Senator Grassley, Chairman
Questions for the Record

Lawrence Joseph Vilardo
Nominee, United States District Judge for the Western District of New York

1. **You represented Dr. Ivan D'Souza in an appeal after New York's Administrative Review Board for Professional Medical Conduct sustained 14 charges against him. According to the New York Supreme Court's opinion in the matter, you argued that the Board did not have sufficient evidence to sustain the charges against the doctor, in part because "the patients' delay in reporting the alleged sexual contact to third parties rendered the reports so inherently unreliable as to preclude their admissibility."**

   a) **Notwithstanding New York's rules of evidence, including the prompt outcry rule, in your opinion, at what point is a sexual assault survivor's reporting of crimes against him or her no longer reliable?**

   Response: I do not believe that a survivor's reporting of a crime is ever unreliable simply due to the lapse of time. When I made the New York "prompt outcry" rule argument referenced in this question, I was serving as an advocate for my client, as I was ethically and professionally bound to do, and I was attempting to rebut specific allegations against my client in light of several factual inconsistencies. Toward that end, I asked the court to preclude hearsay testimony about what had been said to others, not the alleged survivors' testimony about what had happened to them. If I am fortunate enough to be confirmed, I would apply the Federal Rules of Evidence and all controlling precedent regarding the admissibility or weight of evidence.

   b) **Do you believe that a survivor of sexual assault is less credible when she or he does not quickly report the crime?**

   Response: No. I do not believe that a survivor of any crime, including and especially sexual assault, is less credible simply because he or she does not quickly report the crime.

2. **You indicated in your questionnaire that you have unable to find notes, transcripts, or recordings for several of your speeches. Please provide the committee with a more detailed description of the points covered in your lecture than is provided in your original questionnaire for the following talks:**

   a) **April 13, 2014: Panel Discussion at Buffalo Pediatric Society regarding legal, ethical, and moral issues arising from parents' refusing vaccinations for their children.**

Response: At this panel presentation, a medical ethicist and I discussed how pediatricians should handle situations when parents refuse to have their child receive vaccinations that the pediatrician believes are necessary. Although I do not have a complete recollection of all the issues raised and discussed, I recall addressing the importance of carefully documenting the parents' refusal so as to protect the pediatrician from liability in the event that the child contracts the illness that the vaccination was intended to prevent, as well as ways that a pediatrician might present the medical research in an understandable fashion to parents who fear possible side effects of vaccinations.

b) December 19, 2013: "Real Life vs. Reel Life Ethics," New York State Bar Association, regarding legal ethics as seen in motion pictures.

Response: I served on a panel with a New York State Supreme Court Justice, a Buffalo City Court Judge, and a former President of the New York State Bar Association. The panel viewed film clips from motion pictures that depicted attorneys facing ethical issues such as conflicts of interest, scope of representation, lawyer civility, and allocation of authority between the client and the lawyer, and the panelists answered the moderator's questions on those issues. I have participated in this seminar on two occasions, and although I do not recall the specifics of what I said, I do recall that the movies on one occasion or the other included *To Kill a Mockingbird, Adam's Rib, A Few Good Men, A Civil Action, The Verdict,* and others.

c) September 21, 2002: Panel Discussion, Jesuits for Upstate New York, regarding the clergy sex abuse crisis.

Response: Because I was one of the attorneys for the Roman Catholic Diocese of Buffalo in 2002, I was asked to participate in a panel discussion with a psychologist and a prosecutor regarding the clergy sex abuse crisis that had received considerable publicity at about that time. Although I do not recall the specifics of what I said, I believe that I would have addressed the policy of my client, the Diocese of Buffalo, in handling accusations by survivors, the code of conduct expected of clergy and anyone associated with the Diocese of Buffalo, and other such topics.

d) March 2, 2000: "Mini-Medical School" Presentation at SUNY Buffalo Law School, regarding the legal issues connected with obstetrics and delivery resulting in an injured infant.

Response: I have very little recollection of this seminar which occurred 15 years ago. I believe that it addressed a hypothetical delivery of a baby that presented challenges and complications to the obstetrician and that resulted in injury to the infant, as well as ways for physicians to meet the applicable standard of care and therefore avoid medical malpractice liability.

3. How will you handle the cases of litigants who are members of organizations to which you currently belong or once belonged to, or which you represented as an attorney?

Response: I will meticulously follow the statutory rules and the Code of Conduct for United States Judges when handling cases of litigants who are members of organizations to which I currently belong, to which I once belonged, or which I represented as an attorney. I will recuse myself when those rules require or when I believe that my impartiality might reasonably be questioned. In the interests of candor and fairness to all sides, I will, when appropriate, ensure that all parties and counsel know of my current or prior relationship with the organization at issue. If I have any doubt about whether my impartiality might reasonably be questioned, I will err in favor of notifying the parties and seeking their consent. Finally, I will recuse myself from all cases involving my current law firm for an appropriate period of time. After that time expires, in the interests of candor and fairness to all sides, I will ensure that all parties and counsel know of my prior connection to the firm and partnership with any individual attorneys involved in a pending case and entertain requests for recusal.

4. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is respect: respect for the court and our judicial system; respect for precedent and the rule of law; respect for the decisions of the elected legislature; respect for lawyers and litigants; and respect for all who work as part of, or come into contact with, the judicial system, including court staff, marshals, and jurors. My parents taught me from a very young age to treat everyone with respect. Therefore, I believe that I do possess this important attribute.

5. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: In addition to being respectful of all those who play a role in the legal system, a judge should be calm, dispassionate, and in control of the courtroom. Stated another way, judges should have a demeanor that is respectful but at the same time demands the same respect from the lawyers and the litigants toward each other and toward the court. I believe that I will be able to control the courtroom calmly and dispassionately, while at the same time respecting all those who appear in it.

6. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: I am committed to following the precedents of higher courts faithfully and giving them full force and effect regardless of my personal feelings. A district judge has no business deciding cases based upon politics or his or her own personal agenda.

7. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If there were no controlling, dispositive precedent on an issue presented for decision, I would look first to the language of any statute, rule, or regulation at issue, and if the language were not dispositive, then to decisions on analogous issues from controlling jurisdictions, to decisions from other circuits on the issue presented or analogous issues, and to decisions from other district courts on the issue presented or analogous issues. My goal would be to surmise what the controlling jurisdictions would have decided if the issue had been presented to them.

8. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: As far as a district judge is concerned, neither the Supreme Court nor the controlling Court of Appeals can err in rendering a decision: just as Supreme Court precedent is controlling for all federal courts, so any decision by the Court of Appeals is controlling for the district courts in that circuit. I therefore pledge to follow the precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit regardless of my personal views.

9. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: First, a court should entertain a constitutional challenge to a statute only as a matter of last resort. In other words, if a case can be decided without reaching the constitutional issue, then the constitutional issue should not be reached. If the court cannot avoid addressing the constitutionality of a statute, the court should give deference to the elected legislature and therefore to the statute. Only if the language of the Constitution or controlling precedent leads the court to the conclusion that the statute simply cannot pass constitutional muster should a judge declare a statute enacted by Congress unconstitutional.

10. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response. No, it is not proper for a judge to rely on foreign law or the views of the "world community" to determine the meaning of the Constitution. Our Constitution is unique. Foreign law and the views of the "world community" shed no light on its meaning or interpretation.

11. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: The politics or personal motivation of a district judge should play absolutely no role in rendering a decision. I assure the Committee that my decisions will be grounded in precedent and the text of the law and not in any political ideology. Although I have never been a judge and therefore cannot point to any judicial decisions as evidence of this, I can point to decisions that I rendered as a judicial hearing officer and as an arbitrator. Whenever my personal feelings conflicted with what I believed was legally correct, I put my personal feelings aside and decided the case or voted among a panel of arbitrators to make what I believed was the objectively correct decision.

12. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: From a very young age, my parents taught me to be honest and fair to everyone. I have tried to live that way my entire life, and I assure the Committee and future litigants that if I am fortunate enough to be confirmed as a district judge, I will be vigilant in putting aside my personal views and will be fair and impartial to all who appear before me.

13. If confirmed, how do you intend to manage your caseload?

Response: If I am fortunate enough to be confirmed, I will manage my caseload – a heavy caseload in a backlogged district – in several ways. First, I will work hard. I work six or seven days a week now, and I do not plan to change that. Second, I will issue decisions promptly. Judges should not sacrifice justice for efficiency, but they owe it to the lawyers and litigants to make decisions promptly – that is, as soon as justice allows. Hard decisions do not get any easier simply with the lapse of time, and procrastination serves no one. Finally, I would carefully organize my docket and use meaningful scheduling orders to guide the parties and their lawyers and require them to litigate efficiently; I will not permit those orders or deadlines to be abused.

14. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: I believe that judges have an important role in controlling the pace and conduct of litigation. If confirmed, I would take the specific steps outlined in the previous answer to control my docket.

15. President Obama said that deciding the "truly difficult" cases requires applying "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy . . . the critical ingredient is supplied by what is in the judge's heart." Do you agree with this statement?

Response: I am unaware of the context in which President Obama's statement was made. But I believe that judicial decisions should be based on the law and controlling precedent, not on a judge's personal politics or policy agenda.

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

Response: I received these questions from the Office of Legal Policy at the Department of Justice on May 13, 2015. I reviewed the questions and personally prepared answers to them. I submitted my draft responses to the Office of Legal Policy and discussed them with staff from the Office of Legal Policy. I then finalized my responses and authorized the Office of Legal Policy to submit these responses on my behalf.

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

Response: Yes.

Senator Vitter
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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: In *NLRB v. Canning*, ___ U.S. ____, 134 S. Ct. 2550 (2014), the Supreme Court held that if "a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause"; moreover, the Court found that "a recess lasting less than 10 days is presumptively too short as well." 134 S. Ct. at 2567. If the Senate says that it is in session, then *pro forma* sessions of the Senate "count as sessions, not as periods of recess" as long as under the Senate's own rules, the Senate "retains the capacity to transact Senate business." *Id.* at 2574. If I am fortunate enough to be confirmed, I would dutifully follow this as well as any other binding precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit on the issue of recess appointments.

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: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a plurality of the Supreme Court held that "[a]n 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." *Id.* at 878. I understand that the issue raised in this question may be pending in a petition to the Supreme Court for a Writ of Certiorari from a decision rendered by the United States Court of Appeals for the Fifth Circuit, and I therefore do not believe that it would be appropriate for me now to address the issue further. If I am fortunate enough to be confirmed, I would dutifully follow all binding precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit on issues involving abortion as well as all other issues.

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: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court revisited "the fundamental constitutional questions resolved by *Roe*" and concluded that "the essential holding of *Roe v. Wade* should be retained and once again affirmed" based on the "principles of institutional integrity, and the rule of *stare decisis*." *See Casey*, 505 U.S. at 845-46. The Supreme Court rejected *Roe's* "trimester framework," however,

which the Court found was not "part of the essential holding of *Roe*." *Id.* at 873. Neither *Casey* nor *Roe* has been overruled by subsequent decisions of the Supreme Court. If I am fortunate enough to be confirmed, I would dutifully follow those two cases, as well as *Gonzales v. Carhart*, 550 U.S. 124 (2007), and all other binding precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit on this issue.

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: Last month, the Supreme Court heard oral argument in *Obergefell v. Hodges*, a case involving the refusal of certain states to recognize or license same-sex marriages. The Court's decision in that case may decide the issue. In the meantime, the decision of the Minnesota Supreme Court in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), holding that a state law limiting marriage to persons of the opposite sex does not violate the United States Constitution, is good law in Minnesota because the United States Supreme Court dismissed an appeal in that case "for want of substantial federal question." *See Baker v. Nelson*, 409 U.S. 810 (1972). In *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013), the Supreme Court struck down the federal Defense of Marriage Act on equal protection and due process grounds. In reaching its decision, the Court found that it was "virtually [the] exclusive province of the States" to define and regulate domestic relations "subject to constitutional guarantees," and that "[t]he State's power in defining the marital relation is of central relevance" to its decision. *Id.* at 2690-92 (internal quotations omitted). Because the issue raised by this question is currently pending, I do not believe it would be appropriate now for me to respond further. If I am fortunate enough to be confirmed, I would dutifully follow any decision rendered in *Obergefell* and all other binding precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit.

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: I believe that district court judges are bound to apply all precedent from controlling jurisdictions regardless of their personal views. Therefore, they have no business deciding cases based on any political or personal agenda. They are bound to apply the law as it is, not as they might think it should be or wish it were. I therefore would apply prior binding case law regardless of my personal views.

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 *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court concluded that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778. The Court therefore held "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*," *id.* at 791, that is, the right to keep and bear arms for protection in the home and elsewhere. I am not familiar with lower federal court rulings upholding gun control laws, but if I am fortunate enough to be confirmed, I would follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit with respect to any Second Amendment issue.

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

   Response: Last month, the Supreme Court heard oral argument regarding Oklahoma's method of imposing capital punishment. Because the issue is currently pending, I do not believe that it would be appropriate for me now to address the issue. If I am fortunate enough to be confirmed, I would dutifully follow any decision rendered in the Oklahoma capital punishment case and all other binding precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit.