating for one of the States, but rather, as to a territory.” *Consejo de Salud de Puerto Rico, Inc. v. United States*, 450 F. Supp. 3d 103, 104-05 (D.P.R. 2020), *reconsideration denied*, Civil No. 18-1045, 2020 WL 1934447 (D.P.R. Apr. 22, 2020); *see also Consejo De Salud De Puerto Rico, Inc. v. United States*, Civil No. 18-1045, 2020 WL 1934447, at \*1 (D.P.R. Apr. 22, 2020) (“[It is] the constitutional reality that Puerto Rico in 2020 remains a territory of the United States, albeit be incorporated or unincorporated. When the Court decided the original *Consejo* case in 2008 and 2009 the Supreme Court had not yet decided *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016). As such, the Court relied on existing Circuit precedent, to wit primarily, *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F. 2d 36 (1st Cir. 1981). Back then, the constitutional landscape permitted the Commonwealth’s argument. Not now.”)

**30. What practical rule would you set forth that allows lower-court judges to evaluate “pure judicial inventions[s]” from the Supreme Court when confronted by them?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to respond to this question.

As noted in previous response, I reiterate that the direct quote in Question 30 comes from the book *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, which I authored and was written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)* 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 267-268 (1985); *see also Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases*

doctrine).

**31. In your book, you include an article from the late Judge Juan Torruella that “dissents from [the]...celebration [of the Constitution].” Do you think the Constitution is worth celebrating?**

Response: The full direct quote of the article written by the late Judge Torruella included in my book reads as follows: “Although I join the exaltation of the Constitution and the ideals for which it stands, I respectfully dissent from this bicentennial celebration because the Constitution is not equally applied to all of its citizens, and in particular to the residents of Puerto Rico and other territories.” THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 52 (2007). As a proud and committed fourth generation United States citizen, I have always celebrated our Constitution and its significance to all citizens of our Nation. As Chief Judge of the United States District Court of the District of Puerto Rico, I have continued the tradition of commemorating Constitution Day each year with a series of public events at the Court.

**32. In *Igartua de la Rosa v. United States*, you argued on behalf of Puerto Rico that the courts are permitted to enact policy where the legislative and executive branches of government fail to act. Do you still hold this position today?**

Response: As Solicitor General of Puerto Rico, I represented the Puerto Rico government in *Igartúa de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000), arguing that U.S. citizens residing in Puerto Rico enjoyed a fundamental right to vote in presidential elections.

Regarding the premise of Question 32 that “courts are permitted to enact policy where the legislative and executive branches of government fail to act,” I note that this statement was not made in the brief I filed as Solicitor General. This statement was rather made by Judge Torruella in his concurring opinion. See *Igartúa de la Rosa v. United States*, 229 F.3d 80, 90 (1st Cir. 2000) (Torruella, J., concurring) (“It may be that the federal courts will be required to take extraordinary measures as necessary to protect discrete groups completely under the sovereignty and dominion of the United States.”) (citations and internal quotations marks omitted). For the last 20 years, I have served as a federal judge and not as an advocate. As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding this legal issue have no bearing as I would adhere to Supreme Court and First Circuit precedent on this matter.

**33. Do you believe that it is the province of the judiciary to extend the right to vote in presidential elections to the territories where Congress has chosen not to, as you argued in *Igartua*?**

Response: As a pending judicial nominee and a sitting federal judge, any personal views that I might have regarding this hypothetical legal question have no bearing as I would continue to adhere to Supreme Court and First Circuit precedent on this matter.

**34. In that case you chided the United States, saying, “This elemental error of the appellant stems from its rigid approach to the development of individual constitutional rights.”**

- a. Should the development of individual constitutional rights be “flexible”?**
- b. What forms the constitutional basis of “flexible” individual rights?**

Response: As Solicitor General of Puerto Rico, I represented the Puerto Rico government in *Igartúa de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000), arguing that U.S. citizens residing in Puerto Rico enjoyed a fundamental right to vote in presidential elections. It was in said capacity that I filed a brief containing the direct quote in the premise of Questions 34a and 34b. For the last 20 years, I have served as a federal judge and not as an advocate. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to these hypothetical legal questions.

**35. Would you describe a method of interpreting enumerated individual constitutional rights that depends on their original public meaning at the time of their enumeration as “rigid”?**

Response: The Supreme Court has held that the Constitution protects certain rights that are not specifically enumerated in the Constitution, in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). According to the Supreme Court, the Due Process Clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights. If confirmed as a Circuit Judge, I must continue to follow said binding Supreme Court precedent.

As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to the hypothetical question asking to describe “a method of interpreting enumerated individual constitutional rights that depends on their original public meaning at the time of their enumeration as ‘rigid’.”

**36. Would you describe a method of interpreting unenumerated individual constitutional rights that depends on them being “deeply rooted in the nation’s history” as “rigid”?**

Response: Under binding Supreme Court precedent, the Due Process Clause protects “those fundamental rights and liberties which are, objectively deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to the hypothetical question asking to describe “a method of interpreting enumerated individual constitutional rights that depends on them being “deeply rooted in the nation’s history” as ‘rigid’.” If confirmed as a Circuit Judge, I must continue to follow binding Supreme Court precedents.

**37. Do you agree with the following proposition: “Equal Protection and Due Process are fundamental rights afforded to every American, including those who because of their age are still in their mothers’ wombs. As such, state legislation that creates a citizenship apartheid based on stage of development goes against this very concept. It is in the Court’s responsibility to protect these rights if the other branches do not.” If not, why not?**

Response: *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), constitute binding Supreme Court precedent regarding the constitutional protection of a woman’s decision to terminate her pregnancy. If confirmed as a Circuit Judge, I must continue to follow the same whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to the hypothetical legal question without any factual context.

**38. In your opinion in *United States v. Pedro-Vidal*, you wrote:**

The more profound conundrum, however, is the fact that, unlike United States citizens in the States, those in Puerto Rico have never elected federal lawmakers, nor voted for the federal executive. As a corollary, United States citizens in Puerto Rico do not participate through elected officials in the process of nominating and confirming the Attorney General, nor the United States Attorney and District Judges in Puerto Rico. These federal officials all participate directly in death penalty prosecution and trial of defendant.

Such electoral disenfranchisement and lack of participation in federal affairs is without question undemocratic and unacceptable in a Nation that was founded over two hundred and forty-three (243) years ago on the sacrosanct principle of consent of the governed.

**You nevertheless held against the criminal defendant in his claim that his lack of representation made a possible capital conviction inconsistent with Due Process. On what law or judicial precedent did you base the opinion that “[s]uch electoral disenfranchisement and lack of participation in federal affairs is without question undemocratic and unacceptable”?**

Response: The direct block quote referenced in Question 38 was made in the context of addressing the arguments presented by the parties. After making such assertion, I asked the following rhetorical question in my ruling: “Is such territorial predicament unconstitutional?” *United States v. Pedro-Vidal*, 371 F. Supp. 3d 57, 59 (D.P.R. 2019), *aff’d* 991 F.3d 1 (1st Cir. 2021). Immediately thereafter, I held that: “The answer is no.” *Id.* After applying controlling precedent to the facts, I denied the defendant’s petition that the death penalty could not be applied to him.

**39. In *Pedro-Vidal*, you went on to say, “Puerto Rico’s democratic void lies in the hands of Congress.” Why was it appropriate for you, as a federal judge, to opine on the merits of an issue you acknowledged to be a political question?**

Response: The direct quote referenced in Question 39 was made in the context of the addressing arguments presented by the parties in the case before me. After making such assertion, I stated that: “It is not within the Article III purview and whim of federal courts to order Puerto Rico admitted to the Union as a State or have its commonwealth status changed in any form so that a more democratic form of government ensue. This lies within the political process. What the Court can and must do is safeguard the constitutional rights of United States citizens in Puerto Rico should a violation of a fundamental or other constitutional right exist.” *United Sates v. Pedro-Vidal*, 371 F. Supp. 3d 57, 59 (D.P.R. 2019) *aff’d* 991 F.3d 1 (1st Cir. 2021). After applying controlling precedent to the facts, I denied the defendant’s petition that the death penalty could not be applied to him.

**40. When else is it appropriate for federal judges to opine on the merits of political questions?**

Response: As a sitting federal judge, I have not ruled, and cannot rule, on the merits of a political question. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”); *see also Rosario v. Fin. Oversight and Mgt. Bd. for Puerto Rico*, Civil No. 20-1307 (CCC-GAG), 2020 WL 7689592, at \*1 (D.P.R. Dec. 23, 2020) (wherein I held that “The plebiscite claim presents an insurmountable justiciability issue under the political question doctrine. A controversy involves a political question when there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.”) (internal quotations marks and citations omitted).

**41. Is your status, as a Constitutional Officer of the United States, complicity in an unjust and discriminatory system, given your writings in and out of the courtroom?**

Response: No.

**42. What is a “democratic fallacy”?**

Response: I have characterized as a “democratic fallacy” a system of otherwise constitutionally valid laws, but in which citizens do not directly participate in the political process or lack political rights. *See THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)* 188-190 (2017).

**43. If the legitimacy of the law depends upon the consent of the governed, then why is it legitimate for unelected federal judges to strike down legislation?**

Response: In *Marbury v. Madison*, 5 U.S. 137, 177 (1803) the Supreme Court set forth the principle of judicial review holding that, under the Constitution, “[i]t is emphatically

the province and duty of the judicial department to say what the law is.” See Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”).

**44. Would you agree that exceeding jurisdictional limitations to opine on questions of substantive law is a form of judicial activism?**

Response: Judicial activism occurs when a judge is unwilling or unable to rule as the law requires and instead inappropriately resolves cases consistent with his or her personal views. My record as a federal district court judge demonstrates that in cases that come before me, my rulings on the merits have been based on binding Supreme Court and First Circuit precedent.

**45. During your hearing, you stated that you reserved judgment on “a jurisdictional matter” in *United States v. Mercado-Flores*. The question at issue involved a decision by your court on Puerto Rico’s political status in a Mann Act criminal sentencing. The First Circuit delivered what reads like an unusual rebuke of your actions:**

Congress has given courts and parties tools for challenging a conviction and sentence that were imposed in error. A court may reject a plea agreement or postpone a sentencing hearing *sine die* until it has had an opportunity to resolve all relevant issues. If the defendant is dissatisfied with the outcome of the proceeding, he may file a direct appeal of his sentence or may attack it collaterally by petitioning for post-conviction relief under 28 U.S.C. § 2255. But the district court, acting *sua sponte*, lacks jurisdiction to vacate a defendant’s sentence simply because the court has come to conclude, more than three weeks later, that the government has grounded the charge against the defendant on an inapposite statute. Following the imposition of sentence and the expiration of the time allotted under Rule 35(a), it is up to the defendant to decide whether to stand by his guilty plea, and no provision of positive law allows the district court to usurp the defendant’s choice.

**In other words, the actual jurisdictional issue was that your court lacked any authority to vacate a sentence *sua sponte*. I have a number of questions for you about this case. To begin with, what do you understand to be the source of jurisdiction for lower federal courts?**

Response: Federal courts have limited subject matter jurisdiction and are empowered to hear only those cases that are within the judicial power of the United States, as defined in the Constitution, and that have been entrusted to them by a jurisdictional grant by Congress. See 5C Charles Alan Wright & Arthur R. Miller § 3522 Courts of Limited Jurisdiction, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2008).

**46. As a general matter, what situations would authorize a district court to vacate an imposed sentence?**

Response: A ruling by the Court of Appeals or the Supreme Court ordering that it be vacated. Another instance would be if a *habeas corpus* petition, under 28 U.S.C. § 2255, is granted, for example, due to ineffective assistance of counsel or a new rule of constitutional law that the Supreme Court holds applies retroactively. Congress also may enact laws which allow particular sentences to be vacated for resentencing in particular circumstances.

**47. I take your statements at your hearing to mean that Puerto Rico’s status constituted a predicate jurisdictional question for your court that needed to be resolved. If so, by what authority do you understand the jurisdictional *element* of a federal criminal statute to constitute a source of federal-courts jurisdiction?**

Response: The particular statute upon which the defendant was prosecuted, 18 U.S.C. § 2421(a), required the Court to address whether the same applied in Puerto Rico. As such it was necessary to analyze Congress’s intent in granting State-like autonomy to Puerto Rico and, thus, treat it as a State under the scope of the statute. *See United States v. Maldonado-Burgos*, 844 F.3d 339 (1st Cir. 2016) (holding that § 2421(a) does not apply to Puerto Rico).

**48. Doesn’t a charge under Title 18 automatically confer §1331 jurisdiction, regardless of whether the jurisdictional elements of the particular charged crime are met? If not, why not?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate, under the Code of Conduct for United States Judges for me to answer this the hypothetical question. However, to the extent that the question refers to 28 U.S.C. §1331, that pertains to federal question jurisdiction in civil, not criminal, actions.

**49. Why did you conclude that a judgment requiring you to vacate a sentence following a plea—three weeks after the fact—was the correct vehicle with which to explore Puerto Rico’s commonwealth status under the Mann Act?**

Response: Just as the First Circuit subsequently held in *United States v. Maldonado-Burgos*, 844 F.3d 339 (1st Cir. 2016), I concluded that the defendant had been charged under a specific provision of the Mann Act that was inapplicable to Puerto Rico. Although I interpreted the statute’s scope in the same manner as did the First Circuit, I did so after sentencing, when I should have done so prior to sentencing.

**50. Given Puerto Rico’s territorial status, is it within Congress’s power to enact statutes that treat Puerto Rico *as if it were a State*?**

Response: Yes. Congress has repeatedly done so in the majority of criminal and civil statutes. *See United States v. Pedro-Vidal*, 371 F. Supp. 3d 57, 58-59 (D.P.R. 2019) *aff’d* 991 F.3d 1 (1st Cir. 2021). (“Since the United States acquired the territory in 1898, Congress has enacted thousands of federal laws that apply therein. On most occasions,

these laws apply to citizens in the territory exactly as they would to citizens in the States.”)

**51. Have you read *A Matter of Interpretation* by Antonin Scalia?**

Response: No.

**52. Like you, Justice Scalia believes that the legitimacy of our constitutional order comes from democratic accountability. He argued that democratic accountability required statutes to be read according to their original public meaning at the time of enactment. As a fellow scholar of democratic political theory, do you agree with Justice Scalia? If not, why not?**

Response: I do not consider myself as a “scholar of democratic political theory” and have not expressed “that the legitimacy of our constitutional order comes from democratic accountability.” As I stated during my confirmation hearing on June 23, 2021, I would apply originalism as a “test” or methodology of constitutional interpretation in those areas where the Supreme Court has applied it. Similarly, I must follow any other “test” or methodology of interpretation that the Supreme Court applies to a particular constitutional provision. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to answer this question.

**53. If the *Insular Cases* were overturned, how would that affect the political status of:**

- a. Puerto Rico;
- b. Guam;
- c. American Samoa;
- d. the U.S. Virgin Islands;
- e. the Commonwealth of the Northern Mariana Islands;
- f. Naval Station Guantanamo Bay?

Response: As I stated during my confirmation hearing on June 23, 2021, U.S. territories continue to be such under the Territorial Clause. U.S. Const. Art. IV, § 3, cl. 2.

**54. In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?**

Response: I would apply originalism as a “test” or methodology of constitutional interpretation in those areas where the Supreme Court has applied it. Similarly, I must follow any other “test” or methodology of constitutional interpretation that the Supreme Court applies to a particular provision. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States

Judges for me to answer the hypothetical question, without factual context, of whether “[i]n a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment.”

**55. What role should empathy play in interpreting the law?**

Response: Empathy should play no role in interpreting the law.

**56. Should judicial decisions take into consideration principles of social “equity”?**

Response: No.

**57. Are legal doctrine and practice best understood as an objective and defensible scheme of human association? Or are they better understood as being of instrumental use for political ends?**

Response: Question 57 appears to refer to different schools of jurisprudence and legal theory. To safeguard an independent judiciary, a judge must always be impartial and abide by the rule of law.

**58. How do you define formalism?**

Response: According to Black’s Law Dictionary, “formalism” is defined as “[a]n approach to law, and esp. to constitutional and statutory interpretation, holding that (1) where an authoritative text governs, meaning is to be derived from its words, (2) the meaning so derived can be applied to particular facts, (3) some situations are governed by that meaning, and some are not, and (4) the standards for deciding what constitutes following the rules is objectively ascertainable.” BLACK’S LAW DICTIONARY (11th ed. 2019).

**59. Do you consider yourself a formalist?**

Response: I do not ascribe to any school of jurisprudence and legal theory. if confirmed as a Circuit Judge, I would continue to adhere to binding Supreme Court precedents, regardless of whether or not the precedent is considered as “formalist.”

**60. Is the complexity of precedent and its multiplicity a feature or a bug of the law?**

Response: The complexity of precedent is both a feature and a bug of the law.

**61. How do you define legal realism?**

Response: According to Black’s Law Dictionary, “legal realism” is defined as a “theory that law is based not on formal rules or principles but instead on judicial decisions

deriving from social interests and public policy as conceived by individual judges.”  
BLACK’S LAW DICTIONARY (11th ed. 2019).

**62. Do you consider yourself a legal realist?**

Response: I do not ascribe to any school of jurisprudence and legal theory. If confirmed as a Circuit Judge, I must apply binding Supreme Court precedents, regardless of whether or not the precedent is considered as “legal realism.”

**63. Do you agree that all lawyers are, at some level, legal realists?**

Response: If confirmed, my views, if any, about the prevalence or the lack thereof of legal realism amongst members of the bar would have no bearing on my decision-making.

**64. What is the purpose of criminal sentencing under the law?**

Response: Congress has identified four general purposes of criminal sentencing: just punishment, deterrence, protection of the public, and rehabilitation. *See* 18 U.S.C. § 3553(a)(2).

**65. What is the purpose of criminal sentencing from a moral perspective?**

Response: My moral perspective has no bearing in my judicial decision-making process, and I would not consider the same when adjudicating criminal cases that come before the First Circuit. When sentencing an individual, I have always applied the factors set forth in 18 U.S.C. § 3553(a).

**66. What, if anything, do you think is the relationship between morality and the law when it comes to punishing criminals?**

Response: See answer to Question 65.

**67. What is the relationship between morality and the law generally?**

Response: See answer to Question 65.

**68. Is the practice of judicial review defensible absent the existence of neutral legal principles?**

Response: The Supreme Court in *Marbury v. Madison*, 5 U.S. 137, 177 (1803) established the principle of judicial review holding that, under the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *See*

Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”).

**69. In the First Circuit, what is the level of scrutiny a court must apply to a claim arising under the Second Amendment?**

Response: Guided by *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the First Circuit applies a two-step approach for analyzing Second Amendment challenges. *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020); *see also Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 109 (2020). Under this approach, the Court “ask[s] whether the challenged law burdens conduct that is protected by the Second Amendment,” which is considered a “backward-looking” inquiry that “seeks to determine whether the regulated conduct was understood to be within the scope of the right at the time of ratification.” *Gould*, 907 F.3d at 669 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). If that step is “successfully negotiated,” then the Court must decide whether “the challenged law burdens conduct falling within the scope of the Second Amendment.” *Id.* Finally, the First Circuit must then “must determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny.” *Id.*

**70. Do minors have rights under the Second Amendment?**

Response: To the best of my knowledge, the Supreme Court has not explicitly held whether minors have the same rights under the Second Amendment as adults. Notwithstanding, the First Circuit, without deciding this issue, discussed the matter in *United States v. Rene E.*, 583 F.3d 8, 15-16 (1st Cir. 2009), *cert. denied*, 558 U.S. 1133 (2010).

**71. Is it more important for the law to be certain or for it to be correct?**

Response: All laws enacted by Congress are presumed to be constitutional until proven otherwise. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer this hypothetical question without any context.

**72. Where in the text of the Constitution is the right to enter into a same-sex marriage found?**

Response: In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court held that there is a fundamental right to marry, inherent in the liberty of the person, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that same-sex couples may not be deprived of said right. *Obergefell* constitutes binding Supreme Court

precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit.

**73. Do you agree with the following statement: Not everyone deserves a lawyer, there is no civil requirement for legal defense?**

Response: The Supreme Court has not extended the right to counsel to civil cases. In the United States District Court for the District of Puerto Rico where I preside, a pro bono program for civil cases was established in September 2010. Accordingly, *pro se* litigants in the District of Puerto Rico are routinely appointed pro bono counsel under the same. See P.R. Local Civil Rule 83L.

**74. Is *Morrison v. Olson* good law?**

Response: *Morrison v. Olson*, 487 U.S. 654 (1988) constitutes binding Supreme Court precedent and the Court has not overruled the same. If confirmed as a Circuit Judge, I must continue to follow the same whenever applicable to a case that comes before the First Circuit.

**75. You can answer the following questions yes or no:**

- a. Was *Downes v. Bidwell* correctly decided?
- b. Was *Gideon v. Wainwright* correctly decided?
- c. Was *Miranda v. Arizona* correctly decided?
- d. Was *Dickerson v. United States* correctly decided?
- e. Was *Meyer v. Nebraska* correctly decided?
- f. Was *Griswold v. Connecticut* correctly decided?
- g. Was *Roe v. Wade* correctly decided?
- h. Was *Planned Parenthood v. Casey* correctly decided?
- i. Was *Gonzales v. Carhart* correctly decided?
- j. Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?
- k. Was *Sturgeon v. Frost* correctly decided?
- l. Was *Rust v. Sullivan* correctly decided?

Response: These cases constitute binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow the same whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of these Supreme Court decision.

As I have previously noted I have commented on the “racist underpinnings” of the *Insular Cases*, which include *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (“It is obvious that in the annexation of outlying and distant possessions *grave questions will*

*arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.”*) (emphasis added).

**76. Under the Supreme Court’s First Amendment jurisprudence, can someone shout “fire” in a crowded theater?**

Response: The Supreme Court stated in dicta in *Schenck v. United States*, 249 U.S. 47, 52 (1919), that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”

**77. 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: As I have done for the past 20 years as federal judge, I will continue to hire law clerks from a wide range of backgrounds, without regard to membership or non-membership in any particular organization.

**78. Is climate change real?**

Response: I am aware that a substantial majority of scientific studies indicate that climate change exists. If a case came before me presenting an issue related to this topic, I would carefully review the facts of the case, the evidence in the record, and any binding Supreme Court and First Circuit precedent.

**79. Do masks prevent the transmission of COVID-19?**

Response: As Chief Judge of the United States District Court of the District of Puerto Rico, I have followed the Centers for Disease Control and Prevention (CDC) and the Puerto Rico Health Department guidelines that have indicated, according to scientific data from published studies, that mask wearing significantly reduces Covid-19 infections.

**80. Does human life begin at conception?**

Response: The question of whether life begins at conception continues to be litigated. In *Roe v. Wade*, 410 U.S. 113, 159 (1973), the Supreme Court held that it “need not resolve the difficult question of when life begins.” As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer this question.

**81. If the Supreme Court can decide whether or not human life begins at conception, can it also decide whether or not climate change is real? If not, why not?**

Response: As answered in Question 78, I am aware that a substantial majority of scientific studies indicate that climate change exists. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer this question. If a case came before me presenting an issue related to this topic, I would carefully review the facts of the case, the evidence in the record, and any binding Supreme Court and First Circuit precedent.

**82. Do you agree with the proposition that some clients do not deserve representation on account of their:**

- a. Heinous Crime?**
- b. Political beliefs?**
- c. Religious beliefs?**

Response: The Sixth Amendment to our Constitution guarantees right to counsel to criminal defendants regardless of the particular crime committed.

**83. Do the following qualify as public health emergencies? Please explain why or why not:**

- a. Racism?**
- b. Gun violence?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer these policy questions about public health emergencies.

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

Response: As a sitting federal judge, I am bound by the Supreme Court's precedents, regardless of the Court's size or composition. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer this question.

**85. If the Justice Department determines that a 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: The ability to dismiss a prosecution is a determination that is left to the discretion of the Executive Branch. The Court must observe the separation of powers doctrine and cannot step into the executive's role.

**86. Did you discuss your views regarding the political status of Puerto Rico with anyone in the White House or the Justice Department during your candidacy for this judgeship?**

Response: No.

**87. Did you discuss your interest in this judgeship with Governor Pierluisi or former Governors Vázquez or Rosselló? If so, what was the nature of these discussions?**

Response: I did discuss my interest in the judgeship with Governor Pierluisi. I expressed to him that I would be honored if considered. I never discussed this matter with former Governors Wanda Vázquez and Ricardo Rosselló.

**88. Did you discuss your interest in this judgeship with Gretchen Sierra-Zorita? If so, what was the substance of those conversations?**

Response: No.

**89. Have you discussed the legality of the PROMESA oversight board with anyone involved in the judicial-nomination process prior to your selection for this position? If so, please provide a summary of such conversations.**

Response: No.

**90. What efforts, if any, did you undertake to be selected for this seat during the previous Congress?**

Response: The late Judge Juan R. Torruella passed away on October 26, 2020 and, shortly thereafter on November 13, 2020, the President nominated a candidate to his seat.

**91. Have you had any conversations with individuals associated with the group Demand Justice, including but not limited to Brian Fallon or Chris Kang, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

Response: No.

**92. Have you had any conversations with individuals associated with the American Constitution Society, including but not limited to Russ Feingold, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

Response: No

- 93. Have you had any conversations with individuals associated with the Lawyers Committee for Civil and Human Rights, including but not limited to Vanita Gupta, in connection with this or any other potential judicial nomination? If so, please explain the nature of those conversations.**

Response: No

- 94. You mention in your SJQ that you met with President Biden before being nominated. Please describe the nature of that meeting.**

Response: I spoke with President Biden via a Zoom call. We discussed my professional background and my interest in being an appellate judge. The President did not ask me to make any commitments on any matter nor likewise did I offer to make any commitments.

- 95. Please explain with particularity the process by which you answered these questions.**

Response: On June 30, 2021, the Office of Legal Policy at the Department of Justice forwarded these questions to me. I reviewed all the questions, conducted legal research as necessary, reviewed my prior cases and academic writings, and then drafted answers to the questions. I shared my draft responses with the Office of Legal Policy, which provided feedback to me. I considered this feedback before submitting my final answers to the Committee.

- 96. Do these answers reflect your true and personal views?**

Response: Yes.

**Nomination of Gustavo A. Gelpi  
to be United States Circuit Judge for the First Circuit  
Questions for the Record  
Submitted June 30, 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: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia and to use said firearm for traditionally lawful purposes, such as self-defense within the home. *District of Columbia v. Heller* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

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 right to possess a firearm unconnected with service in a militia and to use said firearm for traditionally lawful purposes, such as self-defense within the home. *See also McDonald v. City of Chicago*, 561 U.S. 742 (2010),

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 (2021), the Supreme Court held that the standard of appellate review for a felon-in-possession of a firearm conviction is that of plain error. Previously in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme

Court held that in any such prosecution the Government must prove not only that a defendant knew he possessed a firearm, but also that he knew he was a felon at the time he possessed the same.

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*, the Supreme Court held that the Fair Sentencing Act of 2010, made retroactive by the First Step Act of 2018, did not modify the statutory penalties for crack cocaine offenses under 21 U.S.C. § 841(b)(1)(C). As a result, persons convicted under said section are not eligible for resentencing under the First Step Act below any congressional imposed mandatory minimum sentence.

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 held that the Eighth Amendment does not require a finding that a minor is permanently incorrigible as a prerequisite to sentencing that minor to life-without-parole, so long as the sentence results from a discretionary sentencing procedure.

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*, while in the context of granting an emergency injunction pending appeal, the Supreme Court held that a government regulation which is neither neutral nor generally applicable triggers strict scrutiny review under the Free Exercise Clause whenever the same treats any comparable secular activity more favorably than the exercise of religious activity.

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

Response: In *Sánchez v. Mayorkas* the Supreme Court held that an individual who entered the United States unlawfully is not eligible to become a lawful permanent resident under 8 U.S.C. § 1255, even if the United States granted the individual Temporary Protected Status under 8 U.S.C. § 1254a.

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

Response: The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* provides for private judicial dispute resolution by way of arbitration. The Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) held that it was the clear intent of Congress in enacting the Federal Arbitration Act (FAA) to encourage arbitration as much as possible. As a federal district judge, my experience is that arbitration clauses are common in both employment

and commercial contracts. I have, thus, enforced over the years multiple arbitration clauses following Supreme Court and First Circuit precedent. *See, e.g. Eazy Elecs. & Tech., LLC v. LG Elecs., Inc.*, 226 F. Supp. 3d 68 (D.P.R. 2016); *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011) (affirming a ruling I issued).

**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: On June 30, 2021, the Office of Legal Policy at the Department of Justice forwarded these questions to me. I reviewed all the questions, conducted legal research as necessary, reviewed my prior cases and academic writings, and then drafted answers to the questions. I shared my draft responses with the Office of Legal Policy, which provided feedback to me. I considered this feedback before submitting my final answers to the Committee.

**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.

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

**Questions for the Record for Gustavo Antonio Gelpí, Nominee for the First Circuit**

**I. Directions**

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

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

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

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

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

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

## II. Questions

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

Response: Pursuant to Article II, Section 3 of the Constitution, the executive branch of our government has a duty to ensure that the laws are “faithfully executed.” Whether the refusal to enforce a particular law is appropriate or not, will ultimately depend on the particular facts of a given case and the arguments brought by the parties. If confirmed, and if presented with such an issue, I will apply Supreme Court and First Circuit precedent.

2. **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: As I stated in my 2006 confirmation hearing as District Court Judge nominee, and reiterated during my confirmation hearing this past June 23, 2021, my philosophy is to work as hard as I can and to apply the Constitution and laws of the United States to cases that come before me. My role is not to make new laws, nor rewrite the Constitution. If confirmed to the Court of Appeals, I will continue to follow Supreme Court and First Circuit precedent. The functions of a Supreme Court Justice are distinct from those of a district or circuit judge. As such, I cannot compare any Justice’s particular judicial philosophy to mine.

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

Response: As a district judge, and as a Circuit Judge if confirmed, I am bound to apply Supreme Court precedent on methods of constitutional interpretation.

4. **Did Canon 3A(6) of the Code of Conduct for Federal Judges apply to you when you wrote *The Constitutional Evolution of Puerto Rico and Other U.S. Territories*, which opined that the *Insular Cases* represented “a doctrine of pure judicial invention, with absolutely no basis in the Constitution and one that is contrary to all judicial precedent and territorial practice?”**

Response: The Code of Conduct for United States Judges applies to all sitting federal judges. Hence, yes, Canon 3A(6) applied to me when I wrote *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*. My book was written as a “scholarly presentation[] made for purposes of legal education” as provided in Canon 3A(6).

5. **Did you violate Canon 3A(6) of the Code of Conduct for Federal Judges when you wrote *The Constitutional Evolution of Puerto Rico and Other U.S. Territories*?**

Response: Canon 3A(6) contains the following prohibition “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” However, this prohibition “does not extend . . . to scholarly presentations made for purposes of legal education.” By authoring the book *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, I did not violate Canon 3A(6) because it

constitutes a “scholarly presentation[] made for purposes of legal education.” Moreover, Canon 4(A) allows for federal judges to “speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.” The Commentary on Canon 4 provides that “as a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice[.]” The Commentary also explains that “[t]o the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so[.]” See also Committee on Codes of Conduct Advisory Opinion, No. 55: Extrajudicial Writings and Publications (June 2009); Committee on Codes of Conduct Advisory Opinion, No. 93: Extrajudicial Activities Related to the Law (June 2009) (“The evolution and exposition of the law is at the core of a judge’s role. Judges, therefore, have the ability to make a unique contribution to academic activities such as teaching and scholarly writing, which similarly serve to advance the law.”)

For the past 20 years, as sitting federal judge, I have faithfully observed the Code of Conduct for United States Judges, its Commentary, and Advisory Opinions such as those referenced above. When engaging in “scholarly presentations made for purposes of legal education,” I have always upheld the independence of the judiciary, the dignity of the judge’s office, and my impartiality has never been compromised. I have also been careful to not comment on the merits of matters pending before any court. My scholarly writings also have not interfered with the performance of my official duties. I would additionally note that as a sitting federal judge I have followed binding Supreme Court and First Circuit precedent with respect to every case that came before me, including cases where the parties made arguments related to the status of Puerto Rico. See, e.g. *Consejo de Salud de Puerto Rico, Inc. v. United States*, 450 F. Supp. 3d 103 (D.P.R. 2020), *reconsideration denied*, Civil No. 18-1045, 2020 WL 1934447 (D.P.R. Apr. 22, 2020); *United States v. Pedro-Vidal*, 371 F. Supp. 3d 57 (D.P.R. 2019), *aff’d* 991 F.3d 1 (1st Cir. 2021).

6. **Before publishing *The Constitutional Evolution of Puerto Rico and Other U.S. Territories*, did you consult with anyone to determine whether any aspects of that work violated Canon 3A(6)? If so, who did you consult and what advice did they provide?**

Response: No, I did not consult with anyone. I reviewed and was exclusively guided by the Code of Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably advisory opinions No. 55 and 93.

7. **Have you ever consulted anyone to determine whether any aspects of *The Constitutional Evolution of Puerto Rico and Other U.S. Territories* violated Canon 3A(6)? If so, who did you consult and what advice did they provide?**

Response: No, I did not consult with anyone. I reviewed and was exclusively guided by the Code of Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably advisory opinions No. 55 and 93.

8. **Did Canon 3A(6) of the Code of Conduct for Federal Judges apply to you in 2011 when you concluded a Spanish-language academic article on the *Insular Cases* by saying, “It is now the hour—and indeed it has already grown late—for the Supreme Court to re-examine and remedy this offensive and obsolete judicial dilemma which have had to be tolerate for more than a hundred years**

**by over five million American citizens who live in Puerto Rico and other territories of the United States.”**

Response: The quote in Question 8 is found in the Spanish-language law review article titled *Los Casos Insulares: Un Estudio Histórico Comparativo de Puerto Rico, Hawai'i y las Islas Filipinas*, 45 Rev. Jur. UIPR 215 (2011), which was simultaneously published in the English language. See *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, 58 Fed. Law. 22 (Mar./Apr. 2011). The Code of Conduct for United States Judges applies to all sitting federal judges. Hence, yes, Canon 3A(6) applied to me when I wrote *Los Casos Insulares: Un Estudio Histórico Comparativo de Puerto Rico, Hawai'i y las Islas Filipinas*, 45 Rev. Jur. UIPR 215 (2011). This Spanish-language law review article was written as a “scholarly presentation[] made for purposes of legal education” as provided in Canon 3A(6).

**9. Did the statement quoted in question 9 violate Canon 3A(6) of the Code of Conduct for Federal Judges?**

Response: I understand the question is referencing to the quote in Question 8, not Question 9.

Canon 3A(6) contains the following prohibition “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” However, this prohibition “does not extend . . . to scholarly presentations made for purposes of legal education.” The Spanish-language law review article I authored, *Los Casos Insulares: Un Estudio Histórico Comparativo de Puerto Rico, Hawai'i y las Islas Filipinas*, 45 Rev. Jur. UIPR 215 (2011) did not violate Canon 3A(6) because it constitutes a “scholarly presentations made for purposes of legal education.” Moreover, Canon 4(A) allows for federal judges to “speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.” The Commentary on Canon 4 states that “as a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice[.]” The Commentary also explains that “[t]o the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so[.]” See also Committee on Codes of Conduct Advisory Opinion, No. 55: Extrajudicial Writings and Publications (June 2009); Committee on Codes of Conduct Advisory Opinion, No. 93: Extrajudicial Activities Related to the Law (June 2009) (“The evolution and exposition of the law is at the core of a judge’s role. Judges, therefore, have the ability to make a unique contribution to academic activities such as teaching and scholarly writing, which similarly serve to advance the law.”)

For the past 20 years, as sitting federal judge, I have faithfully observed the Code of Conduct for United States Judges, its Commentary, and Advisory Opinions such as those referenced above. When engaging in “scholarly presentations made for purposes of legal education,” I have always upheld the independence of the judiciary, the dignity of the judge’s office, and my impartiality has never been compromised. I have also been careful to not comment on the merits of matters pending before any court. My scholarly writings also have not interfered with the performance of my official duties. I would additionally note that as a sitting federal judge I have followed binding Supreme Court and First Circuit precedent with respect to every case that came before me, including cases where the parties made arguments related to the status of Puerto Rico. See, e.g. *Consejo de Salud de Puerto*

*Rico, Inc. v. United States*, 450 F. Supp. 3d 103 (D.P.R. 2020), *reconsideration denied*, Civil No. 18-1045, 2020 WL 1934447 (D.P.R. Apr. 22, 2020); *United States v. Pedro-Vidal*, 371 F. Supp. 3d 57 (D.P.R. 2019), *aff'd* 991 F.3d 1 (1st Cir. 2021).

10. **Before publishing the article referenced in question 9, did you consult with anyone to determine whether any aspects of that work violated Canon 3A(6)? If so, who did you consult and what advice did they provide?**

Response: No, I did not consult with anyone. I reviewed and was exclusively guided by the Code of Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably advisory opinions No. 55 and 93.

11. **Have you ever consulted anyone to determine whether any aspects of the work referenced in question 9 violated Canon 3A(6)? If so, who did you consult and what advice did they provide?**

Response: No, I did not consult with anyone. I reviewed and was exclusively guided by the Code of Conduct for United States Judges, its Commentary, and the Committee on Codes of Conduct Advisory Opinions, notably advisory opinions No. 55 and 93.

12. **You have stated that the *Insular Cases* represent “a doctrine of pure judicial invention, with absolutely no basis in the Constitution and one that is contrary to all judicial precedent and territorial practice.” At your hearing, you stated that you were speaking as a matter of history. In response to my questioning, you also stated that you were able to opine on cases as a matter of history, and stated that *Brown* was decided correctly as a matter of history.**

- a. **As a matter of history, and understanding that as a lower court judge you are bound to follow Supreme Court precedent, was *Roe v. Wade* “pure judicial invention, with absolutely no basis in the Constitution”?**

Response: *Roe v. Wade* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

The direct quote in Question 12 comes from the book *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, which I authored and was written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)* 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 267-268 (1985); *see also Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are

responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

- b. **As a matter of history, and understanding that as a lower court judge you are bound to follow Supreme Court precedent, was *Citizens United* “pure judicial invention, with absolutely no basis in the Constitution”? If not, what was the basis in the Constitution for the Court’s decision?**

Response: In *Citizens United*, the Supreme Court held that the government may not, under the First Amendment, suppress political speech on the basis of the speaker’s corporate identity. *Citizens United* constitutes binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

The direct quote in Question 12 comes from the book THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT), which I authored and was written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT) 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. See, e.g. JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 267-268 (1985); see also *Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

- c. **As a matter of history, and understanding that as a lower court judge you are bound to follow Supreme Court precedent, was *District of Columbia v. Heller* “pure judicial invention, with absolutely no basis in the Constitution”? If not, what was the basis in the Constitution for the Court’s decision?**

Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual’s right to possess a firearm unconnected with service in a militia and to use said firearm for traditionally lawful purposes, such as self-defense within the home. *District of Columbia v. Heller* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the Code of

Conduct for United States Judges, to comment on the merits of said Supreme Court decision.

The direct quote in Question 12 comes from the book *THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898 - PRESENT)*, which I authored and was written as a “scholarly presentations made for purposes of legal education” pursuant to Canon 3A(6). In my book, I stated: “Over the years, various Supreme Court Justices, as well as appellate and district court judges, have voiced concerns about the continued validity of the *Insular Cases* doctrine.” *The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898 - Present)* 94 (2007). I then proceed to summarize and discuss those concerns voiced by Justice John Marshall Harlan, Justice William J. Brennan Jr., and Judge Juan R. Torruella, who himself has used similar language. *See, e.g.* Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* 267-268 (1985); *see also* *Igartúa v. United States*, 626 F.3d 592, 612 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (citations omitted) (“As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality.”). Notwithstanding my academic criticism, the *Insular Cases* doctrine constitutes binding Supreme Court precedent. I am bound by it as a district judge and if confirmed as a Circuit Judge, I would continue to adhere to it whenever applicable to a case that comes before the First Circuit. *See Boumediene v. Bush*, 553 U.S. 723 (2008) (applying the *Insular Cases* doctrine).

13. **In response to a question from Senator Lee, you said that originalism is “one of the ways” to interpret the Constitution. Are there legitimate methods of interpretation that do not require determining the original meaning of the Constitution? If so, please name them.**

Response: In my response to Senator Lee, I stated that I would apply originalism as a “test” or methodology of constitutional interpretation in those areas where the Supreme Court has applied it. Similarly, I must follow any other “test” or methodology of interpretation that the Supreme Court applies to a particular constitutional provision. During my confirmation hearing on June 23, 2021, I noted the Supreme Court’s methodology for analyzing the Fourth Amendment when applied in the context of cellular phones. *See Carpenter v. United States*, 138 S. Ct. 2206, 2213-14 (2018) (“Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.”) (internal quotation marks, citations, and corrections omitted).

14. **In response to a question from Senator Lee, you stated that the Supreme Court has departed from originalism in the context of the Fourth Amendment when it held that the Fourth Amendment applies to cellular phones.**

- a. **Do you believe that an originalist interpretation of the First Amendment would exclude photographs because photographs were not invented until the 19th century?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to

the hypothetical legal question of whether “an originalist interpretation of the First Amendment would exclude photographs because photographs were not invented until the 19th century.” I am bound to follow all binding Supreme Court and First Circuit precedent regarding the First Amendment.

**b. Do you believe that an originalist interpretation of the Second Amendment would exclude revolvers?**

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to the hypothetical legal question of whether “an originalist interpretation of the Second Amendment would exclude revolvers.” I am bound to follow all binding Supreme Court and First Circuit precedent regarding the Second Amendment.

**15. In response to a question from Senator Lee, you suggested that you would follow originalism where the Supreme Court has applied originalism, and you cited the Second Amendment and the Confrontation Clause as examples. You also suggested you would follow other methods of interpretation when the Supreme Court departs from originalism, and you cited the Fourth Amendment as an example.**

**a. Will you apply originalism when addressing open issues in areas, like the Second Amendment, where the Supreme Court has applied originalism?**

Response: If confirmed as a Circuit Judge, I must continue to apply binding Supreme Court precedent involving Second Amendment issues, to wit, *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under Code of Conduct for United States Judges for me to provide any view regarding hypothetical “open issues.”

**b. Is a lower court judge required to follow the methodology applied by the Supreme Court?**

Response: As a federal judge for 20 years, I have faithfully followed the methodology used by the Supreme Court and First Circuit.

**c. Is a lower court judge required to follow the reasoning of the Supreme Court?**

Response: As a federal judge for 20 years, I have faithfully followed the reasoning used by the Supreme Court and First Circuit.

**d. Is anything other than the judgment in a case binding precedent? If so, what other than the judgment is binding?**

Response: No.

**16. If you were to be faced with a novel constitutional claim under the 14th Amendment’s Equal Protection and Due Process Clauses in which *Obergefell* would be a relevant precedent, would you be bound to follow Justice Kennedy’s methodology from**

***Obergefell*? Why or why not?**

Response: *Obergefell v. Hodges*, 576 U.S. 644 (2015) constitutes binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it, including any methodology laid out by the Court, whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and as a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to provide any view regarding a hypothetical situation where “novel constitutional claim under the 14th Amendment’s Equal Protection and Due Process Clauses in which *Obergefell* would be a relevant precedent.”

- a. **Regardless whether you would be required to follow Justice Kennedy’s methodology from *Obergefell*, please describe Justice Kennedy’s methodology in that case?**

Response: In *Obergefell*, the Supreme Court held that there is a fundamental right to marry, inherent in the liberty of the person, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that same-sex couples may not be deprived of said right. To arrive at this holding, the Supreme Court analyzed the text of the Constitution (Due Process and Equal Protection Clauses), the Court’s precedent regarding the fundamental right to marry (*see, e.g. Loving v. Virginia*, 388 U.S. 1 (1967)), and equality of same-sex marriage (*see, e.g. United States v. Windsor*, 570 U.S. 744 (2013)) as well as the history and tradition of the institution of marriage and the LGBTQ community’s historical stigmatization.

17. **The Supreme Court in *Washington v. Glucksberg* (1997) held that to determine whether a liberty is fundamental, the Court must look to whether the liberty (a) is deeply rooted in the nation’s history and tradition, and (b) is implicit in the concept of ordered liberty. Are lower court judges bound to follow this test? Why or why not.**

Response: Yes.

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

Response: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms. In *McDonald v. City of Chicago*, the Court further held that the right that the Second Amendment guarantees is a fundamental right extended to the States. These cases are binding Supreme Court precedent and if confirmed as a Circuit Judge, I must adhere to them whenever applicable to a case that comes before the First Circuit.

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

Response: To my knowledge, neither the Supreme Court nor the First Circuit has concluded that the right to own a firearm receives less protection than the other individual rights that are specifically enumerated in the Constitution. If confirmed, I must adhere to *Heller*, *McDonald*, and any other Supreme Court and First Circuit precedent that defines the scope of protections that the Second Amendment guarantees.

20. **Does the right to own a firearm receive less protection than the right to vote under the**

## **Constitution?**

Response: To my knowledge, neither the Supreme Court nor the First Circuit has concluded that the right to own a firearm receives less protection than the right to vote in the Constitution. If confirmed, I must adhere to *Heller*, *McDonald*, and any other Supreme Court and First Circuit precedent that defines the scope of protections that the Second Amendment guarantees.

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

Response: Constitutional protections, such as the Free Exercise Clause of the First Amendment limit what the government can impose on, or require of, private persons and organizations. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-68 (2020).

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

Response: Supreme Court precedent does not limit the rights secured by the Free Exercise Clause and the Religious Freedom Restoration Act to only religious practices in the home or in houses of worship.

23. **If you are to join the federal bench, and supervise along with your colleagues the court's human resources programs, will it be appropriate for the court to provide its employees trainings which include the following:**

- a. **One race or sex is inherently superior to another race or sex;**
- b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**
- c. **An individual should be discriminated against or receive adverse treatments solely or partly because of his or her race or sex; or**
- d. **Meritocracy or related values such as work ethic are racist or sexist.**

Response: No. All judiciary branch training programs must comply with the Constitution and other applicable laws.

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

Response: I am aware that policymakers in the federal, state, and local governments have expressed views about “systemic racism.” As I stated during my confirmation hearing on June 23, 2021, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this question. If confirmed, I will adjudicate all cases raising issues of racial discrimination or disparity on a case-by-case basis, applying binding Supreme Court and First Circuit precedent.

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

Response: As a pending judicial nominee and sitting federal judge, the Code of Conduct for United States Judges prevent me from commenting on the constitutionality of any particular set of factors that the Executive Branch may or does consider when making political appointments.

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

Response: The federal death penalty statute, 18 U.S.C. § 3591 *et seq.*, is an act of Congress and the death penalty has been held to be constitutional under many circumstances by the Supreme Court. Under our constitutional framework the President alone cannot abolish any law.

**Senator Mike Lee**  
**Questions for the Record**  
**Gustavo Gelpi, First Circuit Court of Appeals**

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

Response: As I stated in my 2006 confirmation hearing as District Court Judge nominee, and reiterated during my confirmation hearing this past June 23, 2021, my philosophy is to work as hard as I can and to apply the Constitution and laws of the United States to cases that come before me. My role is not to make new laws, nor rewrite the Constitution. If confirmed to the Court of Appeals, I will continue to follow Supreme Court and First Circuit precedent.

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

Response: Foremost, I must begin with the statute's text and give it its plain and ordinary meaning. *See Stornawaye Fin. Corp. v. Hill (In re Hill)*, 562 F.3d 29, 32 (1st Cir. 2009) ("When Congress uses a term in a statute and does not define it, we generally assume that the term carries its plain and ordinary meaning"). If the statute has been previously interpreted by the Supreme Court or First Circuit, I must apply said precedent. Absent controlling precedent, and, should the text of the statute be ambiguous, when warranted, I will look to the canons of statutory construction and other interpretive tools, including its legislative history. *See City of Providence v. Barr*, 954 F.3d 23, 31-32 (1st Cir. 2020) ("Other tools of statutory interpretation, such as legislative history, customarily carry significant weight only when the text is ambiguous or its plain meaning leads to an absurd result.")

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

Response: I must interpret any constitutional provision applying precedent from the Supreme Court and First Circuit. If the particular provision has never been interpreted, I would look to the most analogous precedent.

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

Response: In a response to a similar question during my confirmation hearing on June 23, 2021, I stated that I would apply originalism as a "test" or methodology of constitutional interpretation in those areas where the Supreme Court has applied it. Similarly, I must follow any other "test" or methodology of interpretation that the Supreme Court applies to a particular constitutional provision. During my confirmation hearing, I noted the Supreme Court's methodology for analyzing the Fourth Amendment when applied in the context of cellular phones. *See Carpenter v.*

*United States*, 138 S. Ct. 2206, 2213-14 (2018) (“Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.”) (internal quotation marks, citations, and corrections omitted).

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: See answer to Question 2.

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

Response: When interpreting the Constitution, I would apply originalism as a “test” or methodology of constitutional interpretation in those areas where the Supreme Court has applied it, including if the precedent’s analysis involved considering “the public understanding of the relevant language at the time of enactment.” See, e.g. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: To establish the constitutional requirements for standing, a plaintiff must establish an injury-in-fact that is concrete, particularized, and actual or imminent, traceable to the challenged action of the defendant, and redressable by a favorable ruling. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

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

Response: The Necessary and Proper Clause grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Const. Art. I, § 8, cl. 18. In *McCullough v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that said clause of the Constitution provides Congress with implied powers that are necessary and proper to execute its enumerated powers accordingly.

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 must foremost focus my analysis on the particular constitutional provision under which the statute is challenged. Next, I must apply Supreme Court and First Circuit precedent.

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

Response: The Supreme Court has held that the Constitution protects certain rights that are not specifically enumerated in the Constitution, in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy) and *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate a pregnancy before viability). According to the Supreme Court, the Due Process Clauses of the Fifth and Fourteenth Amendments are the primary sources for the recognition of unenumerated rights. If confirmed as a Circuit Judge, I must continue to follow these binding Supreme Court precedents.

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

Response: Substantive due process rights recognized by the Supreme Court include: the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to educate and upbringing one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); the right to terminate a pregnancy before viability, *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and, the right to same-sex marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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: *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), constitute binding Supreme Court precedent regarding the constitutional protection of a woman's decision to terminate her pregnancy. The Supreme Court has not afforded an equal level of protection to economic rights. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). As a sitting judge, and if confirmed as a Circuit Judge, I must apply binding Supreme Court precedent regarding abortion and economic rights.

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

Response: The Supreme Court has held that Congress has the authority to regulate channels and instrumentalities of interstate commerce and any activity that has a substantial effect on interstate commerce. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. López*, 514 U.S. 549 (1995); see also *Club Gallístico de*

*Puerto Rico Inc. v. United States*, 414 F. Supp. 3d 191 (D.P.R. 2019), *aff'd sub nom. Hernández-Gotay v. United States*, 985 F.3d 71 (1st Cir. 2021) (applying the Commerce 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 identified four suspect classifications: race, alienage, national origin, and religion.

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

Response: Our Founding Fathers established this democratic concept in the Constitution to avoid concentration of power in order to secure liberty.

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 foremost focus my analysis in the particular action in question and then apply Supreme Court and First Circuit precedent to decide whether the action taken overstepped constitutional limits. *See, e.g. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

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

Response: Empathy should play no role in interpreting the law.

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

Response: All laws enacted by Congress are presumed to be constitutional until proven otherwise. Both courses of action are equally improper for a judge whose oath is to apply the Constitution and laws of the United States.

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: In *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the Supreme Court set forth the principle of judicial review holding that, under the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *See Federalist No. 78* (Alexander Hamilton) (“The interpretation of the laws is the

proper and peculiar province of the courts.”). As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer this hypothetical question regarding the “downsides to the aggressive exercise of judicial review” and the “downsides to judicial passivity”

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

Response: In *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the Supreme Court set forth the principle of judicial review holding that, under the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” See Federalist No. 78 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”). Judicial supremacy has been explained as the power of the judiciary to determine the legal validity of actions taken by the two other branches of government.

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

Response: Elected officials have an independent obligation to uphold the Constitution and take an oath affirming their duty to do so. U.S. Const., Art. VI, § 3. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges, to answer this hypothetical question regarding whether “elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions.”

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: As a federal judge for 20 years I have been bound by the Constitution and Supreme Court precedent to resolve cases and controversies that are adequately brought to the court and as to which the parties have standing.

22. **As a circuit 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: As Circuit Judge, if confirmed, I must apply applicable Supreme Court and First Circuit precedent, unless the same can be distinguished to the case before me.

23. **Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?**

Response: No.

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

Response: Absolutely none. When sentencing an individual, I have always applied the factors set forth in 18 U.S.C. § 3553(a).

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

Response: As a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer this policy question about whether I agree with the Executive Branch's definition of "equity."

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

Response: See answer to Question 24.

27. **Does the 14th Amendment's equal protection clause refer to "equity" or "equality?"**

Response: The Fourteenth Amendment provides that no personal shall be denied "the equal protection of the laws." U.S. Const. amend. XIV, § 2.

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

Response: I am aware that policymakers in the federal, state, and local governments as well as academics have expressed views about “systemic racism.” To the best of my understanding, “systemic racism” is a term developed in academia for explaining that racism has been institutionalized within society through, for example, implicit racial bias. As I stated during my confirmation hearing on June 23, 2021, as a pending judicial nominee and a sitting federal judge, it would be inappropriate for me to answer whether the criminal justice system is “systemically racist.” If confirmed, my understanding, about this academic term would have no bearing on my decision-making. I will adjudicate all cases raising issues of racial discrimination or disparity on a case-by-case basis, applying binding Supreme Court and First Circuit precedent.

29. **How do you define “critical race theory?”**

Response: I am aware that policymakers in the federal, state, and local governments as well as academics, have expressed views about “critical race theory.” To the best of my understanding, “critical race theory” is a conceptual framework developed in academia through which to study history, particularly race relations. If confirmed, my understanding of academic legal theories, would have no bearing on my decision-making. I will adjudicate all cases raising issues of racial discrimination or disparity on a case-by-case basis, applying binding Supreme Court and First Circuit precedent.

30. **Do you distinguish “critical race theory” from “systemic racism,” and if so, how?**

Response: See answer to Questions 27 and 28.

31. **Once again, for the record, what would Puerto Rico’s status be, vis-à-vis the United States, if the *Insular Cases* were overturned?**

Response: As I stated during my confirmation hearing on June 23, 2021, U.S. territories, like Puerto Rico, continue to be such under the Territorial Clause. U.S. Const. Art. IV, § 3, cl. 2.

**Senator Ben Sasse**  
**Questions for the Record**  
**U.S. Senate Committee on the Judiciary**  
**Hearing: “Nominations”**  
**June 23, 2021**

For Judge Gustavo Gelpi:

**1. Why did you choose to work for the Federal Public Defender’s Office?**

Response: As I stated during my confirmation hearing on June 23, 2021 in response to Senator Padilla’s question, I recognized the importance of the constitutional role of representing criminal defendants -- regardless of who they are or what did -- to the fullest, thus, guaranteeing them all constitutional and statutory rights they enjoy. Further, I saw my role as an important component of our larger justice system.

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

Response: No. As an Assistant Federal Public Defender, almost 25 years ago, I had an ethical and constitutional duty to advocate for each of my former clients, regardless of personal views about them, the offense, or public opinion. All my clients were indigent and, pursuant to the Criminal Justice Act of 1964, 18 U.S.C §3006A, the Court appointed the Federal Public Defender to represent them. Since my days as federal defender, and up to the present, the plea and conviction rate of defendants in my District has been one of the highest in the nation. For example, in fiscal year 2019 it was 99.3%. *See United States Sentencing Commission 2019 Annual Report and 2019 Sourcebook of Federal Sentencing Statistics* 42 (2019). As such, the role of federal public defenders consists of advising clients of their rights, negotiating pleas (which may include cooperation), guaranteeing that they are afforded all statutory and constitutional rights, and advocating so that they receive a sentence sufficient but not greater than necessary as per 18 U.S.C. §3553(a), which takes into account all sentencing factors. In those cases where a defendant opts to stand trial, the federal defender likewise must zealously represent the client and guarantee him or her an adequate representation under the Sixth Amendment.

**3. Please list some examples from your time as a judge of when your rulings conflicted with your personal policy preferences or personal sense of justice.**

Response: As judge for 20 years, my “personal policy preferences or personal sense of justice” have no bearing on my decision-making process. If confirmed as a Circuit Judge, I will continue with this practice and adhere to binding Supreme Court and First Circuit precedent whenever applicable to all cases that comes before the Court of Appeals.

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: As I stated in my 2006 confirmation hearing as District Court Judge nominee, and reiterated during my confirmation hearing this past June 23, 2021, my philosophy is to work as hard as I can and to apply the Constitution and laws of the United States to cases that come before me. My role is not to make new laws, nor rewrite the Constitution. If confirmed to the Court of Appeals, I will continue to follow Supreme Court and First Circuit precedent.

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

Response: I do not ascribe to any method of constitutional interpretation. As I stated during my confirmation hearing on June 23, 2021, I would apply originalism as a “test” or methodology of constitutional interpretation in those areas where the Supreme Court has applied it. Similarly, I must follow any other “test” or methodology of interpretation that the Supreme Court applies to a particular constitutional provision.

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

Response: I do not ascribe to any method of statutory interpretation. I must follow any “test” or methodology of interpretation that the Supreme Court applies to a particular statutory provision. Generally, when interpreting a statute, I must begin with the statute’s text and give it its plain and ordinary meaning. *See Stornawaye Fin. Corp. v. Hill (In re Hill)*, 562 F.3d 29, 32 (1st Cir. 2009) (“When Congress uses a term in a statute and does not define it, we generally assume that the term carries its plain and ordinary meaning”). If the statute has been precisely interpreted by the Supreme Court or First Circuit, I must apply said precedent. Absent precedent, and, should the text of the statute be ambiguous, when warranted, I will look to the canons of statutory construction and other interpretive tools, including its legislative history. *See City of Providence v. Barr*, 954 F.3d 23, 31-32 (1st Cir. 2020) (“Other tools of statutory interpretation, such as

legislative history, customarily carry significant weight only when the text is ambiguous or its plain meaning leads to an absurd result.”)

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

Response: The Constitution is an enduring document.

**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 not a particular Justice whose jurisprudence I admire the most. Individual Justices have authored important opinions interpreting our Constitution and laws, which as a judge I have applied in both the civil and criminal context for 20 years. I admire greatly Justices who write opinions in a collegial style and manner that are easy to understand by any reader and thus, impart trust in our judicial institutions and system of government.

- 6. Was Marbury v. Madison correctly decided?**
- 7. Was Lochner v. New York correctly decided?**
- 8. Was Brown v. Board of Education correctly decided?**
- 9. Was Bolling v. Sharpe correctly decided?**
- 10. Was Cooper v. Aaron correctly decided?**
- 11. Was Mapp v. Ohio correctly decided?**
- 12. Was Gideon v. Wainwright correctly decided?**
- 13. Was Griswold v. Connecticut correctly decided?**
- 14. Was South Carolina v. Katzenbach correctly decided?**
- 15. Was Miranda v. Arizona correctly decided?**
- 16. Was Katzenbach v. Morgan correctly decided?**
- 17. Was Loving v. Virginia correctly decided?**
- 18. Was Katz v. United States correctly decided?**
- 19. Was Roe v. Wade correctly decided?**
- 20. Was Romer v. Evans correctly decided?**
- 21. Was United States v. Virginia correctly decided?**
- 22. Was Bush v. Gore correctly decided?**
- 23. Was District of Columbia v. Heller correctly decided?**
- 24. Was Crawford v. Marion County Election Board correctly decided?**
- 25. Was Boumediene v. Bush correctly decided?**
- 26. Was Citizens United v. Federal Election Commission correctly decided?**
- 27. Was Shelby County v. Holder correctly decided?**
- 28. Was United States v. Windsor correctly decided?**
- 29. Was Obergefell v. Hodges correctly decided?**

Response to Questions 6-29: All the cases asked about in these questions constitute binding Supreme Court precedent. If confirmed as a Circuit Judge, I must continue to follow the same whenever applicable to a case that comes before the First Circuit. As a pending judicial nominee and a sitting federal judge, it would be generally inappropriate under the

Code of Conduct for United States Judges, to comment on the merits of these Supreme Court decisions. Prior judicial nominees over the years have made a few exceptions to the practice of avoiding comments on the merits of Supreme Court decisions which are referenced in Questions 6-29. I can identify four exceptions to this general rule: *Marbury v. Madison*, *Brown v. Board of Education*, *Gideon v. Wainwright*, and *Loving v. Virginia*. The holdings in these four cases are beyond dispute.

**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: In the First Circuit, the “law of the circuit doctrine” is that “newly constituted panels in a multi-panel circuit court are bound by prior panel decisions that are closely on point.” *United States v. Lewis*, 963 F.3d 16, 23 (1st Cir. 2020), *cert. denied* 2021 WL 2519339 (U.S. June 21, 2021) (citations omitted). Two exceptions exist as to the “law of the circuit doctrine.” First, when “an existing panel decision is undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an *en banc* opinion of the circuit court, or a statutory overruling.” *Id.* (internal quotation marks, modifications and citations omitted). Second, another exception applies “in those 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.* (internal quotation marks and citations omitted). If confirmed as Circuit Judge, I must follow the “law of the circuit doctrine.”

**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: See answer 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. When sentencing an individual, I have always applied the factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, (C) to protect the public from further crimes of the defendant, and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense committee or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission; (5) any pertinent policy statement (A) issued by the Sentencing

Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and (7) the need to provide restitution to any victims of the offense. Conversely, to treat similarly situated defendants differently in order to correct systemic sentencing disparities is not a factor Congress has instructed courts to consider.

## Questions for Gustavo Gelpí

- 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: Judicial activism occurs when a judge inappropriately and contrary to the oath of office is unwilling or unable to rule as the law requires and instead inappropriately resolves cases consistent with his or her personal views.

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

Response: The Code of Conduct for United States Judges applies to all sitting federal judges. Canon 3 of the Code of Conduct for United States Judges states that "a judge should perform the duties of the office fairly, impartially, and diligently."

- 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: In my 20 years as a federal judge, I have faithfully applied the Constitutions and laws of the United States. If confirmed, my personal views or opinions on a given matter would have no bearing on my decision-making process.

- 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: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia and to use said firearm for traditionally lawful purposes, such as self-defense within the home. *District of Columbia v. Heller* constitutes a binding Supreme Court precedent and if confirmed as a Circuit Judge, I must continue to follow it whenever applicable to a case that comes before the First Circuit.

- 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 as a Circuit Judge, I must adhere to all binding Supreme Court and First Circuit precedent to any case that comes before me. As a pending judicial nominee, a sitting federal judge, and because cases related to Covid-19 restrictions are currently being litigated in the courts, *see, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021), it would be inappropriate, under the Code of Conduct for United States Judges for me to opine as to this hypothetical scenario without any factual context.

- 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: As a federal judge for 20 years, I have considered whether qualified immunity shields government officials from liability for alleged constitutional violations on numerous occasions. Each time, I have carefully considered the particular facts of each case and followed Supreme Court and First Circuit precedent. *See, e.g. López-Erquicia v. Weyne-Roig*, 106 F. Supp. 3d 279 (D.P.R. 2015); *García-Díaz v. Cintrón-Suárez*, 120 F. Supp. 3d 68 (D.P.R. 2015); *Dávila-Torres v. Feliciano-Torres*, 924 F. Supp. 2d 359 (D.P.R. 2013); *Burgos-Yantin v. Municipality of Juana Díaz*, 669 F. Supp. 2d 191 (D.P.R. 2009); *Reyes Cañada v. Rey Hernández*, 286 F. Supp. 2d 174 (D.P.R. 2003).

- 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: As a sitting federal district court judge, and if confirmed as a Circuit Judge, I must apply all binding Supreme Court and First Circuit precedent regarding qualified immunity with respect to any case that comes before me where it is at issue. As a pending judicial nominee and a sitting federal judge, it would be inappropriate under the Code of Conduct for United States Judges for me to opine as to this hypothetical legal question without any factual context.

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

Response: See answer to Question 10.