**Senator Josh Hawley**
**Questions for the Record**

**David W. Dugan**
**Nominee, U.S. District Court for the Southern District of Illinois**

**1.**

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

Please refer to my responses to questions 1b-e below.

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

The Supreme Court has held that the First Amendment "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." (Citations omitted). Indeed, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." (Citations omitted). Our cases have established that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 384–85, (1990). Second, two other cases decided by the Supreme Court may provide further guidance. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993), the Supreme Court struck down as unconstitutional a city ordinance that prohibited the practice of animal sacrifice when not for food consumption. The religion in question, Santeria, calls upon its followers to conduct animal sacrifice as a part of its devotion and worship. This practice violated the ordinance. Recognizing that it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free exercise Clause," the Court stated that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id at* 532. In the case of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2014, 198 L. Ed. 2d 551 (2017) a preschool and daycare center was denied a grant to purchase rubber playground surfaces on the basis that it was a Church. Missouri's Department of Natural Resources was responsible for the grant program and had in place a policy

of categorically disqualifying Churches and other religious organizations from receiving these grants. The Court concluded that "[t]he Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 2021. The Court went further and ruled that "[t]he State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny." Id at 2024 (quoting *Lukumi,* 508 U.S., at 546). If nominated, I would faithfully and dutifully adhere to Supreme Court and Seventh Circuit binding precedent regarding First Amendment freedoms and protections.

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

Respectfully, as a judicial nominee, it would be inappropriate for me to forecast or project how I might rule if presented with this particular issue. *See* Code of Conduct for United States Judges, 2(A) and 3(A)(6). The Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2014, 198 L. Ed. 2d 551 (2017), ruled that "[t]he State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny." Id at 2024 (quoting *Lukumi,* 508 U.S., at 546).

If nominated, I would faithfully and dutifully adhere to Supreme Court and Seventh Circuit binding precedent regarding First Amendment freedoms and protections.

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

Respectfully, as a judicial nominee, it would be inappropriate for me to forecast or project how I might rule if presented with this particular issue. *See* Code of Conduct for United States Judges, 2(A) and 3(A)(6). Nevertheless, the case of *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, (2014) may provide some insight. In that case, the Supreme Court indicated that "the

"exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Id* at 710. (quoting Employment Division, Department of Human Resources of Oregon v *Smith,* 494 U.S.872, 877). "Thus, a law that "operates so as to make the practice of ... religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion." *Hobby Lobby,* 573 U.S. at 710. As such, if an individual's or entity's assertion of a religious belief is only "pretextual", the claim for exemption may fail. See *Hobby Lobby*, 573 U.S. 682,717, n. 28 (where it was noted that "[t]o qualify for RFRA's protection, an asserted belief must be "sincere"; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail).

If nominated, I would faithfully and dutifully adhere to Supreme Court and Seventh Circuit binding precedent regarding First Amendment freedoms and protections.

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

The Religious Freedom Restoration Act of 1993 applies "to all Federal Law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C.§2000bb3(a). Additionally, RFRA provides that " Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA]." 42 U.S.C.A. § 2000bb-3(b).

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

No.

**2.**

**a.** What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?*

The Supreme Court declared that "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in

case of confrontation," *Dist. of Columbia v. Heller*, 554 U.S. 570, 592, (2008); and "that the District's ban on handgun possession in the home violates the Second Amendment." *Id.* at 635. The Supreme Court also stated that "[i]n interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 554 U.S. 570, 576

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

No.

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

I understand that the question of the appropriateness of nationwide injunctions to be the subject of proposed or pending legislation, the efficacy of which may be considered by Congress and the courts in the future. Additionally, I understand that litigation is pending or impending regarding the appropriateness of nationwide injunctions. Respectfully, as a judicial nominee, it would be inappropriate for me to comment on the variety of possible factual or legal settings that may or may not call for a nationwide injunction or an injunction that would affect non-parties. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

**4.** Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."

As a judicial nominee, it would be inappropriate for me to comment on whether I agree or disagree with a legal precept of this nature. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). However, the proffered statement is reflective of the recognized approach to statutory and constitutional construction and interpretation referred to as the "textualist" approach. The Supreme Court has instructed that a court should consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.,* 519 U.S.

337, 341 (1997). As such, I ascribe to the textualist approach to interpretation in the absence of binding precedent.

**5.** Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes Jr. wrote that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

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

Although reasonable minds might very well differ, it appears that the Justice may have been serving a reminder that the liberties of the Fourteenth Amendment are not without some constraints. As a judicial nominee, it would be inappropriate for me to comment on whether a view taken by a Justice was correct or whether a decision was correctly or incorrectly decided. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). However, it is worth mentioning that *Lochner* is viewed as having been effectively overturned. See *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963).

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

It would be inappropriate for me as a judicial nominee to comment on whether a case was wrongly or rightly decided. See Code of Conduct for United States Judges, Canon 2(A) and 3(A)(6). It is nevertheless worthwhile to note that some 60 years after *Lochner* was decided, the Supreme Court, while referencing *Lochner*, determined that it had "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963). See also *Williamson v. Lee Optical of Oklahoma Inc*., 348 U.S. 483, 488, 75 S. Ct. 461, 464, 99 L. Ed. 563 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

**6.** In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set out the precedent of judicial deference that federal courts must afford to administrative actions.

**a.** Please explain your understanding of the Supreme Court's holding in *Chevron.*

In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984) the Supreme Court stated that "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, (1984) Generally speaking, then,"an executive agency's interpretation of an ambiguous statutory term is controlling if that agency administers the statute in question and the agency's interpretation is reasonable" *Emergency Services Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 468 (7th Cir. 2012)

**b.** Please describe how you would determine whether a statute enacted by Congress is ambiguous.

The Supreme Court has instructed that in determining whether the statutory language is clear or ambiguous, the court should consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). More recently, the Supreme Court has further instructed that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) It is "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is "more [one] of policy than of law." *Id.* (quoting *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9, (1984)) "That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can

sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved." *Kisor,* 139 S. SCT at 2415.

If confirmed, I will faithfully and dutifully follow all Supreme Court and Seventh Circuit precedent regarding statutory interpretation and construction.

**c.** In your view, is it relevant to the *Chevron* analysis whether the agency that took the regulatory action in question recognized that the statute is ambiguous?

The Supreme Court has determined that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A,. Inc. v. NRDC, Inc.,* 467 U.S. 837, 842–43 (1984). Further, please see my responses to 1.a and 1b. above.