Senator Josh Hawley
Questions for the Record

Iain D. Johnston
Nominee, U.S. District Court for the Northern District of Illinois

1.

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

Like all constitutional provisions, the First Amendment's protection of the right to freely exercise religion is paramount. Under the incorporation doctrine, the scope of the First Amendment extends to the States and local governments. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). But like the rights protected by other Constitutional provisions, the right is not unlimited.

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

In the context of this question, it appears the freedom of worship is narrower and limited to activities such as prayer and congregating. If that assumption is true, then the free exercise of religion is broader than merely the freedom of worship. The rights protected by the First Amendment are not that cabined. The First Amendment protects the right of persons to exercise their religious beliefs.

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

Depending on the issue presented, I would apply the applicable statutory standard or controlling precedent. For example, in a case involving the Religious Land Use and Institutionalized Persons Act (RLUIPA), the statute addresses substantial burden in the context of land use. *See* 42 U.S.C. Section 2000cc. The Seventh Circuit has interpreted "substantial burden" in this specific context to mean that a regulation imposes a substantial burden on religious exercise if it necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real estate—effectively impractical. But this burden need not be insuperable to be substantial. *See, e.g., Vision Church v. Vil. of Long Grove*, 468 F.3d975, 997 (7th Cir. 2006); *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005).

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

It is not appropriate for a federal court to *sua sponte* question the sincerity of a religiously held belief. But if a party were to raise this issue, a court should apply the appropriate statutory standard and case law precedent. In the Seventh Circuit, that precedent includes, but is not limited to, *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 451-54 (7th Cir. 2013) and cases cited therein.

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 Supreme Court has stated that a person's right to free exercise of religion might be limited or more broadly protected by generally applicable laws, but that this is a delicate question. *See Materpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1723-24 (2018). Because this issue is the subject of potential litigation, it would not be appropriate to further respond. Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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.

Yes; I entered a consent decree in *Fraternite Notre Dame v. Cty. of McHenry*, No. 15 CV 50312, 2020 U.S. Dist. LEXIS 40030 (N.D. Ill. Mar. 2, 2020), finding that the County violated an Order of Catholic nuns' rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. Section 2000cc.

2.

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

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects a person's right to keep and bear arms (specifically in *Heller*, handguns). The holding of *Heller* was made applicable to the States and local governments in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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.

As the administrative law judge for the Illinois State Police hearing appeals under the Firearm Owners Identification Act, I issued recommendations to the Director of the Illinois State Police. I do not possess these orders.

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?**

It is my understanding that this issue is currently the subject of potential legislation and litigation, and as a result, it would be inappropriate for me to express a belief on this issue. Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 generally agree with this statement. The purpose of interpreting a statute is to apply the law as written; no more, no less.

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?**

As a sitting United States magistrate judge and district judge nominee it is not appropriate for me to weigh in on the correctness of a Supreme Court decision. Moreover, I cannot state whether I agree Justice Holmes' statement because I am unsure what he meant when I first read this statement in 1987 and am still unsure what he meant.

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

As a sitting United States magistrate judge and district judge nominee, it is not appropriate for me to weigh in on the correctness of a Supreme Court decision. That being said, it appears that the reasoning underlying *Lochner* is no longer valid. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 596

(1977) (referring to *Lochner* as "not authoritative"); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (overruling *Adkins v. Children's Hosp. of Dist. of Columbia*, 261 U.S. 525 (1923) which relied on *Lochner*).

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's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) addressed the issue of how a court reviews an agency's interpretation of a statute the agency administers. The Supreme Court articulated a two-part test. First, applying the ordinary tools of statutory construction, the court must determine whether Congress has "directly spoken to the precise question at issue." If the Congressional intent is clear, the inquiry ends, and the plain, unambiguous language must be given effect, without any deference to the agency's interpretation of the statute. But if the statute is ambiguous or silent with respect to the specific issue, *Chevron* holds that the court must determine if the agency's interpretation of the statute is based on a permissible construction of the statute.

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

The Supreme Court in *Chevron* and subsequent cases applying the *Chevron* analysis state that a court must apply the ordinary tools of statutory construction to determine whether a statute is ambiguous in the first instance. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). Accordingly, depending on the contentions of the parties and the relevant facts, I would apply the applicable tools of statutory construction to determine whether the statute itself is ambiguous.

    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?**

No. Whether a statute is ambiguous is a legal question for the court, not the agency, to decide. *See Barnhart v. Warton*, 535 U.S. 212, 217-18 (2002). If a court were to defer on this issue, then the result would be that the agency could assert that the statute is ambiguous and, consequently, its interpretation of the statute would prevail without the

court ever interpreting the statute. That double deference would make an agency's interpretation of a statute effectively unreviewable.