Senator Chuck Grassley
Questions for the Record

Donald K. Schott
Nominee, U.S. Circuit Judge for the Seventh Circuit

1. **At your hearing, Senator Tillis asked you what sort of circumstances would make it appropriate for an appellate court to overturn a precedent within a circuit. You responded: "Well, obviously the only circumstance in which you could overturn a precedent within the circuit would be an en banc decision."**

   That is incorrect. Seventh Circuit Rule 40(e) permits individual panels to overturn circuit precedent *sua sponte* unless a majority of the circuit requests to hear the issue en banc before the opinion is published. Under this rule it is not impossible for a *single circuit judge*—joined by a district judge and not opposed by a majority of the circuit—to overturn circuit precedent himself.

   a. **Given that there are multiple ways in which precedent can be overturned within the Seventh Circuit, what specific factors will you take into consideration when deciding to overturn circuit precedent?**

      Response: Under Seventh Circuit Rule 40(e) a "proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court … shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted." Any opinion published pursuant to Rule 40(e) must contain a footnote stating, in substance, that "[t]his opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of" overruling the prior decision. So, as a practical matter, a majority of the active members must agree with, or at least not oppose, a panel opinion that overrules circuit precedent. The result of this procedure has been described by the court as meaning that "[O]ur prior decisions are controlling, and, *only as a panel*, we may not overrule Circuit precedent." *United States v. Wolvin*, 62 F. App'x 667, 668 (7th Cir. 2003) (unpublished decision) (emphasis in original).

      If I am confirmed, the factors I would take into consideration when deciding whether or not to overturn a circuit precedent are the factors that have been stated in several Seventh Circuit cases, and I would follow those cases. First, a circuit precedent may not be overturned without "compelling reasons." *United States v. Reyes-Hernandez*, 624 F.3d 405, 412 (7th Cir. 2010). In *Haas v. Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990), the court identified two factors to be used in determining whether there are compelling reasons to overrule a precedent, noting that "principles of *stare decisis* require that we 'give considerable weight to [prior decisions of this court] unless and

until they have been overruled or undermined by decisions of a higher court, or other supervening developments, such as statutory overruling'" (quoting *Colby v. J.C. Penney Co*., 811 F.2d 1119, 1123 (7th Cir. 1987). Another factor identified by the Seventh Circuit as a consideration for determining whether to reexamine a circuit precedent is when "a number of other circuits reject a position that we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play…." *United States v. Hill,* 48 F.3d 228, 232 (7th Cir. 1995). Nonetheless, even where other circuits may reach a different result, the Seventh Circuit has made clear that this is simply a factor that leads to reexamination of precedent. "That is not to say that reexamination will cause us to relinquish the position. We are not merely to count noses." *Id*.

i. How will you weigh these factors?

Response: The amount of weight that the Seventh Circuit gives to each of these factors in any particular case depends on the facts and circumstances of that case.

b. You also said: "I think there is a great value of following precedent" and "I know from my practice that having some certainty in the law is very important to litigants…"

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

Response: It is very important to decide cases correctly. I anticipate that it will be rare when the correct result in a case is at odds with existing circuit precedent, so the tension between certainty and correctness should not occur often. However, if it does occur in a case in which I am a member of the panel, and a decision does need to be made between certainty and correctness, I will follow the Seventh Circuit's admonitions that "if the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window," *Tate v. Showboat Marina Casino Partnership*, 431 F.3d 580, 582 (7th Cir. 2005), and that "[t]he essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005).

1. What factors will you take into consideration in weighing the good of predictability against the good of correctness?

Response: The factors that the Seventh Circuit has identified as appropriate to consider in weighing the good of predictability against the good of correctness are the factors identified in the *Hass, Colby,* and *Hill* cases cited in my response to Question 1.a.

ii. Are there areas of the law where certainty is more important than correctness?

Response: Area of law is not, in itself, one of the factors the Seventh Circuit has identified in weighing the good of predictability and the good of correctness. See the factors identified in my response to Question 1.a. However, the Supreme Court, in its determination of when to reexamine previous holdings, considers "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation…." *Tate v. Showboat Marina Casino Partnership*, 431 F.3d 580, 583 (7th Cir. 2005) (internal quotations and citations omitted). This a factor that may come into play more frequently in the commercial area of law than in other areas of law.

1. Is certainty more valuable than correctness in commercial law? Why or why not?

Response: Since significant economic decisions are often made based on commercial law rules, commercial law is an area where certainty about those rules is valuable, especially if "the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation…." *Tate v. Showboat Marina Casino Partnership*, 431 F.3d 580, 583 (7th Cir. 2005) (internal quotations and citations omitted). However, the facts and circumstances of a particular case would have to be considered in weighing the relative value of certainty and correctness in that case.

2. Is certainty more valuable than correctness in criminal law? Why or why not?

Response: Although it is difficult to generalize about all cases in the criminal law area, in a recent criminal law case the Supreme Court observed that "departing from those [prior] decisions does not raise any concerns about upsetting private reliance interests." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015).

2. At your hearing, you said in response to Senator Tillis: "The role of a court is not to . . . take public opinion polls and decide what to do in light what seems to be popular at the moment. The role of the court is to interpret and apply the law as written." You also said in response to a question from Senator Klobuchar about reaching consensus on panel decisions that you "enjoy trying to build consensus."

a. Is there a tension between "building consensus" in the judicial conference room and applying "the law as written"?

Response: I do not believe that there is a tension between "building consensus" in the judicial conference room and applying the law as written. A judge should apply the law as written. But even within that framework there are ways to build consensus. For example, in the arbitration instance I referred to in my response to questions from Senator Klobuchar, our panel disagreed about how to apply the facts to some of the legal issues before us. But, we resolved the matter on the basis of a legal issue where we all agreed as to the correct way to apply the facts to the governing law.

b. What is more important, reaching the correct conclusion about the law or reaching a conclusion about the law all three judges agree with? Why?

Response: Reaching the correct conclusion about the law is more important, because deciding cases correctly is a primary function of a judge.

c. What is more important, reaching the correct conclusion about the law or reaching a conclusion that secures a majority? Why?

Response: Reaching the correct conclusion about the law is more important for the reasons explained above.

d. When is it appropriate for a judge to dissent (1) from a panel opinion, (2) from an en banc opinion, and (3) from an order denying en banc rehearing? Why?

Response: It is appropriate for a judge to dissent from a panel opinion, an en banc opinion or an order denying an en banc hearing when the judge believes that a correct application of the law to the facts of that particular case would result in a decision that is different from the decision resulting from the controlling opinion. This is because a judge has a duty to apply the law to the facts.

e. When is it appropriate for a judge to join a majority opinion but file a separate concurring opinion? Why?

Response: It is appropriate for a judge to join a majority opinion but file a separate concurring opinion when that judge agrees with the majority's conclusion but reaches that conclusion in a different way than the majority. In such a case the concurring opinion will provide additional guidance to interested parties about how the court might rule in future cases involving related issues. An example of this is Justice Alito's concurring opinion in *United States v. Jones*, 132 S. Ct. 945, 957-964 (2012).

3. On appellate review, should judges restrict themselves to considering facts in the record?

Response: Yes. The Seventh Circuit "generally decline[s] to supplement the record on appeal with materials that were not before the district court." *Ruvalcaba v Chandler* 416 F.3d 555, 562. n.2 (7th Cir. 2005). "An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below." *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990).

a. Under what circumstances should circuit judges take notice of facts not in the record?

Response: The Seventh Circuit has held that it "may take judicial notice of matters of public record." *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267, 277, n.13 (7th Cir. 2016). See also *Fed. R. of Evid. 201(a)* (governing judicial notice of adjudicative facts).

4. At your hearing, Senator Vitter asked you about the amicus brief you filed in *Appling v. Walker*, 853 N.W.2d 888 (Wis. 2014). In relation to that case, he asked you to explain your understanding of the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Specifically, he asked the following questions, which you offered to investigate. As you read *Obergefell*:

a. Is the right to enter into a same-sex marriage provided by the Constitution's guarantee of due process?

Response: The Supreme Court's decision in *Obergefell v. Hodges* 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." *Obergefell*, 135 S. Ct. 2584, 2604 (2015).

b. Is the right to enter into a same-sex marriage provided by the Constitution's guarantee of equal protection?

Response: The Supreme Court's decision in *Obergefell v. Hodges* 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." *Obergefell*, 135 S. Ct. 2584, 2604 (2015).

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

Response: The text of the Constitution does not refer to the right to marry.

5. Your amicus brief in *Appling* devoted significant argument to the legislative history of the statute in question.

a. Do you believe legislative history to be useful? Why or why not?

Response: The amicus brief I submitted discussed statements that were made during the campaign to ratify the constitutional amendment which petitioners claimed made Chapter 770 unconstitutional. These were not statements that were part of the legislative history of Chapter 770, but statements made by the proponents of the

constitutional amendment about the impact of the constitutional amendment on the constitutionality of Chapter 770.

In the context of statutory interpretation, the Supreme Court and the Seventh Circuit have stated that the role of legislative history is limited. "The general rule of statutory intepretation is that one must first look to the language of the statute and assume that its plain meaning 'accurately expresses the legislative purpose.'" *United States v. Shriver*, 989 F.2d 898, 901 (7th Cir.1992), *as amended on reh'g* (Apr. 2, 1993), quoting *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194 (1985). For this reason, "legislative history of a statute is of weighty import only when the statute is not clear or when the application of its 'plain language produces absurd or unjust results.'" *Shriver*, at 901, quoting *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir. 1989). When a statute is unclear, using legislative history to determine its meaning "is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory…. Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members - or, worse yet, unelected staffers and lobbyists - both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil v. Allapattah*, 545 U.S. 546, 568 (2005).

b. What do you understand the phrase "congressional intent" to mean?

Response: I understand the phrase "congressional intent," when used in the context of statutory interpretation, to refer to "the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC v. Joiner*, 320 U.S. 344, 350-351 (1943).

c. Do you believe that legislative history reflects "congressional intent"?

Response: The "cardinal canon" for determining legislative intent is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). When a statute is ambiguous, courts may turn to other canons of construction as "rules of thumb that help courts determine the meaning of legislation." *Id* at 253. The Supreme Court has indicated that, in some situations, "proper construction" of a statute "requires consideration of its wording against the background of its legislative history and in light of the general objectives Congress sought to achieve." *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). However, as noted in my response to Question 5.a., the Supreme Court has also warned that federal courts must be

cautious about relying on legislative history as an accurate reflection of legislative intent.

6. The Supreme Court of Wisconsin has held that where a "statute's meaning is plain, there is no ambiguity to clarify, and no need to consult extrinsic sources such as legislative history." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 681 N.W.2d 110, 126 (Wis. 2004).

a. In a diversity jurisdiction case, is a panel of the Seventh Circuit bound by this rule? Why or why not?

Response: In a diversity case, a panel of the Seventh Circuit asked to interpret a Wisconsin statute must interpret the statute as "the state's highest court would construe it." *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 634 (7th Cir. 2014). Accordingly, the Seventh Circuit must - as the Wisconsin Supreme Court would - "assume that the legislature's intent is expressed in the statutory language." *State ex rel. Kalal* at 124.

b. For cases involving federal law, would it make sense for the Seventh Circuit to adopt a similar rule? Why or why not?

Response: "The general rule of statutory interpretation is that one must first look to the language of the statute and assume that its plain meaning 'accurately expresses the legislative purpose.'" *United States v. Shriver*, 989 F.2d 898, 901 (7th Cir.1992), *as amended on reh'g* (Apr. 2, 1993), quoting *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194 (1985). "[L]egislative history of a statute is of weighty import only when the statute is not clear or when the application of its 'plain language produces absurd or unjust results.'" *Shriver*, at 901, quoting *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir. 1989). These rules of statutory interpretation guide the Seventh Circuit's analysis unless they are overruled by the Supreme Court or new circuit precedent.

7. Your practice has consisted of both state and federal litigation. As a federal judge, when would you certify a question to a state supreme court?

Response: As a federal judge, my analysis of whether to certify a question to a state Supreme Court would be guided by Rule 52 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit and by controlling precedent within the Seventh Circuit.

a. What factors would you consider in deciding whether to certify a question?

Response: *State Farm Mutual Auto Ins. Co. v. Pate*, 275 F.3d 666, 671-73 (7th Cir. 2001) describes several factors a Seventh Circuit panel should consider in determining whether or not to certify a question to a state Supreme Court. "'The

most important consideration guiding the exercise of this discretion…is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case.'" *Pate,* at 671, citing *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988). "[C]ertification is appropriate when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case and where the state Supreme Court has yet had an opportunity to illuminate a clear path on the issue.'" *Pate* at 672, quoting *In re Badger Lines, Inc.* 140 F.3d 691, 698-99 (7th Cir.1988). "Certification to a state supreme court is more likely when the result of the decision will almost exclusively impact citizens of that state…or when there is a conflict between intermediate courts of appeal, …or if it is an issue of first impression…." *Id* (internal citations omitted). On the other hand "'[f]act specific, particularized decisions that lack broad, general significance are not suitable for certification to a state's highest court [and]…if a question may not be dispositive to a case, then it is a weak candidate for certification." *Id.*

b. What problems, if any, do you see in the practice of certifying questions?

Response: As recognized in *Pate,* in considering the question of whether to certify an issue to a state supreme court, the federal panel should be mindful of any delay and additional cost the certification process may cause for the litigants in the case, and also mindful of burdening the state court, which is already contending with a docket of its own.

c. What benefits, if any, do you see in the practice of certifying questions?

Response: "Certification is a useful tool of cooperative federalism. It permits a federal court to seek a definitive ruling from the highest court of a state on the meaning of state law." *State Farm Mutual Auto Ins. Co. v. Pate,* 275 F.3d 666, 671 (7th Cir. 2001), citing *City of Houston v. Hill,* 482 U.S. 451, 470 (1987).

d. What other judicial tools or doctrines would you consider using to resolve a question of state law, consistent with the *Erie* doctrine?

Response: "When the state Supreme Court has not decided the issue [of state law], the rulings of the state intermediate appellate courts must be accorded great weight, unless there are persuasive indications that the state's highest court would decide the case differently." *State Farm Mutual Auto Ins. Co. v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001). In a case involving construction of a state statute not previously interpreted by a state's supreme court, the panel should interpret the statute using the same process as "the state's highest court would construe it." *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 634 (7th Cir. 2014) (citing *State ex rel. Kalal* for the proposition that Wisconsin courts "assume that the legislature's intent is expressed in the statutory language").

8. Have you ever litigated any questions involving the following jurisdictional issues? If so, what, if anything, did you learn from these cases about the limits of federal jurisdiction?

a. The Collateral Order Doctrine

b. *Younger* abstention

c. *Colorado River* abstention

d. *Pullman* abstention

e. The *Rooker-Feldman* Doctrine

f. Sovereign Immunity

g. Ripeness

h. Mootness

Response: I do not have a way to search the pleadings and briefs in all the cases I have litigated in my career, but from memory I know I have litigated cases in which questions involving the doctrines of *Younger* abstention, *Colorado River* abstention, *Pullman* abstention, Sovereign Immunity, Ripeness and Mootness have arisen. I do not recall litigating any cases in which the Collateral Order Doctrine or the *Rooker-Feldman* Doctrine were involved. Based on this, and other experience, I know that federal courts are courts of limited jurisdiction. Some of these limits are statutorily created and some arise from Article III, Section 2 of the Constitution, including the "case or controversy" requirement. Others are based on judicially created doctrines of deference to other tribunals, such as state courts or administrative agencies. A common theme in all of these doctrines is that the federal courts should, as a first step, carefully consider whether it is an appropriate forum to resolve a matter brought before it.

9. Please describe with particularity the process by which these questions were answered.

Response: I received these questions on the evening of May 25, 2016. I prepared responses, which I shared with the Office of Legal Policy at the Department of Justice. I finalized my responses after speaking with a Justice Department official and sent the final responses to the Department of Justice with a request that they forward those responses on to the appropriate person at the Senate Judiciary Committee.

10. Do these answers reflect your true and personal views?

Response: Yes.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Judicial Nominations
May 18, 2016

Donald K. Schott
Nominee, U.S. Circuit Judge for the Seventh Circuit

1. **What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

   Response: If I am confirmed, my approach to statutory interpretation will be based on controlling precedent. In the Seventh Circuit, "[t]he general rule of statutory interpretation is that one must first look to the language of the statute and assume that its plain meaning 'accurately expresses the legislative purpose.'" *United States v. Shriver,* 989 F.2d 898, 901 (7th Cir.1992), *as amended on reh'g* (Apr. 2, 1993), quoting *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194 (1985). "[L]egislative history of a statute is of weighty import only when the statute is not clear or when the application of its 'plain language produces absurd or unjust results.'" *Shriver*, at 901, quoting *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir. 1989). Under the limited circumstances in which reference to legislative history is employed in statutory interpretation, federal courts must be cautious in relying on legislative history as an accurate reflection of legislative intent. *Exxon Mobil v. Allapattah,* 545 U.S. 546, 568 (2005).

2. **What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

   Response: The 10th Amendment to the Constitution limits the power of the federal government by explicitly stating that the "powers not delegated to the United States by the Constitution, nor prohibited to the States by it, are reserved to the States respectively, or to the people." As an example, the federal government "'may not compel the States to enact or administer a federal regulatory program.'" *Printz v. United States,* 521 U.S. 898, 926 (1997), quoting *New York v. United States*, 505 U.S. 144, 188 (1992). A court should apply the 10th Amendment when faced with a challenge to a federal statute that is not authorized by the powers granted to the federal government under the Constitution.

3. **Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

   Response: Standing is an important doctrine designed to ensure that matters being resolved by the federal courts are actual cases or controversies as required by Article III, Section 2 of the Constitution. Among other things, this doctrine "which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l,* 133 S. Ct. 1138,

1146 (2013). It is one of many rules that reflect the fact that federal courts are courts of limited jurisdiction. The doctrine can affect litigants in competing ways. It may impede the ability of some litigants to litigate in the federal courts, but this may have the impact of reducing congestion and making those same courts more accessible to other litigants who meet the standing requirements. In addition, in assessing the impact of the standing doctrine on the ability of litigants to obtain relief in our legal system it must be remembered that federal courts are only one part of that overall legal system. Litigants who may not be able to obtain relief in the federal courts because of the standing doctrine may be able to obtain relief in another forum, such as a state court.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Mr. Donald Karl Schott

1. **Some individuals have argued that the United States Constitution is a "living document," subject to different interpretations as society changes. Do you subscribe to this point of view?**

   Response: No.

2. **Please define judicial activism. Is judicial activism ever appropriate?**

   Response: I do not have a personal definition of the term judicial activism. In my reading I have seen the term used by others, and believe it usually refers to circumstances in which a judge makes decisions based on his or her personal views, and not based on binding legal authorities. Using that definition, judicial activism is not ever appropriate.

3. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

   Response: As stated by the Supreme Court "[d]ue respect for the decisions of a coordinate branch of Government demands that [a federal court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). In addition, a court should attempt to interpret the statute in a way that avoids a finding of unconstitutionality, if such an interpretation is consistent with the plain meaning of the statute. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

4. **What is a fundamental right? From where are these rights derived?**

   Response: For purposes of the substantive due process doctrine, a fundamental right is a right which is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of the word liberty,' such that 'neither liberty nor justice would exist if they were sacrificed'". *Washington v. Glucksberg*, 521 US 702, 720-721 (1997) (internal citations omitted).

5. **Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

   Response: The First Amendment does offer protection to private citizens and businesses in their exercise of sincerely held religious beliefs. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In addition to this constitutional protection, the United States Supreme Court has recently considered cases involving claims that certain government regulations infringe on religious rights in violation of the Religious Freedom Restoration Act of 1993. *See, e.g., Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) and *Zubik v. Burwell*, 578 U.S. __ (May 16, 2016).

6. **What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

   Response: Neither the United States Supreme Court nor the United States Court of Appeals for the Seventh Circuit has decided the specific level of heightened scrutiny that is constitutionally required when a statute or regulation relating to firearms is challenged under the Second Amendment to the United States Constitution, but both have rejected the rational basis test. *District of Columbia v. Heller,* 554 U.S. 570, 628 n. 27 (2008) ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right…."); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Friedman v. City of Highland Park,* 784 F.3d 406, 410, (7th Cir. 2015); ("[I]f the Second Amendment imposed only a rational basis requirement, it wouldn't do anything.")

7. **Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

   Response: In *Crawford v. Marion County (Indiana) Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld an Indiana law requiring voters to show photo identification before being eligible to cast their votes, concluding that the law was non-discriminatory and supported by valid, neutral justifications. It also found that the record before the court did not demonstrate a special burden on some voters that was sufficient to support petitioners' facial challenge to the law. If confirmed, I would follow this and any other binding precedent in reviewing any decision in a case challenging such a law.

8. **One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

   Response: If I am confirmed, I will take very seriously my obligation to manage my case load diligently and efficiently, and to "secure the just, speedy, and inexpensive determination" of all matters before me. *See Fed. R. Civ. Proc. 1.* At this time, I would anticipate that the process I would use to prioritize the consideration of cases would be dependent upon the facts and circumstances of those cases. In addition, under the Seventh Circuit's operating procedures, certain motions may require immediate resolution and if sitting as a motion judge I would prioritize those motions requiring immediate action.

9. **Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty**?

   Response: The United States Supreme Court has upheld the constitutionality of the death penalty. *See, e.g., Baze v. Rees*, 553 U.S. 35, 47 (2008) (noting that it is "settled" that "capital punishment is constitutional.") As a circuit court judge, I would not have a problem affirming a lower court order imposing such a penalty if the lower court properly followed all controlling law in making the decision to impose such a penalty.