Senator Josh Hawley
Questions for the Record

Hala Y. Jarbou
Nominee, U.S. District Court for the Western District of Michigan

1.

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

The First Amendment precludes Congress from making any laws that prohibit "the free exercise" of religion and the Fourteenth Amendment applies that prohibition to the states. As there is Supreme Court precedent on this topic beginning with *Reynolds v. United States*, 98 U.S. 145 (1879), as well as potential pending and impending cases, as a district court nominee it would be inappropriate under Canons 2A and 3A(6) of the Code of Conduct for United States Judges to comment on any portion or grade any opinion of the Supreme Court. If confirmed as a district judge, I will fully and faithfully apply both Sixth Circuit and Supreme Court precedent.

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

In its determination of the legality of various laws, beginning in *Reynolds v. United States*, 98 U.S. 145 (1879), and continuing today, the Supreme Court has tried to determine the right to the free exercise of religious beliefs and the impact on religious practices. "At 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." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993), citations omitted. Further, "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017), citing *Church of Lukumi Babalu Aye*, *supra* at 533, 542. If confirmed as a district judge, I will fully and faithfully apply both Sixth Circuit and Supreme Court precedent.

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

Generally, when a law discriminates based on religion or interferes with other fundamental rights, a strict scrutiny analysis is applied. However, there exists

disagreement about what qualifies as a substantial burden among the Circuit Courts. As this issue might be the subject of pending or impending litigation, as a district court nominee, it is inappropriate pursuant to Canon 3A(6) of the Code of Conduct for United States Judges for me to comment on the issue.

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

As this issue might be the subject of pending or impending litigation, as a district court nominee, it is inappropriate pursuant to Canon 3A(6) of the Code of Conduct for United States Judges for me to comment on the issue.

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 (RFRA) generally prohibits any federal official or agency from substantially burdening a person's exercise of religion. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that closely held for-profit corporations qualified as persons under the RFRA and could assert claims under the RFRA. As the Court noted, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) amended the RFRA's definition of the "exercise of religion" and "Congress deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religious belief.' § 2000cc-5(7)(A)." *Burwell* at 695-96. Further, "Congress mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Id.* at 696. If confirmed, I will fully and faithfully apply all Sixth Circuit and Supreme Court precedent.

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.

I am not aware of issuing any such opinion.

2.

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

The Supreme Court in *District of Columbia v. Heller* held that "[t]he Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." The Supreme Court further stated that "the right secured by the Second Amendment is not unlimited" and that "nothing in our opinion should be taken 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." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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.

I am not aware of issuing any such opinion.

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?

This issue has been discussed in recent Supreme Court decisions, although the Court has not spoken directly on the issue. As this issue might be the subject of pending or impending litigation, as a district court nominee, it is inappropriate pursuant to Canon 3A(6) of the Code of Conduct for United States Judges for me to comment on the issue.

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."

I agree. As a district court judge, I will apply the law fairly and impartially as written, not as some may view it should be applied or as some may believe it was intended to be applied. In so doing, I will look at the plain meaning of the word(s), what the term meant at the time the law was passed as understood by the general public. If confirmed, I will follow Sixth Circuit and Supreme Court precedent that address acceptable methods of constitutional and statutory construction.

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?**

      I have not read Herbert Spencer's book *Social Statics* that Justice Holmes refers to in the quote above. I believe Justice Holmes was dissatisfied with the majority's activism and claimed the case was "decided upon an economic theory which a large part of the country does not entertain" and that "a constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75, (1905). As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent.

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

      As a general rule Canons 2A and 3A(6) of the Code of Conduct for Unites States Judges prohibit me from grading or commenting on the propriety of a Supreme Court opinion. It is noted however, that *Lochner v. New York*, has been partially overturned by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and subsequent due process precedent. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent.

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.***

      The Supreme Court held in *Chevron* that courts must defer to a federal agency's reasonable interpretation of ambiguities in the regulation. If Congress has directly spoken on an issue, agencies must carry out the clearly expressed intent of Congress. If the statute's language is unclear, judicial deference is given to an administrative agency's interpretation of that language, unless the interpretation is

arbitrary or capricious or contrary to the statue. If confirmed, I will fully and faithfully apply both Sixth Circuit and Supreme Court precedent.

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

As a district court judge, I will apply the law fairly and impartially as written, not as some may view it should be applied or as some may believe it was intended to be applied. In so doing, I will look at the plain meaning of the word(s), what the term meant at the time the law was passed as understood by the general public. If confirmed, I will follow Sixth Circuit and Supreme Court precedent that address acceptable methods of constitutional and statutory 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 held in *Chevron* that if Congress has not directly spoken on an issue, judicial deference is given to an administrative agency's interpretation of that issue; if Congress has clearly expressed its intent, that intent is binding on federal courts. Whether an agency's interpretation of a statute is "lawful" is limited by judicial review, see *Barnhart v. Walton*, 535 U.S. 212, 217 (2002). A court "must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Id.* at 218, citations omitted. If confirmed as a district judge, I will fully and faithfully apply both Sixth Circuit and Supreme Court precedent.