

**Nomination of David W. Dugan to the United States District Court for the
Southern District of Illinois
Questions for the Record
Submitted July 1, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. You ran for judicial office in Illinois in 2018.
 - a. **How many questionnaires or candidate surveys from outside groups did you respond to during the course of your campaign? Please list all organizations to which you submitted a questionnaire or candidate response. Please provide copies of the responses.**

To the best of my recollection, the written questionnaires or candidate surveys from outside groups I submitted during my election contest consisted of those offered by the Illinois Right to Life Action and the Illinois Civil Justice League, both of which are included in the record.

- b. **In 2018, how many outside groups endorsed your candidacy? Please list all organizations that endorsed you and explain the process for securing their endorsement.**

To the best of my recollection, the outside groups that endorsed my candidacy are the Illinois Right to Life Action by questionnaire; Illinois Civil Justice League by questionnaire; Madison County Republican Party by vote or poll; and Madison County Leadership Council by speech/interview.

2. You completed a candidate survey for Illinois Right to Life Action in relation to your campaign to be a Circuit Judge for the Third Judicial Circuit in Madison County, Illinois, in 2018.

In that survey, you wrote that, “for a number of reasons,” the Supreme Court’s decision in *Roe v. Wade* was “sorely misplaced.” You also wrote that any minor seeking an abortion was “in a presumably very emotional and maybe even irrational state.”

- a. **Why did you seek the endorsement of Illinois Right to Life Action?**

I responded to the Questionnaire during the course of my campaign to expand my name recognition within my county and thereby secure votes for my election.

- b. **Please explain, in detail, your reasons for believing the holding in *Roe v. Wade* is “sorely misplaced.”**

As a judicial nominee, it would be inappropriate for me to now comment on whether the Supreme Court rightly or wrongly decided a particular case. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). I will, if confirmed, faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will.

- c. **What was the basis for your assertion that minors seeking abortions are in an “irrational state?” Please provide specific evidence or studies supporting your claim.**

I did not assert “that minors seeking abortions are in an “irrational state.” The questionnaire response to which this question refers clearly states: “I believe sound public policy would give due consideration to the decision-making involvement of the parents of a child who finds herself pregnant. In most instances, the parents can provide unequalled advice and guidance that youth simply does not permit. To allow such a weighty decision to be made by a child in a presumably emotional and maybe even irrational state, invites the expedient solution which so often ends in great regret or grief once that decision is carried out.”

As the questionnaire reflects, I stated then, and I affirm now, that I will, without regard to any personal beliefs, faithfully follow the law as it has been established in *Roe v Wade* and its progeny.

3. **On your Senate Judiciary Questionnaire, you indicated that you were a member of the Alliance Defending Freedom (ADF) from 2014-2016. Among other positions, ADF opposes women’s reproductive rights, marriage equality, civil unions between same-sex couples, and adoption by same-sex couples.**

Do you support ADF’s positions on women’s reproductive rights and the rights of same-sex couples?

I am not aware of, nor have I investigated, ADF’s positions on women’s reproductive rights or the rights of same-sex couples. Accordingly, any comment regarding ADF’s positions would be without basis. In any event, it would be inappropriate for me as a nominee to comment on my personal opinions regarding ADF’s positions on women’s reproductive rights and the rights of same-sex couples. *See* Code of Conduct for United States Judges, Canons 2(A) 3(A)(6) If confirmed, I will faithfully and dutifully adhere to Supreme Court and Seventh Circuit precedent all issues before me.

4. Please respond with your views on the proper application of precedent by judges.
- a. **When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

I am not aware of a circumstance under which it would be appropriate for a district court to depart from Supreme Court precedent.

b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

Typically, district court judges do not author concurring or dissenting opinions. However, all orders authored by a district court judge should reflect fully an adherence to Supreme Court precedent.

c. When, in your view, is it appropriate for a district court to overturn its own precedent?

Except possibly for those situations permitted by rule, such as motions to alter or amend a judgment pursuant FRCP 59, or motions for relief from a judgement or order pursuant to FRCP 60, I do not believe that a district court creates precedent to be overturned by itself.

d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

Whether the Supreme Court overturns its own precedent is a question uniquely within the province of the Supreme Court itself.

5. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?

Roe v Wade has survived numerous challenges, and regardless of whether one refers to the decision in *Roe v Wade* as “super-stare decisis” or “super precedent”, all federal district court judges are bound by the precedent of *Roe v. Wade* and its progeny. If confirmed, I too will faithfully and dutifully adhere to binding precedent, including *Roe v Wade* and its progeny.

b. Is it settled law?

Yes. *Roe v Wade* is a binding precedent of the Supreme Court.

6. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. Is the holding in *Obergefell* settled law?

Obergefell is binding precedent and I, if confirmed, will faithfully and dutifully adhere to binding precedent, including *Obergefell*.

7. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

a. Do you agree with Justice Stevens? Why or why not?

As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a particular case. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6)

b. Did *Heller* leave room for common-sense gun regulation?

In *District of Columbia v. Heller*, the Supreme Court wrote that “nothing in our opinion should be taken as to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626-627 (2008). It otherwise would be inappropriate for me as a nominee to comment on political issues or those issues that are within the purview of the legislative or democratic process. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6)

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

The majority opinion in *Heller* stated that the Court was addressing a question previously unresolved by the courts. The *Heller* Court stated: “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly

remained unilluminated for lengthy periods.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 625, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). If confirmed, I will fully and faithfully apply all Supreme Court and Seventh Circuit precedent.

8. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations’ independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals’ First Amendment rights?

In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court stated that “First Amendment protections extends to corporations.” *Id* at 342. If confirmed, I will fully and faithfully apply all Supreme Court and Seventh Circuit precedent.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see my response to question 8.a.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

The Supreme Court has stated that the First Amendment’s free exercise clause provides protections to associations and organizations. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018). “Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the “exercise of religion.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 684 (2014). Beyond that reference, it would be inappropriate for me as a nominee to comment on a question that is likely to arise in the future. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully and dutifully adhere to all binding Supreme Court and Seventh Circuit precedent.

9. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.” The Fourteenth Amendment provides for the protection of the free exercise of religion from intrusion by the states. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). If confirmed, I will fully and faithfully follow Supreme Court precedent, including precedent involving the First and Fourteenth Amendments.

10. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

The Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967) potentially provides some insight. There, the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Beyond that reference, it would be inappropriate for me as a nominee to comment on this issue as it is likely to arise in the future. See Code of Conduct for United States Judges, Canon 3(A)(6). In any event, I will fully and faithfully follow all Supreme Court precedent regarding this issue.

11. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

The Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), potentially provides some insight to the question. There, the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Beyond that reference, it would be inappropriate for me as a nominee to comment on this issue as it is likely to arise in the future. See Code of Conduct for United States Judges, Canon 3(A)(6). In any event, I will fully and faithfully follow all Supreme Court precedent regarding this issue.

12. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017—more than 30 years after you began practicing law. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

- a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

Respectfully, I am not familiar with the statement, and I do not know what the Federalist Society means by it.

- b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

Please see my response to question 12.a.

- c. What “traditional values” does the Federalist society seek to place a premium on?**

Please see my response to question 12.a.

- d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.**

To the best of my recollection, I have had no contact with anyone at the Federalist Society regarding a possible nomination.

- e. When you joined the Federalist Society in 2017—30 years after you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary or within the Trump Administration? Please answer either “yes” or “no.”**

No.

- i If your answer is “no,” then why did you decide to join the Federalist Society in 2017, more than 30 years after you began practicing law?**

To the best of my recollection, shortly after I became a state court judge, I received a mailed invitation to begin receiving one of its publications, *Harvard Journal of Law & Public Policy* and I accepted by joining. I have enjoyed reading that particular publication.

- ii Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?**

No.

13. In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct].” (*Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

- a. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?**

I have become aware of the draft ethics opinion. Upon reviewing the draft, I considered whether it or Canon 4 required me to relinquish membership. I determined that, in light of my having never been in a leadership or governance role with the Federalist Society, I would defer that decision until such time that a final ethics opinion is issued.

b. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

Please see my response to 12.a.

14. On your Senate Judiciary Questionnaire, you state that you have been a “Life Member” of the National Rifle Association (NRA) since 2008.

a. Are you currently a member of the NRA?

Yes.

b. If confirmed to the District Court, will you remain a member or renew your membership with the NRA?

Presently, it is my intention to remain a member of the NRA.

c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?

A judge is obligated to hear and decide matters assigned, unless disqualified. *See* Code of Conduct for United States Judges, Canon 3(A)(2). It is the duty of a district court federal judge to address and evaluate whether recusal or disqualification is appropriate under 28 U.S.C., §§ 455 and 144. If confirmed, I would address and evaluate each matter for appropriateness of recusal or disqualification as required by these statutes, the Canons, and other appropriate laws, and I will faithfully follow and adhere to Supreme Court and Seventh Circuit precedent regarding recusal and disqualification issues.

d. Can you cite any issue areas where you disagree with the NRA’s publicly stated positions?

I am not aware of all of NRA’s publicly stated positions. In any event, as a nominee it would not be appropriate for me to publicly comment or opine regarding political issues. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6) and 5(C).

e. Why did you join the National Rifle Association?

I have enjoyed for many years shooting sports such as trap and target. I would like to be able to continue to enjoy those things.

15. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

Not to my recollection.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

Not to my recollection.

c. What are your "views on administrative law"?

I have no particular views on administrative law generally. It would be inappropriate for me as a nominee to comment on my personal views on administrative law to the extent those views would bear on how I would decide particular cases. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). If confirmed, I will faithfully and dutifully adhere to Supreme Court and Seventh Circuit precedent in all issues before me.

16. Do you believe that human activity is contributing to or causing climate change?

Respectfully, I have not thoroughly and adequately studied the issue so as to have developed an informed basis for an opinion as to whether human activity is contributing to or causing climate change. I do recognize the issue as a current political topic, and that the topic may give rise to litigation. As such, it would be inappropriate for me, as a nominee to comment on this issue. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

17. When is it appropriate for judges to consider legislative history in construing a statute?

If confirmed, I will consult legislative history as called for by precedent of the Supreme Court or Seventh Circuit. The Supreme Court has held, that “[a]s we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in “looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, (2005); *Cf Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1128 (7th Cir. 2008) (“Resort to the legislative history, however, is only necessary if the language of the statute is ambiguous; if the statutory language is clear, then the legislative history is only relevant if it shows a clear intent to the contrary.”)

18. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

Not to my recollection.

19. Please describe with particularity the process by which you answered these questions.

Once received from the Office of Legal Policy, I reviewed each question. I then reviewed my Senate Judiciary Questionnaire. I next reviewed the Senate Judiciary Questionnaire supporting documents. Where necessary, I conducted research while preparing my responses to each question. Once completed, I forwarded to the OLP a draft of my responses. I then provided my authorization to file my responses to each of the Senators' questions.

**Nomination of David W. Dugan for United States District Court Judge
For the Southern District of Illinois
Senator Dick Durbin
Written Questions for the Record
July 1, 2020**

For questions with subparts, please answer each subpart separately.

Questions for David Dugan

1. **You have served as a trial judge on the Illinois Third Judicial Circuit since 2017. How would you describe the role and responsibilities of a federal district court judge, and how has your previous judicial experience helped prepare you for becoming a federal district court judge?**

While serving as a state court judge, and even as a practicing lawyer, I have come to believe that judges are viewed as the face of our judicial system because often a party's only encounter with the court room typically will involve the judge. As such it is that judge's demeanor, temperament, fairness, impartiality, independence, even-handedness and decisiveness that will reflect the level of confidence and respect society will have for our laws and those who serve to enforce them. Apart from the usual and typical duties that judges must fulfill each day, they must also ensure that their conduct and impartiality will never reduce, but rather will always sustain, a high level of public confidence in our system.

2. In an October 4, 2018 article in the *Belleville News-Democrat*, you were asked "what is your judicial philosophy?" You responded, "I believe that judges must be independent and free from the influences of politics and special interest organizations. Judges must employ their legal judgment and not their personal will when called upon to decide cases or interpret the law. Judges must interpret the Constitution and statutes as they have been written, informed by history and precedent."

- a. **Does this statement still reflect your judicial philosophy?**

Yes.

- b. **In your career as a judge, what steps have you taken to ensure that you adjudicate cases independently and not with any political or personal agenda?**

As a trial lawyer, my core desire was that the judge before whom I appeared would make every effort to ensure that he or she would not take counsel of their personal leanings or beliefs but would always fairly apply the existing law to the facts when deciding an issue that affected my client. I have not forgotten this during my time serving as a state court judge. Accordingly, I make every effort to ensure that my rulings and decisions reflect a fair application of the law to the facts of the case before me. Furthermore, upon becoming a state court judge, I significantly reduced

participation in political activities and, since being nominated, I have further reduced my involvement in all organizations so as to be consistent with the Code of Conduct for United States Judges.

3. You have run for state judicial office and in the course of judicial election campaigns you have made statements regarding your personal views on legal and policy matters, including in a December 30, 2017 judicial candidate survey from Illinois Right to Life Action.
 - a. **Should a judge's personal views on legal or policy matters influence the judge's adjudication of cases or application of precedent?**

No. A judge must in all things be independent of political and societal pressures and influences, and his or her decisions must reflect that independence through faithful and dutiful adherence to binding precedent. If confirmed by the Senate, I will faithfully and dutifully adhere to the precedent of the Supreme Court and the Seventh Circuit.

- b. In the judicial candidate survey you filled out for Illinois Right to Life Action, you concluded by saying "Please keep in mind, however, that while I hold and have held for many years these beliefs, I will follow and apply the law as my sworn obligation as Circuit Judge for Illinois." **Would you similarly follow and apply the law if confirmed as a federal district court judge?**

Yes. I am hopeful that my record clearly reflects that I am committed to following the rule of law and applying binding precedent without regard to any personal belief or will. I will remain committed to and fulfill those principles if confirmed by the Senate.

**Nomination of David W. Dugan
to the United States District Court for the
Southern District of Illinois
Questions for the Record
Submitted July 1, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

1. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: <https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf>. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

Should the draft of Advisory Opinion #117 be formally adopted by the Codes of Conduct Committee of the Judicial Conference of the United States, I will consider it, together with any advisory opinions related to judges' membership in law-related organizations. If confirmed, I will comply with the Code of Conduct for United States Judges.

2. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
 - a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Per the request, I did read the story and listened to the recording.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

I have no actual or personal knowledge of anonymous or opaque spending related to judicial nominations. Further, I have not adequately studied or investigated these issues so as to be able to form a knowledgeable opinion regarding them. Respectfully, it would be inappropriate for as a nominee for me to comment relative to these issues. See Code of Conduct for United States Judges, Canon 2(A) and 5(C).

- c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

I have not adequately studied or investigated these issues so as to be able to form a knowledgeable opinion regarding them. Respectfully, it would be inappropriate for as a nominee for me to comment relative to these issues. See Code of Conduct for United States Judges, Canon 2(A) and 5(C).

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No. I do not know Mr. Leonard Leo.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

I do not know what Mr. Leo meant by the statements, and I am not otherwise aware of or have knowledge of his beliefs.

3. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

As a general metaphor, I believe there is truth to it, particularly for trial judges and federal district court judges, because they should act as arbiters, not advocates, in the cases before them.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

Generally speaking, a judge should be aware of the practical consequences of a particular decision, but that awareness should not be allowed to serve as a basis to depart from the obligation and duty to faithfully follow precedent.

4. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

The case of *Anderson v Liberty Lobby, Inc.* 477 U.S. 242 (1986), may provide some insight. There, the Supreme Court stated: “we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge’s inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.” *Id.* at 252.

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

- a. What role, if any, should empathy play in a judge's decision-making process?

Empathy, in the sense of the of the human quality of the ability to understand and share the feelings of others, while possibly helpful in assessing a person's motive or purpose, should not otherwise be permitted to serve as a basis for departing from obligation and duty to apply fairly the law to the facts in a given case.

- b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

All judges have their own life experiences that have shaped and contoured their beliefs, biases, and even prejudices. All judges must take all measures to separate their personal beliefs, biases and prejudices from the decision-making process.

6. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

I do not envision a scenario whereby such conduct would be appropriate.

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

I do not believe that a judge should allow his or her personal policy preferences or political beliefs to enter into the decision-making process or in any way be reflected in the decision itself.

9. In an interview during your state judicial election campaign in 2018, you stated: "[J]udges must be independent and free from the influence of politics and special interest organizations."

- a. What constitutes being "independent and free" from politics and special interest groups?

This statement was made as part of a political speech and interview prior to my nomination. The statement reflected my views at that time that elected state judges should endeavor to minimize the involvement of party politics in judicial campaigns so as to avoid being viewed as "robed politicians", and to preserve public confidence in its state judiciary.

- b. When and in what capacity is it appropriate for a district judge to have ties to special interest groups or political organizations?

The Code of Conduct for United States Judges governs the conduct of federal judges in terms of upholding the integrity and independence of the Judiciary (Canon 1); avoidance

of impropriety in all activities (Canon 2); performing judicial duties fairly and impartially (Canon 3); engaging in extrajudicial activities (Canon 4); and engaging in certain political activity (Canon 5). I will, if confirmed by the Senate, faithfully and fully adhere to the Code of Conduct for United States Judges as well as any other statute or rule that governs the conduct of federal judges.

- c. Do you believe your present involvement with the National Rifle Association jeopardizes your independence or appearance of independence as a federal judge?

I have neither sought nor accepted leadership or policy making positions or roles with the NRA, and have limited my “involvement” with the NRA to simple membership without active participation. I will, if confirmed, consider and comply with 28 U.S.C. §§455, 144, the Code of Conduct for United States Judges, and all other relevant statutes regarding the assessment of whether disqualification or recusal is appropriate.

- d. Do you believe your past involvement with Alliance Defending Freedom and Options-Now jeopardizes your independence or appearance of independence as a federal judge?

As I testified, I had no formal involvement with Alliance Defending Freedom. To the best of my recollection, I had only two encounters with anyone from ADF. My first contact consisted of a meeting with my former client and ADF counsel regarding legal representation. My second and last contact with ADF consisted of a referral of a potential client. I will, if confirmed, consider and comply with 28 U.S.C. §§455, 144, the Code of Conduct for United States Judges, and all other relevant statutes regarding the assessment of whether disqualification or recusal is appropriate.

10. The Seventh Amendment ensures the right to a jury “in suits at common law.”

- a. What role does the jury play in our constitutional system?

As the Sixth Amendment ensures the right to a trial by an “impartial jury” in criminal cases, and the Seventh Amendment preserves “the right of trial by jury” in suits at common law, juries play a vital role in our system of justice. The reverence that these Amendments receive in our system reflect the long-held belief that a group of ordinary citizens can collectively ensure, as much as possible, a fair, unbiased and impartial decision.

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

I have not encountered this issue in my legal career. However, if confirmed I would faithfully and dutifully follow all applicable Supreme Court and Seventh Circuit precedent in addressing this issue.

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 10.b.

11. What deference do congressional fact findings merit when they support legislation expanding or limiting individual rights?

Congress is free, of course, to investigate and make findings with regard to historical and systemic patterns of unequal treatment for the purpose addressing and fashioning legislation to remedy such unequal treatment. Our Supreme Court has ruled that Congress' chosen remedy must be congruent and in proportion to its object and purpose. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (in relation to the Americans with Disabilities Act); And that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (Family Medical Leave Act). If confirmed, I will faithfully and dutifully follow Supreme Court and Seventh Circuit precedent if presented with these issues.

12. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

Advisory opinion 116 provides that "it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis." The opinion also points to nine factors relating to the sponsoring organization and three factors relating to the program itself that should be considered when deciding whether it is appropriate to attend a particular seminar. I will consult and consider those factors when determining whether to attend any particular seminar and I will, if confirmed, adhere to the Code of Conduct for United States Judges.

- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to Question 12.b.i above.

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to Question 12.b.i above.

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 12.b.i above.

- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to Question 12.b.i above.

- c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 12.b.i above.

13. In your view, what is the evidentiary significance of Congress's failure to enact a proposed amendment to a previously enacted statute for how you would interpret the previously enacted statute? In general, what significance do you attach to evidence of Congress's failure to enact any piece of proposed legislation?

The Supreme Court has recognized that “the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. (citation omitted) Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. (citation omitted) The legislature may select one phase of one field and apply a remedy there, neglecting the others. *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955). In a related vein, the Supreme Court has also remarked that “[a]s we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in “looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, (2005)

14. In your view, what constitutes the ordinary or plain meaning of statutory and constitutional text? When interpreting the text of a statute in the absence of binding precedent, is it proper for a district judge to (a) apply the text's plain meaning to current circumstances without considering its historical origins or (b) limit the text's meaning to how it would have been defined or understood at the time of enactment? If (b), how should a district judge determine how the text would have been defined or understood at the time of enactment?

The Supreme Court provided some possible guidance that may address these questions. In the case of *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1730 (2020), the Supreme Court stated that “[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we

would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.” *Id* at 1738. To determine a text’s meaning or usage at the time of enactment, the Supreme Court consulted the act (Title VII) as a whole to see what it had to say about the text in question, and it consulted dictionary definitions in existence at the time of enactment and at the time of interpretation. *Id* at 1739. If confirmed, I will faithfully and dutifully apply all Seventh Circuit and Supreme Court precedent, including *Bostock*, when called upon to interpret or construe a statute or provision.

**Nomination of David W. Dugan, to be United States District Court Judge
for the Southern District of Illinois
Questions for the Record
Submitted July 1, 2020**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. The Supreme Court itself has turned to period writings, precedent, historical references, treatises, and other sources where it deemed it appropriate. I would, if confirmed, faithfully adhere to and apply all Supreme Court precedent regarding the appropriateness of consulting such sources.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of any court of appeals?

I would consider first Supreme Court and Seventh Circuit precedent to which I would consider myself to be bound in writing any decision or order. In the absence of such binding precedent, I would give consideration to precedent from other circuits.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes, to each question.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes.

- f. What other factors would you consider?

I would give consideration to those factors identified as appropriate by Supreme Court and Seventh Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the "equal protection" guarantees extend across both race and gender. See *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310, (2013); *United States v. Virginia*, 518 U.S. 515, 515, (1996)

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my response to question 2 above.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Respectfully, I do not know the answer to the question. However, a possible explanation might be found in *Dist. of Columbia v. Heller*, 554 U.S. 570, 625, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). The *Heller* Court stated: "We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods."

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Supreme Court has determined that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms accorded to couples of the opposite sex." See *Obergefell v Hodges*, 135 S. Ct. 2584, 2605 (2015).

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

It is my understanding that this issue is presently being litigated. As a nominee, it would be inappropriate for me to comment. See Code of Conduct for United States Judge, Canon 3(A)(6)

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), determined that she does have such a constitutional right.

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court has determined that there is such a constitutional right. *See Roe v. Wade*, 410 U.S. 113 (1973).

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has determined that there is such a constitutional right. *See Lawrence v Texas*, 539 U.S. 558 (2003).

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3.a. and 3.b.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The Supreme Court has at times considered evidence of contemporary changes to societal norms. When the Supreme Court directs inferior courts to consider evidence that sheds light on our changing understanding of society, lower courts should do so. If confirmed, I will follow the Supreme Court's precedent on this issue.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

The presentation of scientific evidence through expert testimony and opinions continues to play an important role in both civil and criminal trials. Rule 702 of the Federal Rules of Evidence governs the admission of such testimony and opinions and places the district court in the role of “gatekeeper” for this type of evidence. See *Daubert v. Merrell Dow Pharmacy, Inc.* 509 U.S. 579 (1993). If confirmed, I will faithfully apply Supreme Court and Seventh Circuit precedent and the Federal Rules of Evidence when considering such evidence.

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

The Supreme Court has determined that same-sex couples have the same right to marry as others, *Obergefell v Hodges*, 135 S.Ct. 2584 (2015), as a right of privacy, *Lawrence v Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully and dutifully adhere to this precedent and all other binding precedent.

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

Since the nature of the formulation of substantive due process itself has and will most likely will continue to bring about an evolving jurisprudence through litigation, it would be inappropriate for me comment. See Code of Conduct for United States Judge, Canon 2(A) and 3(A)(6). If confirmed, I will faithfully and dutifully adhere to binding precedent on issues involving substantive due process.

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.
 - a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not thoroughly examined this issue. If confirmed, however, I will faithfully and dutifully follow *Brown*, and all Supreme Court and Seventh Circuit precedent.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited June 30, 2020).

I have not thoroughly examined this issue and I am not familiar with this particular writing. Therefore, any comment in response would be without sufficient basis. If confirmed, however, I will faithfully and dutifully follow all Supreme Court and Seventh Circuit precedent.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court in *Dist. of Columbia v. Heller*, 554 U.S. 570, 586, 128 S. Ct. 2783, 2794, 171 L. Ed. 2d 637 (2008), recognized the importance of a provision’s text, context, structure and original public meaning to the process of interpretation. If confirmed, I will faithfully follow all Supreme Court and Seventh Circuit precedent.

- d. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to question 6.c.

- e. What sources would you employ to discern the contours of a constitutional provision?

Please see my response to question 6.c.

7. You stated on your 2018 Judicial Candidate Survey for Illinois Right to Life Action that you are a cofounder of Illinois Vision 2020. Illinois Vision 2020 describes its mission as “Ending Abortion in Illinois by 2020.”

- a. You did not list Illinois Vision 2020 in your response to Question 11 of the Senate Judiciary Committee Questionnaire. Please explain the reason for this omission.

I supplied in my Senate Judiciary Committee Questionnaire, in response to Question 12(c), references to Vision 2020 in my Illinois Right to Life Action Candidate Questionnaire, which reflects my presence at the founding meeting. My understanding of Question 11 of the Senate Judiciary Committee Questionnaire is that the candidate list organizations “to which you belong, or which you have belonged since graduation from law school.” It is my understanding that there has been no “membership” and I at no time “belonged” to Vision 2020. I regret any confusion that my submission in response to 12(c) may have caused.

- b. Please further describe the structure, activities, and purpose of Illinois Vision 2020.

Please see my response to question 7.a. I do not know whether Vision 2020 took on any organizational structure, activities, or purpose following my attendance at its founding meeting and luncheon.

- c. Please detail your involvement with Illinois Vision 2020, including why you decided to found it and what your involvement with it has been since its founding.

Please see my response to question 7.a.

- d. Did you found Illinois Vision 2020 or have any other involvement with it while you were a circuit court judge? If so, please explain how your involvement with it was consistent with applicable ethical standards of conduct.

No. Please see my response to question 7.a. My attendance at Vision 2020's founding luncheon occurred before I became a circuit court judge.

- e. Please explain how Illinois Vision 2020 sought to end abortion in a constitutionally permissible manner.

Please see my response to question 7.a. above.

Nominations
Hearing before the Senate Committee on the Judiciary
Questions for the Record
June 24, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Judge David W. Dugan

1. During your 2018 campaign to become a Circuit Judge on the Third Judicial Circuit in Illinois, you submitted a Judicial Candidate Survey to Illinois Right to Life in which you wrote, “While I would, if called upon in my role as a Judge, follow the law as it has been established, I do believe that, for a number of reasons, the case of *Roe v. Wade* is sorely misplaced.”¹ When asked about this statement by Senator Durbin, you responded, “I cannot comment based upon being a nominee now on *Roe v. Wade*, but you do have my word and you do have my record that I will follow precedent and follow the law, and I always have.”²

a. Please state—

i. whether it is still your view that “*Roe v. Wade* is sorely misplaced”?

As a judicial nominee, it would be inappropriate for me to now comment on whether the Supreme Court rightly or wrongly decided a particular case. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). I will, if confirmed, faithfully and dutifully apply binding precedent, including *Roe v. Wade* and its progeny, without regard for my personal beliefs or will.

ii. how you would “follow precedent and follow the law,” specifically with respect to *Roe v. Wade* and its progeny.

If presented with such an issue as a judge, I would review and study the numerous cases that have been decided by the Supreme Court that have upheld *Roe v. Wade*, and faithfully apply that binding precedent to the facts of the case, without regard to my personal beliefs.

b. On the issue of precedent and *Roe v. Wade* specifically, please explain --

i. on which courts *Roe* is and is not binding.

I am not aware of any United States Court or state court where *Roe* is not binding precedent. *Roe v. Wade* is “settled law” and has survived numerous challenges.

¹ Candidate Questionnaire, David Dugan, Illinois Right to Life Action (Dec. 31, 2017) [see Senate Judiciary Questionnaire Attachments 12(c) at p. 16].

² *Nominations Before the S. Comm. On the Judiciary*, 116th Cong. (2020), available at <https://www.judiciary.senate.gov/meetings/06/24/2020/nominations-1>.

- ii. the central holding of *Roe* and whether *Roe* protects a pregnant person's right to choose.

The Supreme Court held that a woman's decision to choose abortion is encompassed by the right of privacy and, therefore, protected. Further, "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' (citations omitted) and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 155, (1973) *holding modified by Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

2. In your response to the aforementioned Judicial Candidate Survey, you stated, "My belief is that life begins at conception and that from that moment forward, taking that child's life is the taking of a human life." When asked by Senator Hirono if this was still your personal view, you responded, "I think I'd be violating the canons, and it's very unfair to people who might appear before me to express now that I'm a nominee what my personal views are."
 - a. Please identify the specific "canons" that you would be "violating" were you to answer questions about statements you made before you were nominated to the District Court for the Southern District of Illinois and explain why answering Senator Hirono's question would violate them.

I viewed Senator Hirono's question regarding my current personal views to call for a response that would necessarily touch upon the issue of the commencement of life which contains political questions and is being considered in pending litigation. I believed that any such response would violate the Code of Conduct for United States Judges, specifically Canon 1 (independence of judiciary and deference to judgments of the Courts); Canon 2(A) (impartiality of judiciary); and Canon 3(A)(6) (refraining from making public comment).

b. Please explain—

- i. how you plan to separate your "personal views" from your judicial decision-making and the specific affirmative steps you will take to do so.

As I testified at the hearing in response to Senator Hirono's question, my "personal views" have not, while a state court judge, and will not, if confirmed, be a part of or be reflected in my judicial decision making. All judges must make decisions and rulings independent of their personal views. I believe that I am no exception. To that end, I will, if confirmed, faithfully and dutifully follow Supreme Court and Seventh Circuit precedent on this and all issues.

- ii. how you plan to ensure that litigants can safely believe that your previously stated views on abortion from 2017 will not impact the result of the cases they bring

before you.

All judges are bound by their oath to faithfully and dutifully apply binding precedent regardless of his or her personal beliefs or will. Presently, in my current position as a state court judge, and, if confirmed as a federal district court judge, I will continue to faithfully and dutifully apply binding precedent, including *Roe v. Wade* and its progeny, without regard for my personal beliefs or will. Additionally, as in all cases, I will review the matter for any basis for disqualification or recusal consistent with 28 U.S.C. §§ 455 and 144 as well as other applicable statutes and rules.

c. Please state whether it is still your position, as you stated in the aforementioned Judicial Candidate Survey, that—

- i. “life begins at conception and that from that moment forward, taking that child’s life is the taking of a human life.”

Please see my response to Question 2.a. above. Presently, in my current position as a state court judge, and, if confirmed as a federal district court judge, I will continue to faithfully and dutifully apply binding precedent of the Supreme Court and Seventh Circuit, including *Roe v Wade* and its progeny, and I will do so without regard for any personal beliefs or will.

- ii. “sound public policy should give due consideration to the decision-making involvement of the parents of the child who finds herself pregnant. . . . To allow such a weighty decision to be made by a minor, in a presumably very emotional and maybe even irrational state, invites the then expedient solution which so often ends in great regret and grief once the wrong decision is carried out.”

With regard to the policy of giving due consideration to the notion of allowing parental involvement in the decision making process of a pregnant minor child, this is a question that is within the purview of Congress and lawmakers. Additionally, I understand that this issue is one that is involved in pending or impending litigation. Therefore, as a judicial nominee, it would be inappropriate for me to comment on this issue or policy concerns that may be considered by Congress. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(c). Presently, in my current position as a state court judge, and, if confirmed as a federal district court judge, I will continue to faithfully and dutifully apply binding precedent without regard for my personal beliefs or will.

- iii. “it is an incongruent argument for those who are ‘pro choice’ to advocate that in only the case of the abortion ‘medical procedure’ should a patient be deprived of the knowledge and information for her to make a fully informed decision. Public policy requires that her decision be based on all available information, including, not just the physical, but also the emotional and psychological, risks to her.”

Please see my response to question 2.c.ii above.

3. In your response to the Judicial Candidate Survey, you stated, “I have been deeply involved in various organizations as a pro-life advocate.” You explained that you have “serv[ed] as a supporter, volunteer, board member, and then president of, and legal counsel for, a large faith-based women’s pregnancy medical center.”
 - a. Please list all the “various organizations” with which you have been involved “as a pro-life advocate.”

I have been at various times prior to becoming a judge involved in the following organizations: Arms of Love, corporate attorney and financial supporter; Options Now Medical Pregnancy Center, corporate attorney, board member, financial supporter; Thrive Metro East, financial supporter; First Baptist Church of Bethalto, member, elder, financial supporter. In addition, I attended the meeting and luncheon at which the Vision 2020 concept was founded. My involvement has centered around faith-based efforts to reduce or eliminate the need or demand for abortion by providing options, choices and support for young women who might be struggling through the decision.

- b. Please describe the roles you held and the work that you did for each of these organizations [Question 3(a)], without violating any privilege or duty of confidentiality, “as a pro-life advocate.”

Please see my response to question 3.a.

- c. Please explain how your past involvement in these “various organizations as a pro-life advocate” will not translate to your role on the federal bench and what affirmative steps you will take to overcome your “pro-life” biases.

Respectfully, my “personal views” have not during my time serving as a state court judge and will not, if confirmed, enter into or be reflected in my judicial decision making. I believe that all judges must make decisions and rulings based on the law and independent of their personal views, whatever they might be. I am no exception. To that end, I will, if confirmed, faithfully and dutifully follow Supreme Court and Seventh Circuit precedent on this and all issues.

**Questions for the Record for David W. Dugan
From Senator Mazie K. Hirono**

1. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Yes.

b. Have you ever taken such training?

Yes.

c. If confirmed, do you commit to taking training on implicit bias?

Yes.

2. You stated you are a co-founder of Illinois Vision 2020. Its website identifies its aim is to “end abortion in Illinois by 2020” and offers prayers for pro-choice legislators.

a. What steps have you taken to “end abortion in Illinois by 2020”?

Vision 2020 was at the time of my involvement a concept developed by members of local faith leadership to partner with other organizations to commit themselves to prayer to end the need and demand for abortion services in Illinois by 2020 through providing a variety of support mechanisms and options for women who face unwanted pregnancies. My pro-life advocacy has always been faith-based and consistent with this concept.

b. If confirmed, how will litigants advocating for the protection of abortion rights who come before you be assured that you are not seeking to “end abortion” in their case?

My personal views have not and will not be a part of my judicial decision making. All judges must make decisions and rulings independent of their personal views. I am no exception. To that end, I will, if confirmed, faithfully and dutifully follow Supreme Court and Seventh Circuit precedent on this and all issues.

c. If confirmed, what kind of relationship will you continue to have and how active do you plan to be with this organization?

Since well before becoming a state court judge, I have not engaged in any activities on behalf of Vision 2020.

**Nomination of David W. Dugan
United States District Court for the Southern District of
Illinois Questions for the Record
Submitted July 1, 2020**

QUESTIONS FROM SENATOR BOOKER

1. On a candidate survey for Illinois Right to Life Action, you stated that you have been “deeply involved in various organizations as a pro-life advocate.”¹ You opposed a judicial bypasses for minors seeking an abortion without parental consent, questioned the holding in *Roe v. Wade*, and urged public policy that would require women seeking an abortion to be informed of the “emotional and psychological” risks.² You have also indicated that you would “follow and apply the law” in regards to *Roe v. Wade*, but described the holding as “sorely misplaced” and lacking a “sound basis” if applied under the Illinois Constitution.³

- a. Do you stand by those statements?

Prior to becoming a judge, I voluntarily provided my time, talent and treasure for the protection of children of all ages, including unborn children and their mothers. My pro-life advocacy has always been in the form of faith-based efforts to reduce the need and demand for abortion by providing alternatives and options to, and support for, women who find themselves with an unwanted pregnancy.

As a nominee, it would be inappropriate to now provide my opinion as to whether the Supreme Court rightly or wrongly decided a case. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). I will, if confirmed, faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will.

Regarding the issues of permitting minors to undergo abortive procedures without parental consent and of obtaining more full informed medical consent, it is my understanding that litigation regarding these issues is pending and/or impending. Respectfully, therefore, as a judicial nominee, it would be inappropriate for me to comment. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6),

- b. Why did you believe the holding in *Roe v. Wade* was “sorely misplaced”?

I will, if confirmed, faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will.

- c. If you are confirmed, why should a litigant arguing in favor of women’s

¹ David Dugan, Candidate Questionnaire, Illinois Right to Life Action (Dec. 31, 2017); SJQ Attachment 12(c) at pp. 15-16.

² *Id.*

³ *Id.*

reproductive rights, such as Planned Parenthood, expect to have a fair and impartial judge, in light of your statements and record on abortion issues?

All judges are bound by their oath to faithfully and dutifully apply binding precedent regardless of his or her personal beliefs or will. I do not perceive myself as being exempted from that duty. Presently, in my current position as a state court judge, and, if confirmed as a federal district court judge, I have and will continue to faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will, and without regard to the previously expressed beliefs of litigants appearing before me.

2. You have spoken in favor of forced arbitration and said that mandatory arbitration has “some favorable benefits.”⁴

a. When making those statements, was it your perspective that aggrieved consumers and employees are better able to access justice when they are forced into arbitration?

The Seventh Amendment to the Constitution of the United State provides that “[i]n Suits at common law, ... the right to a trial by jury shall be preserved.” I believe that juries play a vital role in our justice system. My response to the Illinois Civil Justice League Candidate Questionnaire that this question references was about Illinois’ Mandatory Arbitration established by the Illinois Supreme Court in conjunction with lower Illinois Courts (Please see Il. Sup. Ct. Rules 86, 93, et seq.). As noted, Illinois’ Mandatory Arbitration is non-binding, meaning that either litigant, if unhappy with the arbitrators’ decision, may reject it, and still proceed to jury trial. The favorable benefits to which I spoke, and which I observed as the trial judge assigned to overseeing the non-binding arbitration docket, included that providing non-binding arbitration early in the case can prove to be far-less costly to the litigant than jury trials and, as a result, non-binding arbitration can serve to lower equal access to justice barriers for those who might otherwise forego seeking a remedy due to the financial cost and/or inability to pay that cost.

b. If an employee is discriminated against because of the color of her skin do you believe that forced arbitration is the best forum for that employee to seek justice?

As a lawyer who appeared before juries, I understand the level of importance that juries play in our system of justice. Juries remain vital and foundational: The Seventh Amendment to Constitution provides that “[i]n Suits at common law ... the right of trial by jury shall be preserved.” However, during my career as a litigation attorney, I came to understand that attorneys may, for a variety of reasons, encourage or recommend their client pursue an avenue to justice other than by jury trial.

⁴ David Dugan, Candidate Questionnaire, Illinois Civil Justice League (Feb. 10, 2018); SJQ Attachment 12(c) at p. 13.

3. You became a member of the Federalist Society in 2017.⁵

a. Why did you decide to join the Federalist Society?

I came to enjoy reading the *Harvard Journal of Law and Public Policy*, a subscription to which was included with my membership.

b. Is there any connection between your interest in becoming a member of the Federalist Society and your interest in becoming a federal judge?

No.

4. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I understand the term “originalism” to refer to an approach to constitutional or statutory interpretation and construction, where the words in question are assigned their plain and ordinary meaning as those words were understood by the public when the constitutional or statutory provision was passed. While I prefer to avoid labels, I generally ascribe to this approach when called upon to determine the meaning of a constitutional or statutory provision. If confirmed, I will fully and faithfully apply all binding precedents of the Supreme Court and the Seventh Circuit with regard to constitutional and statutory interpretation and construction.

5. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

I understand the term “textualism” to refer to an approach to constitutional or statutory interpretation and construction, where the words of the governing text are of paramount concern and that what they fairly convey in their context is what the text means. It is my understanding that “textualism” is an appropriate approach to interpretation and construction, and is in many ways very similar to the concept of “originalism”. If confirmed I will fully and faithfully apply all binding precedents of the Supreme Court and the Seventh Circuit with regard to constitutional and statutory interpretation and construction.

6. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress’s intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

I will, if confirmed, consult and cite legislative history when doing so is consistent

⁵ SJQ at pp. pp. 5.

with the precedent of the Supreme Court and Seventh Circuit regarding interpretation and construction. The Supreme Court has stated: “As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 2626, 162 L. Ed. 2d 502 (2005). See also *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1128 (7th Cir. 2008) (“Resort to the legislative history, however, is only necessary if the language of the statute is ambiguous; if the statutory language is clear, then the legislative history is only relevant if it shows a clear intent to the contrary.”).

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Yes, it would be reasonable to hear argument regarding legislative history in a case that may come before me. Nevertheless, if confirmed, I will consult and cite legislative history consistent with the precedent of the Supreme Court and Seventh Circuit regarding interpretation and construction. The Supreme Court has stated: “As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, (2005). See also *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1128 (7th Cir. 2008) (“Resort to the legislative history, however, is only necessary if the language of the statute is ambiguous; if the statutory language is clear, then the legislative history is only relevant if it shows a clear intent to the contrary.”).

7. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

The term “judicial restraint,” as I understand it, refers to the concept that a court should avoid allowing his or her personal will, desire, or societal philosophy to become a part of or be reflected in his or her rulings and decisions. Yes, I believe that judges should avoid allowing his or her personal will, desire, or societal philosophy to become a part of or be reflected in his or her rulings and decisions.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁶ Was that decision guided by the principle of judicial restraint?

The majority opinion in *Heller* stated that the Court was addressing a question previously unresolved by the courts. The *Heller* Court stated: “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights

⁶ 554 U.S. 570 (2008).

was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 625, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a case or to discuss my personal beliefs as to its practical effects. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁷ Was that decision guided by the principle of judicial restraint?

In *Citizens United v. FEC*, 558 U.S. 310, 342 (2010), the Supreme Court stated that “First Amendment protections extends to corporations.” As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a case or to discuss my personal beliefs as to its practical effects. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁸ Was that decision guided by the principle of judicial restraint?

In *Shelby County, Ala. v. Holder*, 570 U.S. 529, 536 (2013) the Supreme Court stated that “voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, ‘the Act imposes current burdens and must be justified by current needs.’” As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a case or to discuss my personal beliefs as to its practical effects. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

8. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁹ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.¹⁰
 - a. Do you believe that in-person voter fraud is a widespread problem in

⁷ 558 U.S. 310 (2010).

⁸ 570 U.S. 529 (2013).

⁹ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁰ *Id.*

American elections?

I have not thoroughly studied whether in-person voter fraud is a widespread problem in American elections and any comment I might make on the issue would have insufficient basis. Further, as a nominee for the position of a Federal District Court Judge, it would not be appropriate for me to express my personal beliefs on political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not thoroughly studied the issue of whether voter ID laws generally serve to suppress the vote in poor and minority communities, and any comment I might make on this issue would be have insufficient basis. Further, as a nominee for the position of a Federal District Court Judge, it would not be appropriate for me to express my personal beliefs on political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I have not thoroughly studied the issue of whether voter ID laws are the twenty-first century equivalent of poll taxes, and any comment I might make on this issue would have insufficient basis. Further, as a nominee for the position of a Federal District Court Judge, it would not be appropriate for me to express my personal beliefs on political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

9. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁴

- a. Do you believe there is implicit racial bias in our criminal justice system?

Yes.

¹¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

¹² *Id.*

¹³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹⁴ *Id.*

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not yet thoroughly studied the issue of implicit racial bias in our federal criminal courts. I did attend a related program shortly after joining the state bench, and have I have also reviewed a variety of articles and writings so as to develop a general understanding of the issue, the urgency with which it needs to be studied and addressed, and the ongoing efforts to address it.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁵ Why do you think that is the case?

I have not yet thoroughly studied the issue of racial disparity in sentencing in our federal criminal courts. Any comment I might make at this time as to the cause of such disparity would be without sufficient basis. However, whatever the cause, the disparity is alarming.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹⁶ Why do you think that is the case?

I have not yet thoroughly studied the issue of racial disparity in sentencing in our federal criminal courts. Any comment I might make at this time as to the cause of such disparity would be without sufficient basis. However, whatever the cause, the disparity is alarming.

- f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

18 U.S.C.A. § 3553 requires district courts at the time of sentencing to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” It is certainly within the purview of a circuit court to examine on appeal any claimed error related to a district court’s failure to comply with §3553. If confirmed, I will fully and faithfully apply all sentencing statutes

¹⁵ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁶ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

and precedent of the Supreme Court and Seventh Circuit.

10. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁷ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁸

- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not thoroughly studied or adequately investigated this issue. Accordingly, I do not have an informed basis on which to determine whether such a direct link exists.

- b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

Please see my response to question 10.a.

11. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

12. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

13. Do you believe that *Brown v. Board of Education*¹⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. While I believe that it is typically inappropriate for me as a nominee to express my views as to whether a case was wrongly or rightly decided by the Supreme Court, I also believe that *Brown* is a watershed and inimitable unanimous decision that hopefully places to rest forever *Plessy's* notions of separate but equal.

14. Do you believe that *Plessy v. Ferguson*²⁰ was correctly decided? If you cannot give

¹⁷ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁸ *Id.*

¹⁹ 347 U.S. 483 (1954).

²⁰ 163 U.S. 537 (1896).

a direct answer, please explain why and provide at least one supportive citation.

No. Please see my response to question 13.

15. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Not to my recollection.

16. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”²¹ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

It is the duty of a Federal Judge to address and evaluate whether recusal or disqualification is appropriate under 28 U.S.C., §§144 and 145. If confirmed, I would address and evaluate each matter before me for appropriateness of recusal or disqualification.

17. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”²² Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) held that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” If confirmed, I will fully and faithfully apply all binding precedent.

²¹ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

²² Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted July 1, 2020
For the Nomination of:**

David W. Dugan, to be United States District Judge for the Southern District of Illinois

1. In 2018, you completed a candidate survey for Illinois Right to Life Action. In your response, you wrote: “While I would, if called upon in my role as a Judge, follow the law as it has been established, I do believe that, for a number of reasons, the case of *Roe v. Wade* is sorely misplaced.”

- a. **Do you stand by this statement today?**

Regarding the reference to *Roe v. Wade*, since I am now an judicial nominee, I believe that it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a particular case. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). In any event, I will faithfully apply Supreme Court and Seventh Circuit precedent including *Roe v. Wade* and its progeny.

2. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortions. After the law passed, the number of those health care facilities dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman’s Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

- a. **When determining whether a law places an undue burden on a woman’s right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

The Supreme Court has considered whether barriers to access to abortion have a disproportionate impact on “poor, rural, or disadvantaged women”. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2302, 195 L. Ed. 2d 665 (2016), *as revised* (June 27, 2016). I will faithfully follow Supreme Court and Seventh Circuit precedent on this issue.

- b. **When determining whether a law places an undue burden on a woman’s right to choose, do you agree that the analysis should consider whether the law has an overall impact of reducing abortion access statewide?**

Please see my response to 2.a.

3. In 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that the right to marry is fundamental and must be guaranteed to all same-sex couples.

- a. **In your view, does the right to marry carry an implicit guarantee that everyone should be able to exercise that right equally?**

The Supreme Court has held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05, 192 L. Ed. 2d 609 (2015). I will faithfully follow Supreme Court and Seventh Circuit precedent, including *Obergefell*.

- b. **If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

The Supreme Court has held that hurdles to marriage between same-sex couples must be on the same terms and conditions as marriages between persons of the opposite sex. *See Obergefell v. Hodges*, 135 S. Ct. 2584192 (2015). I will faithfully follow Supreme Court and Seventh Circuit precedent

- c. **If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

Please see my response to 3.b.

4. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

I would review the factors set forth in 18 U.S.C. §3553 for the purpose of determining an appropriate sentence. I would review and give consideration to all of the relevant facts of the case, taking into account the sentencing guidelines, presentence report and objections to it, testimony or statements from victims and the defendant, as well as his/her family and friends. I would grant to the defendant the opportunity to make a statement to the court regarding allocution and consider the same. I would hear and give consideration to arguments of counsel.

Having considered the evidence and information provided, I would review each factor in 18 U.S.C. § 3553 to ensure I impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing. These purposes include the need for the sentence to reflect the seriousness of the crime, to promote respect for the law, and to provide just punishment for the offense. I would seek to ensure that the sentence I impose would appropriately serve to

deter criminal conduct, protect the public from future crimes by the defendant, and to promote rehabilitation, including vocational training, medical care and correctional treatment.

b. As a new judge, how would you plan to determine what constitutes a fair and proportional sentence?

Please see my response to question 4.a. Additionally, I would look to my experiences during my time representing defendants at sentencing hearings. I would consult and consider any sentencing data generated by the Sentencing Commission.

c. When is it appropriate to depart from the Sentencing Guidelines?

If confirmed I will fully and faithfully follow all Supreme Court and Seventh Circuit precedent regarding the authority to depart from the Sentencing Guidelines. Additionally, I would consult and consider any sentencing data generated by the Sentencing Commission.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹

i. Do you agree with Judge Reeves?

I have not thoroughly studied this issue. In any event, as a judicial nominee, it would be inappropriate for me to comment with any personal beliefs regarding Congress's assessments of mandatory minimum sentences. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6)

ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?

Please see my response to question 4.d.i.

iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.

Please see my response to question 4.d.i.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>.

remedy unjust sentences that result from mandatory minimums.¹ **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. Describing the injustice in your opinions?

If confirmed, I would state any and all bases for my decision regarding sentencing, including those for which there is no discretion. In any event, I would faithfully and dutifully adhere to all Supreme Court and Seventh Circuit precedent and sentencing statutes during the sentencing phase of any case.

2. Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?

It is within the province of the Executive Branch to make charging policies and decisions.

3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?

Clemency power is within the province of the Executive Branch.

- e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes, where consistent with sentencing statutes and Supreme Court and Seventh Circuit precedent.

5. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

- b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

¹ See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>.

Racial disparities exist in our criminal justice system and this is evident from statistics demonstrating a disparity in sentencing.

6. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes.

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.