

**Questions for the Record from Senator Vitter addressed to L. Felipe Restrepo, nominee
United States Court of Appeals for the Third Circuit.**

- 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 United States Supreme Court's holding in *NLRB v. Canning*, 134 S. Ct. 2550 (2014), is binding precedent on all lower courts. The opinion noted that a recess of 3-10 days is presumptively too short to fall within the recess appointment clause but that extraordinary circumstances may warrant exercise of the President's recess appointment powers during a shorter break.

- 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: *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992), held that "...an undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." The issue presented in the above question is currently being litigated in the lower courts. Given that I am a sitting United States District Judge and a nominee to the United States Court of Appeals for the Third Circuit I do not believe that I should comment on this matter. I can assure you that I will faithfully apply all binding Supreme Court and Circuit precedent should I have to address this issue as a judge.

- 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: Although the Supreme Court has issued opinions modifying *Roe v. Wade*, see for example, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court has not reversed *Roe v. Wade* and as modified it is settled precedent.

- 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: The issue presented in the above question is currently being litigated in the lower courts. Given that I am a sitting United States District Judge and a nominee to the

United States Court of Appeals for the Third Circuit I do not believe that I should comment on this matter. The Court may very well resolve this issue in its anticipated decision in *Obergefell v. Hodges*. I can assure you that I will faithfully apply all binding Supreme Court and Circuit precedent should I have to address this issue as a judge.

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: My philosophy on judicial precedent is that Supreme Court precedent is binding on all lower courts and that Circuit precedent is binding on all District Courts within the relevant Circuit. As a United States District Judge I am bound by prior binding case law even if I personally disagree with it.

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: An individual's Second Amendment right to bear arms in the home for self-defense was addressed by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010). The issues identified above are currently being litigated in the lower courts and the Supreme Court has yet to consider these Second Amendment issues. Given that I am a sitting United States District Judge and a nominee to the United States Court of Appeals for the Third Circuit I do not believe that I should comment on this matter. I can assure you that I will faithfully apply all binding Supreme Court and Circuit precedent should I have to address this issue as a judge.

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 issue presented in the above question is currently being litigated in the lower courts. Given that I am a sitting United States District Judge and a nominee to the United States Court of Appeals for the Third Circuit I do not believe that I should comment on this matter. The Court may well resolve this issue in its anticipated decision in *Glossip v. Gross*. I can assure you that I will faithfully apply all binding Supreme Court and Circuit precedent should I have to address this issue as a judge.

8. How should a judge's gender, race, or background influence a judge's judicial philosophy or view on the law?

Response: A judge's gender, race or background should have no influence on a judge's judicial philosophy or view on the law.

- 9. You represented Oscar Antonio Grande, a member of the MS-13 gang, who was eventually convicted of murder and sentenced to life in prison without parole. In your questionnaire response you stated:**

“Mitigation efforts included finding an expert who was in a position to discuss the evolution of MS-13, the conflict in El Salvador and Mr. Grande's family.”

- a. Do you believe that a person's culture and origin should be considered mitigating factors in sentencing?**

Response: I do believe that the jury's consideration of the evolution of MS-13, the conflict in El Salvador and Mr. Grande's family were relevant mitigating sentencing considerations in the penalty phase of his case. Given that Title 18 U.S.C. Section 3592 allows the finder of fact to consider “any mitigating factor” when determining the appropriate sentence in a capital case I do believe it appropriate to give the fact finder any and all information that may inform their decision as to the appropriate sentence. Information about an individual's culture, origin, personal and family history may be relevant mitigation information that should be considered by the fact finder.

- b. If so, to what extent should they be mitigating factors?**

Response: The “extent” of any individual mitigating factor is left to the discretion of the jury in a jury trial and to the judge in a bench trial consistent with Title 18 U.S.C. Sections 3592 and 3593.

- 10. Have you ever expressed an opinion on whether the death penalty is unconstitutional?**

Response: No.

- a. If so, what was that opinion?**

- b. If not, do you have such an opinion?**

Response: The United States Supreme Court has held that the death penalty is constitutional. As a United States District Judge I am bound by Supreme Court and Circuit precedent. I can assure the Committee that nothing in my personal views would prevent me from upholding a sentence of death if the law required such a sentence.

11. Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), applied original public meaning to their interpretation of the Second Amendment. I would faithfully apply *Heller* and all other binding precedent to issues of constitutional interpretation.

12. Under what circumstance would you overrule or overturn precedent as a judge?

Response: As a District Judge and if fortunate enough to be confirmed and serving as a member of a 3-judge panel I would not overturn precedent. If I were a member of the 3rd Circuit sitting *en banc* I would look to Fed. R. App. P. 35(a) which notes that: *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or the proceeding involves a question of exceptional importance. I would also consider the applicability of any Supreme Court precedent relevant to the issue.

13. How would you characterize your judicial philosophy, and which past U.S. Supreme Court Justice's judicial philosophy is most analogous with yours?

Response: My judicial philosophy is based on a firm commitment to the rule of law and treating all litigants with respect and dignity. During my 2-year term as a United States District Judge and my 7-year term as a United States Magistrate Judge, my record demonstrates a commitment to applying Supreme Court and Circuit precedent to the facts established by the evidence.

Given the very different roles of a trial court and appellate court, I do not have a specific Justice of the Supreme Court whose judicial philosophy is most analogous to mine.

14. Describe in detail your views on the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution. Do you understand those clauses to ever require the affirmative accommodation of religious practices and beliefs? Do those protections extend to the workplace?

Response: In *Locke v. Davey*, 540 U.S. 712, 719 (2004), the Supreme Court recognized that: "The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" The Court recognized that "the Establishment Clause and the Free Exercise Clause are frequently in tension [but that] 'there is room for play in the joints.'" See also *Cutter v. Wilkinson*, 544 U.S. 709 (2005). I would apply this and all applicable precedents to a justiciable case presenting the question of affirmative accommodations and beliefs in the work place.