Nomination of Bridget Bade to the U.S. Court of Appeals for the Ninth Circuit Questions for the Record
October 31, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

   It is never appropriate for lower courts to depart from Supreme Court precedent.

   b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

   Lower court judges are bound to follow all Supreme Court precedents, including in concurring and dissenting opinions. There may be limited circumstances in which a lower court judge could appropriately and respectfully identify intervening or inconsistent authority, or confusion or unintended consequences arising from Supreme Court precedent.

   c. When, in your view, is it appropriate for a circuit court to overturn its own precedent?

   The Ninth Circuit may overturn its own precedent when sitting en banc, or if there is an intervening, contrary decision from the Supreme Court that has invalidated a prior circuit precedent.

   d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

   Only the Supreme Court may decide whether to overturn its own precedent, and it would be inappropriate for me to offer opinions on when the Supreme Court should overturn its own precedent.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?

I agree that *Roe* is long-standing Supreme Court precedent that has been upheld several times and is binding on all lower courts, regardless of any label that may be applied to it. I will faithfully apply *Roe* and all other Supreme Court precedent if I am confirmed.

b. Is it settled law?

Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

As a sitting magistrate judge and a judicial nominee, it would be inappropriate for me to state whether I agree or disagree with statements in Supreme Court opinions, including dissenting opinions. As with all Supreme Court precedent, *Heller* is binding on the lower courts and I would faithfully apply it if confirmed.

b. Did *Heller* leave room for common-sense gun regulation?

In *Heller*, the Supreme Court stated that "the right secured by the Second Amendment is not unlimited," and that "nothing in our opinion 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." *District of Columbia v. Heller*, 544 U.S. 570, 626-27 (2008). These issues are the subject of pending and impending litigation and so it would be inappropriate for me to comment further.

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

Please see my response to question 4(a).

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

   a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

   As a sitting magistrate judge and judicial nominee, it would be inappropriate for me to comment on whether I agree with any Supreme Court decision, including *Citizens United*, or to offer opinions on how that decision may be interpreted or applied. Furthermore, these issues are the subject of pending or impending litigation and therefore it would be inappropriate for me to comment on these issues. If confirmed, I will faithfully apply *Citizens United* and all Supreme Court precedent.

   b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

   Please see my response to question 5(a).

   c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

   Please see my response to question 5(a).

6. According to publicly available filings, you were a named defendant in a 1987 lawsuit brought by the lesbian and gay student organization at Arizona State University (ASU). That student organization alleged that it was denied funding by the student government "because of the perceived sexual orientation of [the organization's] members and because the subject matter of its educational programming often deals with issues related to sexual orientation." The complaint alleged that ASU, its administration, and the student government violated the First and Fourteenth Amendments by denying funding to student groups that they deemed "controversial," thereby effectively discriminating against groups based on the content of their speech. According to public filings, the groups that were denied funding included the lesbian and gay student organization, the Greens (an environmental group), Students Against Apartheid, United Campus to Prevent Nuclear War, Progressive Student Network, Pan-African Research Committee, and Israel Action Committee.

   You were the Executive Vice President of the student government at the time. Although you did not serve in the student senate, which passed the funding bills that excluded the gay and lesbian student group, the lawsuit alleged that you approved one or more of these exclusionary funding bills. Further, an affidavit appended to the complaint filed in the case alleged that ASU's Vice President for Student Affairs asked you and the student government's other executive officers "to reopen the appropriations process and was informed by [you] that such action would be impossible." You also later received a memo from the Vice President for Student Affairs conveying advice from ASU's General Counsel

that denying funding to the lesbian and gay student organization was unconstitutional and asking the student government to reconsider the denial of funding. (First Amended and Supplemental Complaint, *Lesbian and Gay Academic Union of Arizona State University v. Arizona State University et al.*, No. 87-0266-PHX-WPC (D. Ariz. June 15, 1987))

a. As Executive Vice President of the student government, what role did you play in reviewing the bills that denied funding to the lesbian and gay student group?

The question states that I "approved one or more of these exclusionary funding bills." That is not an accurate description of my role in undergraduate student government. As vice president of the student body, I served as chair of the student senate. I did not have authority or responsibility for approving or denying funding bills, or any other bills the student senate passed. Only the student body president had the authority to sign or veto bills from the student senate. Therefore, I did not play any role in reviewing bills from the student senate.

b. When you approved the bills that denied funding to the lesbian and gay student organization, were you aware that the organization had sought and been denied funding?

Please see my response to question 6(a). I did not approve or disapprove bills from the student senate, including appropriations bills for campus clubs.

c. If so, what was your understanding of the reason that the Senate had denied the organization funding?

Please see my responses to questions 6(a) and (b). I did not approve or disapprove bills from the student senate. I do not recall what any particular student senator said about club funding and I could only speculate as to the reason or reasons for each of their votes on club funding in 1987. However, I do recall that there were several clubs that were denied funding, and there were disagreements about funding requests by several organizations that received funding. I believe the students generally were struggling with the issue of funding political speech. I remember the student senate tried to adopt standards to address club funding issues and passed bylaws that stated that the student senate would not approve funding requests for "controversial" or political programs.

d. When you reviewed the funding bills that denied funding to the lesbian and gay student organization, were you aware that student senators had made the following arguments against funding, as detailed in the complaint? If not, when did you become aware?

i. That no one would attend the student group's events because of the type of people promoting their particular events;

ii. That there was no educational value to the group's programs;

iii. That the ASU student government should not encourage or endorse the

"gay lifestyle" by funding the group's events;

iv. That "homosexuality should not be tolerated";

v. That the ASU student government should not set a precedent by funding the group;

vi. That funding would constitute official recognition of the student group, which the student senate should not do; and

vii. That the student group's members are "immoral."

Please see my responses to questions 6(a), (b), and (c). I did not review, approve, or disapprove bills from the student senate. I do not recall what any particular student senator said about club funding and I do not recall anyone making the comments described above in question 6(d). The first time I recall being aware of these allegations is in responding to these questions. To the best of my recollection, I have not seen the complaint in this matter for over thirty years. Also, my recollection is that the complaint was dismissed on motion and no answer was filed and no discovery was taken.

e. Why did you refuse to reopen the appropriations process when asked to do so by ASU's Vice President for Student Affairs, even when advised that ASU's General Counsel had determined that the funding denial was unconstitutional?

Although I recall a meeting with the student officers and the University's Vice President of Student Affairs, I do not recall the Vice President of Student Affairs asking me to "reopen the appropriations process," or providing any legal advice or opinions on constitutional law. As student body vice president, I did not have the authority to "reopen" the appropriations process. Any individual student senator could have introduced additional appropriations bills for any student group.

f. After you were informed by ASU's Vice President for Student Affairs that the General Counsel had concluded that denying funding was unconstitutional, did you approve of any other bills that denied funding to the lesbian and gay student group? When, if ever, is it appropriate for public institutions to limit, restrict, or otherwise discriminate against speech on the basis of content?

Please see my responses to questions 6(a) – (e) above. In my role as student body vice president, I served as chair of the student senate. I did not have authority or responsibility for approving or disapproving bills from the student senate, including appropriations bills. I do not recall that the Vice President of Student Affairs provided legal advice or opinions on constitutional law. To the best of my recollection, the issues in this lawsuit did not involve restricting or limiting speech based on content and that the program at issue in the funding request was presented on campus. Instead, I believe the students were struggling with the issue of funding political speech. These issues are the subject of pending and likely impending litigation and it would not be appropriate for me to comment further.

7. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

   a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

   I was interviewed by different attorneys from the White House and the Department of Justice in 2017 and 2018. The interviews addressed a wide range of topics and I do not recall the details of all the questions and answers, or who asked various questions. I do not recall that I was asked for my "views on administrative law," although I recall that there were some questions about my knowledge of Supreme Court decisions addressing administrative law**.**

   b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

   No.

   c. What are your "views on administrative law"?

   I do not have a generalized "view on administrative law." This is a very broad area of the law and, if confirmed, I would faithfully apply all Supreme Court and Ninth Circuit precedent to any issues of administrative law.

8. When is it appropriate for judges to consider legislative history in construing a statute?

   In the Ninth Circuit, it may be appropriate for a court to consider legislative history when a statute is ambiguous. *See Abrego Abrego v. The Dow Chem. Co.,* 443 F.3d 676, 683 (9th Cir. 2006).

9. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

   No.

10. Please describe with particularity the process by which you answered these questions.

After I received the questions from the Department of Justice, I prepared answers to the questions and then, as requested, returned the completed questions to the Department of Justice, whose attorneys provided input. My answers are my own.

Senator Dick Durbin
Written Questions for Eric Miller and Bridget Bade
October 31, 2018

For questions with subparts, please answer each subpart separately.

Questions for Bridget Bade

1.

a. **Do you believe that judges should be "originalist" and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

Lower court judges must follow Supreme Court precedent when applying constitutional provisions. Therefore, lower court judges must adhere to whatever meaning the Supreme Court has assigned to constitutional provisions.

b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

> …no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

Please see my response to question 1(a).

1.

a. **Is waterboarding torture?**

It is my understanding that waterboarding constitutes torture when it is intentionally used "to inflict severe physical or mental pain or suffering" upon a detainee. 18 U.S.C. § 2340(1).

b. **Is waterboarding cruel, inhuman and degrading treatment?**

It is my understanding that Congress amended the Detainee Treatment Act through Section 1045 of the National Defense Authorization Act of Fiscal Year 2016. The law provides that no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual. 42 U.S.C. § 2000dd-2(a)(2). It is also my understanding that waterboarding is not authorized in the Army Field Manual.

c. **Is waterboarding illegal under U.S. law?**

Please see my responses to questions 1(a) and (b).

2. **Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

I have not researched this issue and I do not have any information from which I could offer an opinion on the accuracy of this statement. It would be improper for me as a magistrate judge and a judicial nominee to comment further on this question because it addresses a political issue and matters of pending or impending litigation. *See* Canons 3(A)(6) and 5 of the Code of Conduct for United States Judges.

3. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees should answer questions to the best of their ability and in accordance with the Code of Conduct for United States Judges and any other restrictions that govern their conduct.

4.

a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I have no knowledge of any such donations, and I am not aware of the Judicial Crisis Network, or any other front organization, supporting my nomination. Because this question addresses a political issue it would be improper for me to offer any personal opinion. *See* Canon 5 of the Code of Conduct for United States Judges.

5. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

As a sitting magistrate judge, I follow the recusal requirements set forth in Canon 3 of the Code of Conduct for United States Judges, 28 U.S.C. § 455, and in the guidance of the Administrative Office of the United States Courts. If confirmed as an appellate judge, I will continue to follow these recusal requirements. This question raises a political issue and so it would be improper for me to offer any personal opinions. *See* Canon 5 of the Code of Conduct of United States Judges.

6. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my responses to questions 4 and 5.

7.

a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not researched this issue. In addition, because this question raises issues that may be addressed in impending litigation it would be improper for me, as a magistrate judge and a judicial nominee, to offer opinions on this issue. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

b. **What answer does an originalist view of the Constitution provide to this question?**

Please see my response to question 7(a).

Nomination of Bridget S. Bade, to be
United States Circuit Judge for the Ninth Circuit
Submitted October 31, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

(1) As a judge, would your personal views prevent you from objectively evaluating scientific evidence that demonstrates that there is overwhelming consensus that human activity is a contributing factor to climate change?

No. As a magistrate judge I understand that I must objectively consider all admissible evidence that is properly presented to the court. If confirmed, as an appellate judge I will continue to consider all record evidence, under the appropriate standards of review, regardless of any personal views I may have on any issue.

(2) During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

a. Do you agree with Justice Roberts' metaphor? Why or why not?

I agree that Chief Justice Robert's metaphor explains in relatable terms the role of judges as neutrals. Judges must fairly and impartially apply the law to the issues presented in a case, and that may include making factual determinations, interpreting the law, and applying the law to the facts. However, judges are not advocates in the legal system, or as stated in the Chief Justice's metaphor, players in the baseball game. Therefore, judges must decide cases based on the law, and not based on any personal views or preference for a particular result.

b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

I believe that a judge should be aware of the practical consequences of a ruling or decision, and should consider those consequences if it is appropriate to do so under the applicable law. However, a judge must apply the law fairly and impartially, even if the judge disagrees with the results of that decision.

(3) During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

a. What role, if any, should empathy play in a judge's decision-making process?

A judge should have empathy for all participants in the legal system. Because judges must apply the law, which may have harsh results in many cases, it is important for judges to respect the dignity of those appearing before them and to try to understand their circumstances. As a magistrate judge, I understand that I cannot fix all of the problems of the people who may appear before me, and that is not my responsibility, but I can recognize the dignity of each person before me and treat each person with respect. If

confirmed, as an appellate judge I will not have the same kinds of interactions with litigants as in the trial court. However, I believe appellate judges show respect for the litigants by their careful and thoughtful consideration of the issues presented in an appeal.

b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

Judges are products of their backgrounds, personal experiences, education, training, and work experiences. Judges should recognize that they bring their background experiences to their work, and they must guard against allowing these experiences to affect their decision making. Although different perspectives enrich the judicial system, judges must set aside anything that could affect their ability to apply the law fairly and impartially.

(4) In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

(5) What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

As a magistrate judge I have taken an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." I have upheld this oath for the last six and a half years. For any assurance of my commitment to this oath, I would direct the committee and the American people to my record as a judge. If confirmed, I will take this oath again, and I will continue to honor it.

In addition, in my career as a lawyer I accepted pro bono cases and provided representation to people who were not able to afford to litigate their cases. My clients included the United States, its agencies, and employees, corporations, small businesses, and individuals. But I also represented clients who would be considered "the little guy," such as plaintiffs in personal injury and medical malpractice cases.

I believe that my career as an attorney and a judge demonstrates my commitment to equally uphold the rights of all participants in our legal system.

Senate Judiciary Committee
"Nominations"
Questions for the Record
October 24, 2018
Senator Amy Klobuchar

Questions for Judge Bade, nominee to the Ninth Circuit Court of Appeals

- How would you view the importance of adhering to precedent – even precedent where you felt that the case was wrongly decided – if you are confirmed to the Ninth Circuit?

  As a magistrate judge, I understand that one of my fundamental and most important duties as a lower court judge is to follow precedent from the United States Supreme Court and the Ninth Circuit, regardless of whether I agree with the reasoning or outcome of those cases. I believe that the duty of the lower courts to follow to precedent is one of the most important features of our legal system because it provides stability and predictability. My views on the role of lower court judges and the importance of adhering to precedent will not change if I am confirmed to the Ninth Circuit.

- If you are confirmed, you will be hearing cases as part of a panel judges on the Ninth Circuit. In your view, is there value to finding common ground – even if it is slightly narrower in scope – to get to a unanimous opinion on appellate courts?

  Yes. I believe that in most cases a panel of judges will find common ground on which they can correctly decide the issues before them. A decision that is narrower in scope may be more appropriate. The collaborative nature of the appellate decision making process should include considering the views of the other judges and welcoming their ideas and contributions to a decision. However, in those cases in which judges cannot reach agreement, I do not think it is appropriate for a judge to join a decision that they believe is incorrect, simply for the sake of unanimity.

Nomination of Bridget Shelton Bade, to be United States Circuit Judge for the Ninth Circuit
Questions for the Record
Submitted October 31, 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 consider the factors set forth in Supreme Court and Ninth Circuit precedent.

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Yes, as guided by Supreme Court and Ninth Circuit precedent.

   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, as guided by Supreme Court and Ninth Circuit precedent.

   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 Supreme Court and Ninth Circuit precedent. In the absence of any authority from these courts, I would consider precedent from other circuits as potentially persuasive authority.

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

      Yes.

   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, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

      Yes. Both *Casey* and *Lawrence* are binding Supreme Court precedent.

   f. What other factors would you consider?

      Any relevant factors set forth in Supreme Court or Ninth 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 Fourteenth Amendment applies to both race and gender. *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?

      If confirmed as an appellate judge, I would respond to these arguments, if they were presented in a case, by relying on binding Supreme Court and Ninth Circuit precedent, including *United States v. Virginia*.

   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 have any information on the timing of when *United States v. Virginia* was filed or resolved.

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

      The Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

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

      This question raises issues that are the subject of pending or impending litigation and therefore it would be improper for me, as a magistrate judge and a judicial nominee, to offer any opinion on these issues. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

   Yes. The Supreme Court recognized this right in *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. The Supreme Court recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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. The Supreme Court recognized this right 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.

N/A

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 for judges to consider evidence that sheds light on our changing understanding of society?

Lower court judges should consider such evidence when it is appropriate under Supreme Court precedent and under any controlling circuit precedent.

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

The Federal Rules of Evidence and Supreme Court precedent provide that such evidence must be considered in judicial analysis when it is relevant, admissible, and based on a reliable methodology. *See, e.g.*, Fed. R. Evid. 702; *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

As a magistrate judge and a judicial nominee, it would be improper for me to state whether I agree or disagree with Supreme Court decisions. In addition, the application of *Obergefell* in other contexts is the subject of pending and impending litigation and therefore it would be improper for me to answer this question. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges. *Obergefell* is binding Supreme Court precedent and I would faithfully apply it as an appellate judge if I am confirmed.

b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

Please see response to question 5 (a).

6. 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.

a. 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?

Although I understand that there is some scholarly commentary on this issue, I have not studied this issue. These academic discussions do not have any effect on the binding force of *Brown* as Supreme Court precedent. If confirmed as an appellate judge, I would continue to faithfully apply *Brown*.

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-papers/democratic-constitutionalism (last visited October 31, 2018).

I am not familiar with the article cited in the question, but I understand that there are scholarly critiques and analysis of originalism and other theories of constitutional interpretation. These academic debates do not affect the binding force of Supreme Court precedent. I would respond to these arguments, to the extent they were presented in a case, by relying on relevant Supreme Court and Ninth Circuit precedent to interpret the meaning of any constitutional provision.

c. 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?

In some cases the Supreme Court has based its holding on an analysis of original public meaning and in other cases it has not. A lower court judge must apply Supreme Court precedent interpreting constitutional provisions, regardless of the methodology applied in those cases.

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

Please see response to question 6(c).

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

If confirmed as an appellate judge, when analyzing a constitutional issue, I would review the text of the provision at issue, relevant Supreme Court and Ninth Circuit precedent, other persuasive authority, the parties' arguments, and the record.

Questions for the Record for Bridget Bade
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

   a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

      No.

   b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

      No.

2. You were a named defendant in the case Lesbian and Gay Academic Union of Arizona State University v. Arizona State University et al. This was a lawsuit brought by a lesbian and gay student organization at Arizona State University alleging that it had been denied funding for several years by the university's student government because of its members' sexual orientations and its educational programming that often dealt with issues related to sexual orientation. At the time, you were the Executive Vice President of the student government and responsible for approving all appropriations passed by the student senate for student organizations. The Lesbian and Gay Academic Union of Arizona State University (LGAU) alleged that you approved the funding bills that denied it funding, even after you had been informed in writing of the constitutional concerns with such a denial of funding under the First and Fourteenth Amendments.

   a. You were informed in writing by Arizona State University's Vice President of Student Affairs that the student government's policy of denying funding to student groups that it deemed to involve a "controversial matter" raised constitutional concerns under the First and Fourteenth Amendments. In light of these concerns, the Vice President of Student Affairs asked you to reopen the appropriations process after the LGAU was denied funding, but you refused. Why did you continue to deny funding to the LGAU after being advised of these constitutional issues?

      Please see my response to Senator Booker's question 6, Senator Feinstein's question 6, and Senator Harris's question 2. As I stated in response to Senator Booker's questions about this lawsuit, I was not "responsible for approving all appropriations passed by the student senate" as stated in this question. I was the vice president and chair of the student senate. I did not have the responsibility or authority to sign or veto any bills that the student senate passed, including appropriations bills. Approving or rejecting these bills was the responsibility and authority of the student body president who could sign or veto bills. Although these events occurred over thirty years ago, I recall a meeting with the student officers and the Vice President of Student Affairs, and that she expressed concerns about the student senate's actions. However, I do not recall receiving any legal advice from the Vice President of Student Affairs or being informed of any constitutional concerns in writing.

b. In contrast to your actions, the president of the student government vetoed the student senate's funding bill that denied funding for the LGAU. The student senate, however, overrode this veto. Did you take any actions similar to those of the student government president to disapprove or reject any of the funding bills that denied funding to the LGAU in a discriminatory manner?

As vice president and chair of the student senate, I did not have any authority to veto or sign bills. However, as vice president and chair of the senate, I had the authority to set the agenda for senate meetings. Therefore, I added to every senate agenda a "call to the audience" to provide an opportunity for any student or student groups to address the student senate. To my knowledge, no other vice president had included a call to the audience in the senate agenda and I was the first to institute this practice. At almost every senate meeting several student groups, including the LGAU, addressed the senate.

c. As Executive Vice President of the student government, what actions, if any, did you take to address the constitutional issues raised by the Vice President of Student Affairs regarding the discriminatory actions taken by the student government?

Please see response to question 2(a). As I recall, the lawsuit was dismissed shortly after it was filed, before an answer or any discovery, and the court did not make any findings of discrimination. I do not recall the University's Vice President of Student Affairs providing any legal advice or opinions of constitutional law.

d. According to the complaint in that case, the LGAU alleged that senators in the student government denied LGAU funding after arguing that LGAU's "programs presented a biased, controversial viewpoint, offered nothing of value to the university community, and its members consisted of immoral people." As Executive Vice President of the student government, what actions, if any, did you take to discourage discriminatory and demeaning behavior like that referenced in the complaint?

Please see my responses to questions 2(a) and (b). I do not believe I have seen the complaint in this matter for over thirty years. I have no recollection of any specific allegations in that complaint. I do not recall any student senator making the statements described in this question.

e. Is it your view that a university's denial of funds to an LGBTQ student organization based on the sexual orientation of its members does not violate the Constitution's Equal Protection Clause?

Please see response to Senator Booker's question 6(c) and (d). Although I am generally aware of Supreme Court decisions addressing funding political speech and funding student club funding, and also cases addresses equal protection based on sexual orientation, this is an area of continuing litigation and the subject of pending or impending cases and therefore it would be improper for me to comment. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

Nomination of Bridget Bade
United States Court of Appeals for the Ninth
Circuit Questions for the Record
Submitted October 31, 2018

QUESTIONS FROM SENATOR BOOKER

1. As you no doubt noticed, one side of the dais at your October 24 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.

    a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, *and* without the minority's consent—which the Committee has never done before?

    The Senate has the constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees. The manner in which the Senate fulfills this constitutional duty is a political question and the subject of current political debate. Therefore, it would be improper for me, as both a sitting magistrate judge and as a judicial nominee, to comment on this matter. *See* Canon 5 of the Code of Conduct for United States Judges.

    b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

    Please see my response to question 1(a).

    c. At the October 24 hearing, you received a total of 3 questions from a single Senator. Your entire live questioning lasted less than 3 minutes. Do you think that is appropriate and consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

    Please see my response to question 1(a).

    d. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the scheduling of your confirmation hearing?

    Please see my response to question 1(a).

2. What is the most difficult experience you have had making an oral argument before a federal court of appeals, and why?

At the United States Attorney's Office, I handled an appeal involving traveling in interstate commerce and attempting to travel in foreign commerce for the purpose of engaging in

illicit sexual conduct with a minor, which is also referred to as child sex tourism. The record included voluminous transcriptions of explicit discussions about engaging in sexual conduct with children, including children as young as five-years old. The oral argument before the Ninth Circuit was set in an auditorium at the law school at Arizona State University, and was attended by hundreds of students and other members of the public. The argument was successful, and I did not experience difficulties during the argument, but the preparation for the argument was more difficult and time consuming than for other arguments as I considered how to present the record evidence in the setting of the argument.

3. What is the most difficult experience you have had writing a brief for a federal court of appeals, and why?

Shortly before I left the United States Attorney's Office to start my position as a magistrate judge, I was assigned a lengthy and complicated appeal that involved eight major issues and a lengthy record. It was difficult to prepare the brief because my time to do so was limited and my impending departure from the office presented a hard deadline. We filed the brief on my last day in the office.

4. Please describe your most significant experiences litigating before the Ninth Circuit.

Although I argued appeals before the Ninth Circuit, one of my most significant experiences before the Ninth Circuit involved a case in which I wrote the brief, but the appeal was argued after I left the United States Attorney's Office and joined the district court as a magistrate judge. In this case, the defendant was convicted of first-degree murder, kidnapping, and felony murder. The case involved a novel issue on the standard to establish a defendant's status as an Indian, which is a required element of an offense under the Major Crimes Act. The Ninth Circuit adopted my argument on this issue.

5. In 2018, you recommended the denial of a habeas petition of an individual who committed murder as a juvenile.[1] The petitioner argued that his 154-year life sentence for first degree murder and other crimes was essentially a life sentence without parole and violated the Eighth Amendment pursuant to *Graham v. Florida* and *Miller v. Alabama*.[2] In your recommendation, you wrote that "[b]ecause there is no clearly established Supreme Court precedent holding that an aggregate sentence that is functionally equivalent to life imprisonment without the possibility of parole violates the Eighth Amendment,"[3] the petitioner was not entitled to habeas corpus relief. The district court adopted your recommendation.

The Supreme Court ruled in *Miller v. Alabama* that mandatory life sentences for juveniles without the possibility of parole violate the Eighth Amendment's prohibition on "cruel and unusual punishments."[4] "Because juveniles have diminished culpability and greater prospects for reform," the Court explained, "'they are less deserving of the most severe

[1] *Laird v. Ryan*, 2018 WL 4126557 (D. Ariz. Jun. 26, 2018).
[2] *Id.*
[3] *Id.*
[4] *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (citing U.S. CONST. amend. VIII).

punishments.'"[5] The Court went how to say that "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking."[6]

The Court had previously noted that a life sentence without the possibility of parole is "the second most severe [penalty] known to the law," after only the death penalty.[7] In *Miller*, the Court recognized the special import of life without parole for juvenile offenders. Life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences"—above all because "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'"[8] At a minimum, the Court reasoned, a sentencer should be able to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it" in an individualized manner whenever "a juvenile confronts a sentence of life (and death) in prison."[9]

a. Do you believe that juveniles should be held less criminally culpable than adults?

   Yes, as set forth in relevant Supreme Court precedent, including *Graham* and *Miller*, in state law, and in the Juvenile Delinquency Act, 18 U.S.C. §§ 5031 – 5042.

      a. In what circumstances do you think a juvenile should be held to the same standards as adults?

   The Juvenile Delinquency Act provides that under some circumstances a juvenile who has been charged with an act of juvenile delinquency may request in writing, and with advice of counsel, to be proceeded against as an adult. 18 U.S.C. § 5032. For juveniles of certain minimum ages who are charged with certain enumerated offenses, the Attorney General may file a motion to transfer for criminal prosecution. *Id*. In some cases involving offenses in Indian country, transfer for criminal prosecution requires the consent of the tribal governing body. *Id*. The statute also provides for the transfer for criminal prosecution for juveniles who are at least sixteen-years old, are charged with certain enumerated offenses, and have prior convictions for certain offenses. *Id*. The statute lists the factors for the court to consider in assessing whether a transfer would be in the interest of justice. *Id*.

b. The Supreme Court has recognized that a life-without-parole sentence shares a special characteristic with the death penalty: irrevocability.[10] Based on your understanding of the applicable law, why is the irrevocable nature of a life-without- parole sentence so significant for juvenile offenders?

   My understanding of the significance of a life-without-parole sentence for juvenile offenders is based on the Supreme Court's decisions in *Graham* and

[5] *Id.* at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).
[6] *Id*. (quoting *Roper v. Simmons* 543 U.S. 551, 569 (2005)).
[7] *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).
[8] *Miller*, 567 U.S. at 474-75 (quoting *Graham*, 560 U.S. at 69).
[9] *Id.* at 477.
[10] *Id.* at 474-75.

Miller. If I am confirmed as an appellate judge, I will continue to faithfully apply these cases.

c. The Supreme Court has also recognized the fundamental implications of a life-without-parole sentence: it "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'"[11] Based on your understanding of the applicable law, how is the threshold for imposing a sentence of life without parole different for juvenile offenders, as opposed to adult offenders?

Please see my response to question 5(b).

d. Bryan Stevenson in *Just Mercy* noted that former Senator Alan Simpson (R-WY), a staunch conservative, had "been adjudicated a juvenile delinquent when he was seventeen for multiple convictions for arson, theft, aggravated assault, gun violence, and, finally, assaulting a police officer. He later confessed: 'I was a monster.'"[12] Would you have guessed that a juvenile delinquent who was convicted of arson, theft, aggravated assault, gun violence, and assaulting a police officer would eventually become a United States Senator?

I do not have any information about former Senator Simpson's life experiences, including the acts of juvenile delinquency described in the question or the changes in his life that resulted in his service as a United States Senator. If I had known him when he was a young man, I would not have speculated or guessed about his future. I believe that people are not only capable of change, but that people do change.

e. Do you believe your decision in *Laird* adhered to the principles and spirit of *Miller*?

The report and recommendation addressed in the question, *Laird v. Ryan*, CV 17-00482-PHX-JAT (BSB), Doc. 32, addresses arguments in a habeas petition that a state appellate court's decision was contrary to federal law as clearly established in the holdings of the Supreme Court at the time of the state court decision. *See* 28 U.S.C. § 2254(d)(1); *Greene v. Fisher*, 565 U.S. 34, 38 (2011). The petitioner's arguments challenged the state court's application of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), and the validity of these binding, precedential cases was not in dispute or at issue in the habeas petition. The report and recommendation sets forth my analysis of the issues and my conclusions. The district court adopted the report and recommendation (Doc. 34), and petitioner filed an appeal to the Ninth Circuit. (Docs. 36, 38); *Laird v. Ryan*, Case No. 18-16634 (9th Cir.). It would be improper for me to comment on the merits of this pending case. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

[11] *Graham*, 560 U.S. at 70 (alteration in original) (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)).
[12] BRYAN STEVENSON, JUST MERCY 271 (2014).

6. In 1987, an LGBT student organization named you in a lawsuit alleging that it was denied funding by the student government "because of the perceived sexual orientation of LGAU members and because the subject matter of its educational programming often deals with issues related to sexual orientation."[13] At the time, you were a senior and an Executive Vice President of the student government and were allegedly responsible for approving or disapproving all appropriations passed by the student senate.[14]

    b. Did you play any role in the denial of funds to Lesbian and Gay Academic Union of Arizona State University?

    I do not believe that I have seen the complaint that was filed in this matter for over thirty years. However, I remember that there were several controversies in the student government over the funding of campus clubs and organizations. The lawsuit involved funding requests from the year in which I was the executive vice president of the student body. In that role, I served as the chair of the student senate. The question states that as vice president I was "allegedly responsible for approving or disapproving all appropriations passed by the student senate." That is not an accurate statement of my role or authority during my undergraduate years. As vice president of the student body, and chair of the student senate, I did not approve or disapprove all appropriations bills, or any other bills. Instead, the student senate passed bills, including bills to appropriate funds to clubs and organizations, and the president of the student body was then responsible for either signing or vetoing those bills. In the event of a tie vote in the student senate, I could cast a vote. To the best of my recollection, there were times that I voted in the student senate, but I do not remember voting on the appropriations bill. The LGAU and several other groups were denied funding that year.

    c. Why were they denied funds?

    I do not recall what any particular student senator said about club funding and I could only speculate as to the reason or reasons for each of their votes on club funding. However, I do recall that there were several clubs that were denied funding, and there were disagreements about funding requests from several organizations that received funding. I believe that the students generally were struggling with the issue of funding political speech. I remember that the student senate tried to adopt standards to address club funding issues and passed bylaws that stated that the student senate would not approve funding requests for "controversial" or political programs.

    d. Do you believe it is appropriate to deny funding to student groups based the sexual orientation or gender identity of its members?

    No.

[13] First Amended and Supplemental Complaint, *Lesbian and Gay Academic Union of Arizona State University v. Arizona State University et al.*, No. 87-0266-PHX-WPC at 2 (D. Ariz. Jun. 15, 1987).
[14] *Id.* at 5.

e. In your life have you ever seen an individual discriminated against because of their sexual orientation or gender identity? If so, please explain.

I believe that such discrimination exists, but I do not recall seeing a specific instance of this type of discrimination that I could describe in response to this question.

f. As a general matter, do you agree that LGBT people in the United States are frequently the targets of discrimination?

Yes. I agree that discrimination continues to be a serious problem in our society, including discrimination against LGBT people.

g. What can you point to in your past that will assure LGBT people who appear before you in court that you will be an impartial jurist?

I would point to my record serving as a magistrate judge for six-and-a-half years. I have treated all litigations fairly and with respect, and I have impartially applied the law.

7. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[15] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[16] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[17] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[18]

a. Do you believe there is implicit racial bias in our criminal justice system?

Yes. From the training I received on implicit bias at judicial conferences, I understand that everyone has bias, which may be conscious or unconscious.

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

---

[15] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[16] *Id.*
[17] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[18] *Id.*

Yes. I attended three sessions on implicit racial bias at the Ninth Circuit Judicial Conferences in 2014 and 2016, and at the Federal Magistrate Judges Conference in 2017.

8. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[19] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[20]

   a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

      I have not researched this issue and I do not have any basis to offer an opinion on the relationship between incarceration rates and crime rates.

   b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

      Please see my response to question 8(a).

9. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

   Yes.

10. Do you believe that *Brown v. Board of Education*[21] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    As a magistrate judge and a judicial nominee, I do not believe it would be appropriate for me to offer opinions on whether Supreme Court cases were correctly or incorrectly decided, even seminal decisions like *Brown*. *See, e.g.,* Canon 3(A)(6) of the Code of Conduct for United States Judges. Although I cannot comment on *Brown*, or any other Supreme Court decision, since 2016 I have chaired the District of Arizona's participation in the Ninth Circuit Civics Contest, which is an essay and video contest for high school students. In 2017, the contest topic was on the Fourteenth Amendment in the context of education and *Brown* was a critically important case that we asked the students to consider. I previously provided the committee with a recording of a program we presented at the district court for that contest.

---

[19] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.

[20] *Id.*

[21] 347 U.S. 483 (1954).

11. Do you believe that *Plessy v. Ferguson*[22] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

The Supreme Court overruled *Plessy* and repudiated the odious doctrine of "separate but equal" in *Brown*. Therefore, *Plessy* is no longer valid or binding precedent.

12. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

In preparation for my hearing before the committee, I met with attorneys at the Department of Justice and we discussed the hearing process, including questions that have been asked in previous hearings and questions that I might be asked. They did not direct me on the answer to any question. They advised me to review the Code of Conduct for United States Judges.

13. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[23] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Yes. The Supreme Court has held that immigrants are entitled to due process protections. *See Reno v. Flores,* 507 U.S. 292, 306 (1993).

[22] 163 U.S. 537 (1896).

[23] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted October 31, 2018
For the Nomination of

Bridget Bade, to the U.S. Court of Appeals for the Ninth Circuit

1. In *Laird v. Ryan*, a juvenile offender challenged his 154-year aggregate sentence, asserting that his term of imprisonment was equivalent to life without parole—which the U.S. Supreme Court had previously held to be unconstitutional for juveniles in *Miller v. Alabama*. As a magistrate judge, you recommended that the district court deny his petition for release on the ground that there was no clearly established precedent prohibiting judges from sentencing juveniles to the functional equivalent of life in prison.

    a. **Do you stand by that recommendation today?**

    Please see my response to Senator Booker's question 5. In particular, after the district court adopted the report and recommendation, the petitioner filed an appeal to the Ninth Circuit. *Laird v. Ryan*, CV 17-00482-PHX-JAT (BSB), Docs. 36, 38; *Laird v. Ryan*, Case No. 18-16634 (9th Cir.). It would be improper for me to comment on the merits of this pending case. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges ("A judge should not make public comments on the merits of a matter pending or impending in any court.").

    b. **In making that recommendation, did you have any concerns about affirming the sentencing of a child to 154 years in prison?**

    Please see my response to question 1(a).

    c. In *Graham v. Florida* (2010), the U.S. Supreme Court held that juvenile offenders could not be sentenced to life without parole for non-homicide offenses. Writing for the majority, Justice Kennedy noted that juveniles are characteristically distinct from adults because they have less maturity, a less developed sense of responsibility, and less formed character. Accordingly, Justice Kennedy concluded that "because juveniles have lessened culpability they are less deserving of the most severe punishments."

        i. **Do you agree with Justice Kennedy's description of the characteristics of juveniles?**

        Please see my response to Senator Booker's question 5(b) and (c). It would be improper for me, as a magistrate judge and as a judicial nominee, to state whether I agree or disagree with statements in Supreme Court decisions. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges. *Graham* is binding precedent that I will continue to faithfully apply, and its validity was not disputed or at issue in the *Laird* habeas petition.

ii. **Based on Justice Kennedy's description, do you agree that leniency is appropriate when sentencing a juvenile defendant?**

Please see my response to question 1(c)(i).

iii. **Do you agree with Justice Kennedy's conclusion that juvenile offenders are "less deserving of the most severe punishments"?**

Please see my response to question 1(c)(i).

d. Building on *Graham,* the U.S. Supreme Court in *Miller v. Alabama* (2012) held that juvenile offenders could not be sentenced to life without parole for any crime, including homicide offenses. In the majority opinion, Justice Kagan made clear that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." Quoting the majority opinion in *Graham*, Justice Kagan reiterated that "[i]mprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable."

i. **Do you agree with Justice Kagan's statement that "imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable"?**

Please see my response to question 1(c). *Miller* is binding precedent that I will continue to faithfully apply, and its validity was not disputed or at issue in the *Laird* habeas petition.

ii. **Do you believe the same reasoning applies to a juvenile sentence of 154 years in prison?**

Please see my response to question 1(c).

e. **Do you believe that harsh sentencing practices improve public safety? If yes, please provide citations.**

I have not studied whether there is a relationship between sentencing practices and public safety and so I do not have a basis to offer an opinion on this issue.

2. In June 1987, as Executive Vice President of Arizona State University's (ASU) Student Government, you were named as a defendant in a discrimination lawsuit filed by a gay and lesbian student organization. The student group alleged that it was denied funding because of the perceived sexual orientation of its members, and because the group's programming dealt with issues related to sexual orientation. Accordingly, the group claimed that ASU had violated the First Amendment by denying funding based on the presumptive content of the group's speech.

Although you were not a member of the Student Senate Appropriations Committee, the group alleged that you were responsible for approving and vetoing appropriations, and therefore shared responsibility for the alleged First Amendment violation.

a. **As Executive Vice President, did you have any role in denying appropriations to gay and lesbian student groups? If the answer is "yes," please explain the nature and scope of your role.**

   As vice president I served as chair of the student senate. I did not have the authority or responsibility for "approving or vetoing appropriations" or any other bills that the student senate passed. The student government president was the student officer with the authority to sign or veto bills that the student senate passed. In the event of tie vote in the student senate, I could cast a vote. To the best of my recollection of these events, which occurred over thirty years ago, there were times that I voted in the student senate, but I do not remember voting on the appropriations bill at issue in this lawsuit.

b. **Did you advise the Student Senate Appropriations Committee, or any other subdivision of ASU, to deny funding to gay and lesbian student groups?**

   To the best of my recollection, there were three committees in the student senate, including the appropriations committee. As student body vice president, and chair of the student senate, I did not serve on any of these committees and I did not attend their meetings, or tell them how to conduct their committee business. The committees would introduce bills for the consideration of the student senate. I did not have the authority to tell the committees or the student senators to approve or deny any funding request.

c. **At the time of the lawsuit, did you believe that funding could be withheld from an LGBTQ organization consistent with the First Amendment?**

   i. **If the answer is "yes," please explain why and provide citations.**

      The lawsuit related to student government activities in 1986 and 1987, when I was an undergraduate student. I had not attended law school and I did not have any basis to form legal opinions. I do not recall that I had any opinions on issues of constitutional law as an undergraduate.

   ii. **If the answer is "yes," do you still agree with that position today?**

      Several cases that address First Amendment issues in the context of funding student organizations were decided many years after this lawsuit. *See, e.g., Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). These issues are still being litigated. Therefore, the application of the First Amendment to funding for campus

groups, and political speech, is the subject of pending and likely impending litigation and so it would not be appropriate for me as a magistrate judge or a judicial nominee to offer an opinion on these issues. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

a. **Have you ever, in any way, assisted with or contributed to advocacy against LGBTQ rights? If the answer is "yes," please explain the nature and scope of your assistance.**

No.