

Senator Vitter
Questions for the Record

Ann Marie Donnelly,
Nominee, U.S. District Judge for the Eastern District of New York

- 1. What is your opinion of the constitutionality of the majority ruling NLRB v. Canning and what would be your allowable time frame between pro forma sessions of the senate before the president can soundly exercise his recess appointment power? Is it 3 days? 4? 5?**

Response: The Supreme Court recently held that the President is empowered to make recess appointments during any recess of sufficient length, and that “in light of historical practice, a recess of greater than three days but less than ten days is presumptively too short to fall within the [Appointments] Clause,” the Court used the word “presumptively” to leave open the possibility that some “very unusual circumstance...could demand the exercise of the recess-appointment power during a shorter break.” *NLRB v. Canning*, 134 S. Ct. 2550, 2567 (2014). If confirmed, I would apply this precedent and any applicable Second Circuit case law.

- 2. In your opinion, is it an undue burden on a woman seeking an abortion under Planned Parenthood v. Casey if a state requires that doctors performing the procedures have admitting privileges at one of the hospitals in the state to protect women’s health and, as a result, all abortion clinics in the state are shut down?**

Response: The constitutionality of a law that mandates state hospital admitting privileges for doctors who perform abortions is currently the subject of litigation. Neither the Supreme Court nor the Second Circuit have ruled on this issue. As a judicial nominee, I do not believe that it would be appropriate for me to address this subject.

- 3. The Court’s ruling on the right to privacy in Griswold v. Connecticut laid the foundation for Roe v. Wade. From your perspective, is Roe v. Wade settled law?**

Response: *Roe v. Wade*, 410 U.S. 113 (1973), as clarified and modified by subsequent cases (see, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)) is binding Supreme Court precedent, and lower courts must follow it.

4. **Do you agree that the ruling in Baker v. Nelson precludes the federal courts from hearing cases regarding state definitions of marriage? Do you think that US v. Windsor contradicts the Court's previous ruling in Baker?**

Response: In 1971, the Minnesota Supreme Court rejected a constitutional challenge to a state law that restricted marriage to members of the opposite sex. *Baker v. Nelson*, 291 Minn. 310 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). The plaintiff appealed to the Supreme Court, at a time when the Court was required to accept the appeal as a matter of right, and the Court dismissed the case “for want of a substantial federal question.” The precedential significance of the Supreme Court’s dismissal is limited, since a “summary affirmance is an affirmance of the judgment only.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court found that it had jurisdiction to consider whether the federal Defense of Marriage Act precluded Ms. Windsor from claiming a federal tax exemption as a surviving spouse. *Windsor* is established precedent that a district court judge is obligated to follow.

5. **What is your philosophy on judicial precedent and would you apply prior binding case law that resulted in a court decision that you personally disagree with?**

Response: The philosophy to which I have adhered in my six years on the state court bench, and to which I will adhere if confirmed as a district court judge, is one of strict adherence to binding precedent, regardless of personal beliefs.

6. **How do you reconcile the 2nd Amendment basic right under the Constitution to keep and bear arms made applicable to states under the 14th Amendment in McDonald v. City of Chicago with the more recent crop of lower federal court rulings upholding gun control laws, such as laws requiring gun registration, laws making it illegal to carry guns near schools and post offices, and laws banning bottom loading semi-automatic pistols for protection?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), made applicable to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2008), the Court struck down an ordinance that banned the possession of handguns in the home. The Court ruled that the Second Amendment protects the right to keep and bear arms, but cautioned that “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” and that nothing in the decision “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.” *Heller*, 554 U.S. at 626-27. Since *Heller* and *McDonald*, the Second Circuit has had occasion to consider various laws regulating the possession of firearms. See, e.g., *Burgess v. Town of*

Wallingford, 569 Fed. Appx. 21 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013), *cert. denied sub nom. Kwong v. de Blasio*, 134 S. Ct. 2696 (2014); *United States v. Bryant*, 711 F.3d 364 (2d Cir. 2013), *cert. denied sub nom. Bryant v. United States*, 134 S. Ct. 904 (2013); *Kachalsky v. County of Westchester*, 710 F.3d 81 (2d Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013). If confirmed, I will follow the binding precedent of the Supreme Court and the Second Circuit.

7. Do you support suspending capital punishment sentencing pending the Supreme Court's decision on the use of lethal injection drugs in Oklahoma?

Response: The Supreme Court recently heard arguments on this issue in *Glossip v. Gross*, and stayed the executions of the petitioners pending the Court's decision. As a judicial nominee, I do not believe that it would be appropriate for me to opine on this subject. If confirmed, I will follow binding precedent from the Supreme Court and the Second Circuit.