

**Nomination of John B. Nalbandian,
to be United States Circuit Judge for the Sixth Circuit
Questions for the Record Submitted March 14, 2018**

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?

I would apply the Supreme Court's governing precedent in the area of substantive due process and fundamental rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (listing cases).

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. *See Glucksberg*, 521 U.S. at 720-21.

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

Yes. I would be bound by precedent from the Supreme Court and the Sixth Circuit. I would also consider relevant precedent from other courts for its persuasive value.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

I would consider binding precedent from the Supreme Court and the Sixth Circuit including any governing rationale.

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, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Both *Casey* and *Lawrence* are binding Supreme Court precedents and I would apply them faithfully as well as all other applicable precedent.

f. What other factors would you consider?

I would consider any other factors that are relevant under governing Supreme Court and Sixth 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 on numerous occasions that the guarantee of equal protection in the Fourteenth Amendment applies to discrimination based on gender as well as race. *See, e.g., United States v. Virginia*, 518 U.S. 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?

To the extent that this question is asking for an opinion on something that may come before me as a judge, it would be inappropriate for me to answer under the canons of judicial ethics. Otherwise, the academic rationale for this Supreme Court precedent will have no effect on my duty to apply it fully and faithfully.

- 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?

I do not know why the *United States v. Virginia* dispute was filed and resolved when it was.

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

Obergefell v. Hodges held that the Fourteenth Amendment requires same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." 135 S. Ct. at 2607.

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

Under the judicial canons of ethics, it would be inappropriate for me to opine on the subject of pending litigation or on matters that might come before me in litigation.

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

Yes, under Supreme Court decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

- a. Do you agree that there is a constitutional right to privacy that protects a

woman's right to obtain an abortion?

Yes, under Supreme Court decisions like *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

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?

Yes, under the Supreme Court's decision in *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?

As a lower court judge, I would fully and faithfully apply the precedent of the Supreme Court and the Sixth Circuit. Where applicable precedent considers evidence of changing societal understandings, I would follow that analysis.

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

I would follow the relevant precedent of the Supreme Court and the Sixth Circuit regarding this type of evidence. Generally, under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), federal courts may permit and consider expert evidence where it may assist the trier of fact in resolving a question at issue and where the evidence meets the standards of reliability set forth by governing law.

5. 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?

My understanding is that this question has been the subject of much scholarship. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); William Baude, *Is Originalism Our Law?*, 115 Columbia L. Rev. 2349 (2015); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis Univ. L.J. 550 (2006). This is an academic debate that does not affect the binding force of the *Brown* decision on a lower court judge.

b. How do you respond to the criticism of originalism that terms like “the freedom of speech,” ‘equal protection,’ and ‘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-pages/democratic-constitutionalism> (last visited March 12, 2018).

This is an academic debate that does not change the force of Supreme Court precedent. That said, Supreme Court decisions show that in some instances discerning the original public meaning of certain provisions of the Constitution may not be easy. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). But that does not change the legal force and precedential nature of the Supreme Court’s decisions.

6. During your hearing, you asserted that the Supreme Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967), was properly grounded in the principle of equal protection, notwithstanding the public’s understanding of whether equal protection included a right to interracial marriage at the time of the Fourteenth Amendment’s adoption.

a. 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?

As a lower court judge I would be bound by the Supreme Court’s holdings and governing rationales on the original public meaning of particular provisions of the Constitution. And regardless of the particular methodology employed by the Supreme Court in interpreting the Constitution or its provisions, I am absolutely bound by that Court’s decisions.

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

Please see my answer to question 6(a).

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

As a lower court judge, I would be bound by the precedents of the Supreme Court and the Sixth Circuit in any case involving the interpretation of a constitutional provisions. I would consider the arguments of the parties as well as all applicable law (including law regarding what sources the Supreme Court and the Sixth Circuit have consulted in construing constitutional provisions) and precedent and the specific facts of the case.

7. At your hearing, you stated that *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967), were correctly decided, but you then refused to answer whether *Roe v. Wade*, 410 U.S. 113 (1973), was correctly decided.

a. Please explain why you would not answer this question with respect to *Roe v. Wade* but would answer it with respect to *Brown v. Board of Education* and *Loving v. Virginia*.

I declined to answer because of the possibility that litigation involving abortion would come before me. Please see my answer to Senator Feinstein's question 5(a) (listing recent and pending district court and Sixth Circuit cases involving the contours of abortion rights).

As I indicated at my hearing I will fully and faithfully follow all Supreme Court precedent including *Roe v. Wade* and *Casey*.

There is no reason to believe that racial segregation and interracial marriage will pose any contemporary controversies in the country. With regard to lists of Supreme Court cases and whether they are correctly decided, I believe further comment would be inappropriate for the same reasons that, in their confirmation hearings, Justice Kagan declined to "grade cases" from the Supreme Court and Justice Gorsuch declined to offer personal views on past Supreme Court cases.

All of the cases listed below are precedents of the Supreme Court and I will follow them fully and faithfully.

b. Was *Baker v. Carr*, 369 U.S. 186 (1962), correctly decided?

Please see my answer to question 7(a) above.

c. Was *Gideon v. Wainwright*, 372 U.S. 335 (1963), correctly decided?

Please see my answer to question 7(a) above.

d. Was *United States v. Nixon*, 418 U.S. 683 (1974), correctly decided?

Please see my answer to question 7(a) above.

e. Was *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), correctly decided?

Please see my answer to question 7(a) above.

f. Was *Griswold v. Connecticut*, 381 U.S. 479 (1965), correctly decided?

Please see my answer to question 7(a) above.

g. Was *Miranda v. Arizona*, 384 U.S. 436 (1966), correctly decided?

Please see my answer to question 7(a) above.

h. Was *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), correctly decided?

Please see my answer to question 7(a) above.

8. A 2014 report by Justin Levitt published in the *Washington Post* (available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.dc645a28fb6b) found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were 1 billion ballots cast. Meanwhile, the Department of Justice has been involved in many successful cases against jurisdictions that violate the Voting Rights Act.

a. Do you agree that laws passed with the stated purpose of protecting “voter integrity” can suppress the votes of racial minorities?

It would be inappropriate for me under the judicial canons of ethics to comment on political issues or issues that might come before me in litigation. The Supreme Court has made clear that Constitution and the Voting Rights Act and other laws can constrain the enactment of certain state voting regulations. I would apply that law and those precedents fully and faithfully in any case involving voting rights that comes before me.

b. The amicus brief you filed in *Crawford v. Marion County*, 553 U.S. 181 (2008), asserted that Indiana’s voter ID law did not disproportionately impact minorities and the poor. Do you agree that it is possible for a voter ID law to disproportionately impact minorities and the poor?

As a circuit court judge, I would be duty bound to follow the precedent of the Supreme Court, including *Crawford v. Marion Cty. Elec. Bd.*, 128 S. Ct. 1610 (2008), regarding voter-identification laws and Supreme Court cases regarding voting rights generally. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992). In any case involving voter-identification laws, I would evaluate the arguments of the parties in light of applicable law and precedents and the specific facts of the case. The facts my client relied on in its amicus brief would not affect how I review a case involving voter-identification laws, if one were to come before me.

c. Your client, the Center for Equal Opportunity, states on its website that it opposes bilingual ballots. Do you agree that the failure to provide election materials, including ballots, in a minority language can constitute a violation of the Voting Rights Act?

I have always represented my clients zealously as required by ethical rules. Under those views, the views of a client should not be imputed to the attorney. *See* ABA Model Rules of Professional Responsibility 1.2(b). That said, it would be inappropriate for me under the judicial canons of ethics, to offer personal views on political questions or questions that might come before me in litigation.

9. Based on your service on the Board of Directors of the State Justice Institute, what measures would you take as a judge to provide support for limited English proficiency litigants and pro se litigants?

The State Justice Institute has prioritized helping courts provide service to limited English proficiency and pro se litigants. I have supported this work as a member of the State Justice Institute's Board. Whether I am permitted to remain on the Board of Directors of SJI is not a question that I have examined in any depth. I will do so in accordance with applicable recusal and ethical rules. With regard to measures outside of the State Justice Institute, I will not know what measures are currently being taken and what measures might be taken until I become a judge and can interact with the relevant court governing bodies.

10. Based on your service on the Board of Directors of the State Justice Institute, what measures would you take as a judge to enhance public trust and confidence in the courts?

Similar to the answer to question 9, the State Justice Institute has prioritized enhancing public trust and confidence in the courts. If I become a judge, I will attempt to ascertain what measures are currently being taken and what measures might be taken to enhance public trust and confidence in the courts consistent with governing ethical constraints. I believe generally that judges should be involved in their communities and with the local bar to the extent permitted by governing ethical standards.

11. You coauthored an article entitled *Life Sciences Patents Dealt a Significant Blow*, in which you expressed concerns that if the holding of the district court in *Association for Molecular Pathology v. U.S. Patent and Trademark Office*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010), was upheld on appeal, it "would deal a fatal blow to the vast majority of genetic patents and significantly stifle research into the role genetics plays in human illness."

a. This case ultimately reached the Supreme Court. Does the holding from the Supreme Court in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013), raise the concerns you outlined in your article related to incentivizing future research and development?

I have not looked closely at the implications of the Supreme Court case. The article expressed concern that the invalidation of all of the patents at issue in the matter could have a chilling effect on the incentives to perform certain kinds of scientific research.

My understanding is that the Supreme Court ultimately invalidated some of the patents involved in the case and upheld the validity of others. My further understanding is that the implications of this Supreme Court case on scientific research is subject to academic debate. See, e.g., Peter Lee, *The Supreme Court's Myriad Effects on Scientific Research: Definitional Fluidity and the Legal Construction of Nature*, 5 U.C. Irvine L. Rev. 1077 (2015).

b. Do any of the Supreme Court's other recent cases concerning patent eligible subject matter (namely, *Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012); and *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014)), raise the concerns you outlined in your article related to regarding incentivizing future research and development?

I have not examined this question closely. My understanding is that these Supreme Court cases address what can constitute a patentable subject matter. My understanding is that there is still debate about the implications of these cases. See, e.g., Haghighatian et al., *So What's Patentable Now? Recent Decisions on Section 101*, 34 Corp. Couns. Rev. 73 (2015).