Question for the Record for Ryan Bounds

1. Mr. Bounds, you have spent the past eight years as a federal prosecutor in Oregon. You have the support of other federal prosecutors and numerous criminal defense lawyers you litigated against. How has being a prosecutor prepared you to serve as a federal appellate judge?

   In my role as a prosecutor, I have had the honor of representing the people of the United States in hundreds of matters. From this work I have gained a deep familiarity with the issues that predominate in the Ninth Circuit, including questions of constitutional law, criminal law and procedure, the admissibility of evidence, and immigration enforcement. I have handled many appeals to the Ninth Circuit (from judgments in my own cases and others'), so I am familiar with the court as a practitioner as well as a former law clerk. And, as a trial attorney, I am similarly familiar with district court practice, which provides the procedural context for most of the claims heard by the court of appeals. Finally, I have enjoyed the opportunity to work with many superb lawyers, both as colleagues and opposing counsel, and I have learned much from working collaboratively with all of them. If I were to be confirmed, I believe these experiences would permit me to contribute immediately and effectively to the work of the court.

Nomination of Ryan Bounds to the U.S. Court Appeals for the Ninth Circuit
Questions for the Record
May 16, 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?

   Lower courts must always follow the controlling Supreme Court precedent, even when there is doubt as to its vitality. *See e.g., Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

   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?

   The circuit courts are always bound to follow Supreme Court precedent, but it may (in rare circumstances) be salutary to note tensions with intervening and inconsistent authority as a means of soliciting the Supreme Court's resolution of the issue.

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

   The Supreme Court has occasionally reviewed at length the factors it considers in deciding whether to overturn its own precedents, *see, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-69 (1992), but ultimately the decision is for the Court alone. As a nominee for an inferior court, I could not offer an independent view on the matter.

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

   Please see my answer to Question 1(c), *supra*.

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"?

The Supreme Court itself has emphasized that the central holding of *Roe* has been reaffirmed and reapplied by the Court many times. *See Casey*, 505 U.S. at 857-58 (noting "one could classify *Roe* as *sui generis*"). As a nominee for an inferior court, I would regard every controlling Supreme Court precedent as absolutely binding, be it super or otherwise.

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 nominee to an inferior court, I would be bound to apply the opinion of the Court in *Heller*; the persuasiveness of the dissent would be immaterial.

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

The opinion of the Court specifically noted that "nothing in [it] should be taken to cast doubt" on a number of "longstanding prohibitions" and firearm regulations. *Heller*, 554 U.S. at 626-27 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

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

The Court held in *Heller* that "nothing in [its] precedents foreclose[d its] adoption of the original understanding of the Second Amendment," because the question was theretofore "judicially unresolved." *Heller*, 554 U.S. at 625. As a nominee to an inferior court, I would be bound by the Court's reading of its own precedents.

5. For the Ninth Circuit vacancy to which you have been nominated, Senators Wyden and Merkley and Representative Greg Walden convened a bipartisan judicial selection committee — as Oregon's Congressional delegation has done for the previous two decades, including during the Bush Administration — to interview applicants for the Ninth Circuit vacancy. However, the White House had nominated you before the committee had begun accepting applicants.

   According to your Senate Judiciary Questionnaire, on March 15, 2017, you interviewed with the White House Counsel's Office and the Justice Department's Office of Legal Policy regarding the Ninth Circuit vacancy that arose as a result of Judge O'Scannlain's decision to take senior status. You also note that on May 24, 2017, the White House informed you that it was sending your name to the Justice Department "to begin a vetting process," and that on September 7, 2017, the President submitted your nomination to the Senate. (Bounds SJQ at p. 32)

   a. At any point before your nomination in September 2017, were you aware that Oregon's congressional delegation had a practice of using bipartisan judicial selection committees for recommendations for Ninth Circuit vacancies?

   My understanding is that no such practice had been used in Oregon for Ninth Circuit vacancies (though it has been used for district court nominations in Oregon since at least the 1980s). As the records of this Committee reflect, Senator Wyden supported the last Oregonian nominated for the Ninth Circuit, Judge Susan P. Graber (appointed by President Clinton in 1998), despite her assertion in her questionnaire that no such committee existed.

(i) If you were aware, did you at any point reach out to the offices of the Oregon Senators prior to your nomination?

It was not my understanding that any such practice was customary.

(ii) If you were aware, did you ever request during your vetting process with the White House that your candidacy wait for an evaluation by an Oregon judicial selection commission?

It was not my understanding that any such practice was customary.

(iii) If you were not aware, did you inquire at any point during your vetting process with the White House prior to your nomination what role your home state senators would play in your nominations process? If so, what were you told?

I do not recall asking that question, but I understood the White House would solicit the senators' support for my nomination.

b. During your vetting process with the White House prior to your nomination, did officials mention to you the role home state senators would play in your nominations process? If so, what were you told and were blue slips mentioned?

Blue slips were mentioned, and I was told that securing my home state senators' support would be important helpful to moving any potential nomination forward. As a result, when the senators' judicial selection committee was announced (after my nomination), I eagerly applied for—and was honored to receive—the committee's recommendation.

6. Question 12(a) of the Senate Judiciary Questionnaire asked you to list and supply copies of all "books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet." (SJQ

Question 12(a)) In response, you listed several opinion pieces you wrote for the *Stanford Review* in 1994 and 1995, including several articles like "Race-Think: A Stanford Phenomenon?" and "Lo! A Pestilence Stalks Us." According to a notarized affidavit attached to your Questionnaire, you responded to the Questionnaire in September 2017, before your interview with the Oregon bipartisan judicial selection committee.

At your hearing, when asked about your writings, you said: "It seemed perfectly reasonable to me, I have to say, that there would not be a lot of interest in writings of a quarter-century of age that have no bearing or relationship to someone's professional practice."

a. If writings are unrelated to one's current professional practice, but still touch upon legal subjects or one's view's on potential litigants, why did you think there "would not be a lot of interest" in them?

The articles at issue were about campus politics and nowhere purported to analyze any legal question or to offer views on any potential litigants.

b. Was your view on the relevance of your writings for the Oregon committee changed in any way by the fact that you were aware that the U.S. Senate found them to be relevant in its consideration of your nomination?

No. Relying on the instructions I received from Sen. Wyden's staff, I surmised that the committee had independently decided such dated material—having nothing whatever to do with a candidate's legal career—was of little relevance to its deliberations.

7. In an October 1994 article entitled "Reasonable Doubt?" in the *Stanford Review*, you wrote: "There is really nothing inherently wrong with the University failing to punish an alleged rapist — regardless his guilt — in the absence of adequate certainty; there is nothing that the University can do to objectively ensure that the rapist does not strike again. Only the legal system can do that, and if it lacks the certainty to do so, it is not necessarily up to the University to stick it to the suspect, anyway, just in case. Expelling students is probably not going to contribute a great deal toward a rape victim's recovery; there is no moral imperative to risk egregious error in doing so." (*Reasonable Doubts?*, STANFORD REVIEW (Oct. 17, 1994))

a. Is it your position that if a university cannot "objectively ensure that [a] rapist does not strike again," then it has no role to play in punishing perpetrators?

No. I have never believed, and the article does not say, that universities should forgo punishing students found to have committed sexual assault. The only issue was whether the university should reduce the burden of proof to be borne in making such a finding.

b. Is it your position that if universities lack the ability to adjudicate crimes of sexual violence with the certainty of the criminal justice system, they should not adjudicate claims of sexual violence on campus?

No. As I testified, the article focused on the fairness to the accused of reducing the burden of proof needed to inflict the same life-long consequences that had previously required a finding of guilt beyond a reasonable doubt. It was the nature of the change that was at issue rather than the legitimacy of the enterprise.

Student survivors of sexual violence are often further traumatized by the presence of their classmate-perpetrators, who may live in their same dorms and attend the same classes as the survivors.

c. In those instances, why would expelling students found to have committed sexual violence "probably not...contribute a great deal toward a rape victim's recovery?"

I think that I stated this proposition poorly. I believe I meant that academic sanctions could not substitute for the criminal justice system in ensuring that victims see their assailants justly punished and deterred from committing further crimes.

8. In a piece you wrote in May 1995 in the *Stanford Review* entitled "Labor Unions and the Politics of Aztlan," you criticized a Stanford Latino student organization, MEChA, for protesting a hotel owned by a company that had fired three employees at another property

after those employees attempted to form a union. You wrote: "What political purposes of Stanford's Chicano and Latino communities are advanced by assaulting a local business that is only tangentially involved with some remote labor dispute? For that matter, what does a small-scale labor dispute have to do with these communities in the first place? . . . If MEChA considers any sub-opulent living standard or less-than-enviable wage that is endured by a Latino or Chicano American to be grounds for it to make a bombastic organizational pronouncement, why hasn't it circulated a policy memo against the minimum wage for which so many Latinos and Chicanos are forced to slave away?" (*Labor Unions and the Politics of Aztlan*, STANFORD REVIEW (May 15, 1995))

a. Please explain your view that students protesting a company for firing workers attempting to unionize is "assaulting" a business.

That was a juvenile exaggeration.

b. What statements in particular of the students protest did you believe constituted a "bombastic organizational pronouncement"?

I do not recall any facts about this incident other than those recounted in the article itself, so I do not know what I had in mind by that phrase.

c. Is it your position that those receiving minimum wage "slave away" at their work?

To the contrary, I was inartfully criticizing the protesters for suggesting as much. I have held a minimum-wage job, and I expect my daughter one day to do the same.

9. 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 discussed deference to administrative agencies with lawyers at the White House Counsel's Office during my interview there. I do not recall with whom exactly. Administrative law has not factored into my prosecutorial practice over the last decade in any significant way. I noted the general risks to the separation of powers that inheres in combining executive and adjudicative functions with expansive delegations of legislative power. I also noted that courts are not well

suited to fill in the gaps of legislation and generally lack political accountability, unlike Congress and the Executive. I posited that the best solution to the present debates over administrative law might be more detailed legislation from Congress.

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"?

Please see my answer to Question 9(a), *supra*.

10. 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.

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

I drafted answers and submitted them to the Justice Department for stylistic review and formatting. The answers as submitted are my own.

Senator Dick Durbin
Written Questions for Ryan Bounds, J. Campbell Barker, and Maureen Ohlhausen
May 16, 2018

For questions with subparts, please answer each subpart separately.

Questions for Ryan Bounds

1. On February 12, 2018, the Multnomah Bar Association (MBA), an association to which you have belonged from 2000-04 and 2010 to the present, issued a statement regarding articles you wrote as a college student. The statement said that your articles "express insensitive, intolerant, and disdaining views toward racial and ethnic minorities, campus sexual assault victims, and the LGBTQ community" and said "[t]he MBA strongly disavows the views expressed in those articles as racist, misogynistic, homophobic and disparaging of survivors of sexual assault and abuse." The statement said that the MBA requested and accepted your resignation as Chair of the MBA's Equity, Diversity and Inclusion Committee.

   On February 13, 2018, you sent a letter to Andrew Schpak, President of the MBA, regarding your resignation as Chair of the Equity, Diversity and Inclusion Committee. In the letter, you discussed your "bedrock conviction that lawyers can, and should, learn from new perspectives and insights on issues relating to diversity and inclusion throughout their careers" and said "the Board dangerously undermines this proposition by insisting that I resign my chair because of regrettable words I used as a college student a quarter-century ago but have since repudiated."

   a. **Was the Multnomah Bar Association correct when it said in its statement that your articles "express insensitive, intolerant, and disdaining views toward racial and ethnic minorities, campus sexual assault victims, and the LGBTQ community"?**

      I do not believe so.

   b. **Was the Multnomah Bar Association correct to "disavow[ ] the views expressed in those articles as racist, misogynistic, homophobic and disparaging of survivors of sexual assault and abuse"?**

      I do not believe that is a fair characterization of anything I have ever written.

   c. **When prior to February 13, 2018 did you specifically "repudiate" the words you wrote in these articles? Please cite the date and circumstances of that repudiation.**

      In a February 9, 2018, email to my colleagues on the local bar association's Equity, Diversity & Inclusion Committee, which I chaired at the time, I flagged an advocacy group's critical report on the articles and apologized for the "ill-considered, tone-deaf, and mortifyingly insensitive" language in them. That email was published on the local newspaper's website the next day.

d. **During your confirmation hearing, you described your articles as "often overheated" and "often high-handed" but you did not repudiate them. To the contrary, you sought to defend your articles as being about "how best to pursue a diverse and mutually tolerant campus." Why did you not repudiate the words you wrote in your articles during your confirmation hearing? Will you do so now?**

As I testified, I regret the overheated, hyperbolic and juvenile rhetoric in the articles in question. They strained to provoke rather than persuade, and they were insufficiently respectful of the fellow students whose views and actions I was criticizing. I apologize for that. I would not have written and have not written anything of the sort since leaving college. Those articles are inconsistent with the collaborative spirit in which I have worked to advance our society's goals of diversity and inclusiveness throughout my adult life.

2. According to a letter sent by Senators Wyden and Merkley to Chairman Grassley on May 3, 2018, you were asked by Oregon's bipartisan judicial selection committee "to disclose any potentially controversial materials that could impact a potential recommendation by the committee." You did not disclose your articles in the *Stanford Review* to the committee.

a. **Why did you fail to disclose these articles to the committee when you were asked to disclose any potentially controversial materials that could impact a potential recommendation by the committee?**

I do not believe anyone on the committee asked me to disclose any materials at all. Senator Wyden's office explicitly told me the committee sought to review materials going back only "as far as law school," and so I identified and (to the extent practicable) produced all such materials without regard to whether they were potentially controversial.

b. **Are there any more potentially controversial materials that you failed to disclose to the committee? If so, what are those materials?**

I have produced to this Committee all public writings, speeches, and statements I have made (and of which I have records) since entering college without regard to whether they are potentially controversial.

3. In a column that you wrote as an undergraduate entitled "Race-Think: A Stanford Phenomenon," you wrote:

> During my years in our Multicultural Garden of Eden, I have often marveled at the odd strategies that some of the more strident racial factions of the student body employ in their attempts to "heighten consciousness," "build tolerance," "promote diversity," and otherwise convince us to partake of that fruit which promises to open our eyes to a PC version of the knowledge of good and evil. I am mystified because these tactics seem always to contribute more to restricting consciousness, aggravating intolerance, and pigeonholing cultural identities than many a Nazi bookburning. Strangely, the

> Multiculturalists don't seem to catch on to the inevitable non-efficacy of their rallies, protests, whinings, demands, and vitriolic brickbats towards all printed policies not incorporating the language of the 1964 Civil Rights Act in their preambles.

What did you mean when you described the "more strident racial factions of the student body"?

I have no independent recollection, but I gather from the article that I was referring to certain activists on campus who engaged in the tactics I went on to criticize.

4. **Do you think your undergraduate writings helped to "heighten consciousness," "build tolerance" or "promote diversity" on campus?**

   They criticized tactics that I thought were counterproductive of those aims, but I have no reason to believe anyone who engaged in those tactics read the articles in question.

5. You wrote another column in college entitled "Reasonable Doubts." In this column you criticized the effort to lower the standard in university reviews of sexual assault cases from "beyond a reasonable doubt" to "a preponderance of the evidence." You said:

   > Although it is understandable, even advisable, in paternalistic situations to place a greater emphasis on punishing misbehavior than on respecting the integrity of its suspected perpetrator, such a strategy is wholly inappropriate, insulting, and dangerous in a community whose members are socially and morally competent and expected to assume lifelong responsibility for their actions.

   You went on to say:

   > There is really nothing inherently wrong with the University failing to punish an alleged rapist – regardless his guilt – in the absence of adequate certainty; there is nothing that the University can do to objectively ensure that the rapist does not strike again. Only the legal system can do that, and if it lacks the certainty to do so, it is not necessarily up to the University to stick it to the suspect, anyway, just in case. Expelling students is probably not going to contribute a great deal toward a rape victim's recovery; there is no moral imperative to risk egregious error in doing so.

   Do you think your article could have had the effect of discouraging victims of campus sexual assaults from reporting the assaults to the university?

   I certainly hope not. The article specifically advocated that all potential victims of sexual assault be assured "that coming forward . . . would cost them little but could contribute to recovery as well as justice."

6. In your February 13, 2018 letter to Mr. Schpak of the Multnomah Bar Association, you said:

> Unfortunately, it has come to my attention that the board seeks my resignation, citing editorials I wrote as a college student nearly a quarter-century ago. I have acknowledged that those editorials were poorly worded and ill-conceived pronouncements of a youth who had much to learn about the world. I sincerely wish the board would judge me not on decades-old words, but by the work we have done together.

Your letter is interesting because you ask the MBA not to judge your words by their plain (and intolerant) meaning but with your preferred context and interpretation. This is an interesting insight into your view of judging.

a. **When should judges interpret written words in their context rather than based on their plain meaning?**

In the absence of controlling precedent, courts should always consider context in determining whether the meaning of a federal statute is plain. *See, e.g.*, 1 U.S.C. § 1 (outlining general rules to apply in interpreting "any Act of Congress, unless the *context* indicates otherwise" (emphasis added)); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

b. **When should written words be judged in light of the length of time since the words were written, rather than simply judging the words based on their plain meaning?**

It depends on the purpose for which the words are being considered. As evidence of a current fact, ancient writings may not be particularly reliable evidence and might be properly discounted in light of the passage of time. As legal authorities, written words must be understood with regard to the linguistic context in which they were written, but their meaning is fixed (although the best understanding of that fixed meaning remains subject to refinement) and remains in force until superseded.

c. **When should written words be judged in the context of the author's behavior rather than simply judging the words based on their plain meaning?**

The behavior of individual drafters is usually of limited relevance in interpreting the law, because the law in this country is not the product of individuals (and even drafters may act inconsistently with laws they championed). In interpreting agreements, devises, and similar writings, however, the authors' behavior can provide important context from which to infer their intended meaning.

d. According to your questionnaire you have been a member of the Multnomah Bar Association (MBA) for at least 12 years and you held leadership positions in the association from 2011 to 2018. In other words, the MBA is familiar with you and the

work you have done in recent years. Yet when the MBA learned of your college articles, the MBA "strongly disavow[ed] the views expressed in those articles as racist, misogynistic, homophobic and disparaging of survivors of sexual assault and abuse" and requested your resignation as Chair of an MBA committee.

The MBA, which knows you far better than members of the Senate Judiciary Committee and which was aware of the work you had done since you wrote those articles, nonetheless felt after they learned of the views you expressed in those articles that you were not fit to serve in a position of authority within the MBA.

Should the Senate Judiciary Committee take into consideration this judgment of the MBA when considering whether your written views render you unfit to serve as a federal judge?

The weight, if any, this Committee gives to any consideration bearing on my nomination is for this Committee to decide.

7. In another of your college columns, entitled "Lo! A Pestilence Stalks Us," you criticized certain students who you viewed as being overly sensitive. For example, you mocked LGBT students for being sensitive when a group of intoxicated athletes vandalized a statute celebrating gay pride, and you mocked Latino students for being sensitive when they complained about the termination of a Latino administrator.

   Do you repudiate the views you expressed in this column?

   I believe that article did not evince sufficient respect for the subjective concerns of the students involved. I apologize for that; it is not in keeping with how I have lived my life.

8. On April 11, 2014, Senator Hatch wrote an op-ed in *The Hill* in which he said, "Weakening or eliminating the blue slip would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's 'advice and consent' role knows how disastrous such a move would be."

   a. **Do you believe the Senate's advice and consent role is important under our Constitution?**

      Yes.

   b. **Do you believe the blue slip serves as a check on the president's judicial appointment power?**

      As a judicial nominee, I could not comment on the Senate's procedures for considering nominees. Such procedures are for the Senate alone to decide.

   c. According to the Congressional Research Service, never in the era of Senate blue slips has a judicial nominee been confirmed over the objections of both home state senators. **Would it trouble you to be the first?**

It would be a tremendous honor to be confirmed by the Senate and appointed by the President to this position. The honor would be greater still if it were supported by the Senators from Oregon.

Nomination of Ryan Wesley Bounds
United States Court of Appeals
For the Ninth Circuit
Questions for the Record
Submitted May 16, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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 believe the metaphor illustrates the neutrality that is absolutely essential to judging cases. The public's confidence in the courts would be impossible to maintain without conspicuous impartiality and an unwavering commitment to applying the law to the case without fear or favor.

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

    The practical consequences of a ruling can inform judicial practice in discrete areas, such as the granting of injunctive relief, but distaste for the results in a particular case should never to cause a court to shirk its obligation to apply its best understanding of the law.

2. 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?

    Empathy should not skew a judge's interpretation of the law or application of it in any particular case, but it should inform a judge's appreciation of the full scope and importance of the parties' arguments and aims.

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

    Every judge's personal life experience and the empathy to which it gives rise should help the judge form a deeper appreciation of the positions and concerns of the parties in the matters before the court.

3. 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.

4. 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?

In addition to my solemn oath to "do equal right to the poor and to the rich" and to "faithfully and impartially discharge" the duties of the judicial office, 28 U.S.C. § 453, I would refer the Committee to the many letters from opposing counsel, colleagues, law professors, and others attesting to my fairmindedness and objectivity.

5. During your confirmation hearing, you referred to some of your past rhetoric as "too often not as respective as it should've been of people of opposing viewpoints . . . ." What assurances can you give the Committee that as a judge you will respect all litigants that come before you and the arguments they present?

   Please see my answer to Senator Klobuchar's Question #2.

6. During your confirmation hearing, you stated that, "I definitely do believe that long-marginalized communities in the United States do continue to face obstacles and do continue to face discrimination and I find it totally unacceptable." If confirmed, what would be your role in combatingsuch obstacles and discrimination? What experiences will you draw upon to successfully complete this role?

   As a judge, I would be constrained to apply the law in every case evenhandedly, ever mindful of the court's obligation to ensure equal justice under law. That obligation includes ensuring the full and proper application of the antidiscrimination laws enacted by Congress and the equal protection guarantees of the U.S. Constitution as well as all other laws.

   In doing so, I would draw on all of my legal experience as well as my experiences learning from the students, clients, criminal defendants and colleagues I have interacted with over the years, many of whom have shared with me their own stories of confronting such obstacles.

7. How, if at all, will your experiences as a criminal prosecutor and your advocacy (and testimony before the House Judiciary Committee) for the Prison Litigation Reform Act impact your judgement and decision-making in appeals involving criminal defendants or inmates?

   As a prosecutor, much of my work involves discussing with criminal defendants (often through counsel) the full contexts of their crimes and their personal backgrounds. This information is important both in plea negotiations and in formulating sentencing recommendations. I have also prosecuted cases in which prison inmates and former convicts were the victims of crime. I think these experiences would afford me an exceptionally informed perspective on the plights of the criminal defendants and inmates in cases before me. I do not think my testimony on the PLRA, in which I conveyed the Justice Department's position on the utility and implementation of that statute, would have any particular impact on my judgment or decision-making.

8. Do you still believe that "[e]xpelling students is probably not going to contribute a great deal toward a rape victim's recovery."? Why or why not?

   That assertion from a college article was poorly worded. I believe rapists' being publicly convicted and incarcerated would do more for their victims' recovery, but sparing victims from further encounters with their assailants on campus would be an important remedial step.

9. You have previously written that "Multiculturalists . . . do not tend to see themselves as invulnerable, but instead as universally and unbearably persecuted," and similarly that "if we fancy ourselves oppressed (regardless of how oppressed, ignored, or downtrodden we

objectively are) we will see the world, however unrealistically, as overflowing with instances that support our perception." In your view, who is a "multiculturalist"? Do you still hold this sentiment? What do you believe is the value of diversity and multiculturalism, particularly in the context of higher education?

As I testified at my hearing, I believe the language I used in a few college articles was sometimes overbroad; this characterization of multiculturalists was not only overbroad but hyperbolic. I take it that the column in question was referring to a subset of student activists advocating for special programming and facilities for certain racial and ethnic groups on campus.

The Supreme Court has long observed that diversity in ideas and views (and, by extension, cultures) in the context of higher education is important. *See, e.g., Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("Few students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."). I agree.

10. How will your interest and experience with immigration reform—having served as both a volunteer in the Justice Department in immigration review proceedings and criminal appeals; and participated in formulating comprehensive immigration reform policy—affect your role as a judge when hearing immigration appeals in the Ninth Circuit?

    Immigration cases—both criminal and civil—constitute an outsized proportion of the Ninth Circuit's docket. They also frequently are its most backlogged. My extensive experience with immigration litigation and policy would allow me to confront these matters with a greater awareness of and deeper familiarity with the applicable authorities. I hope it would help me serve as a productive and efficient member of the court from the outset of my tenure.

11. Do you recall the judicial selection committee in Oregon asking you whether there was any controversial or potentially controversial information concerning you that could come to light during this confirmation process? If yes, do you recall your answer to the committee?

    I do not recall any general question about controversial information about me. I recall being asked whether I had participated in any activity that had been previously illegal in Oregon but was now legal under Oregon law. I said no.

Senate Judiciary Committee
"Nominations"
Questions for the Record
May 9, 2018
Senator Amy Klobuchar

Questions for Ryan Bounds, Nominee to the Ninth Circuit Court of Appeals

- How do you view the importance of adhering to precedent, and how would you approach a case in which there was a relevant precedent that you felt was wrongly decided if you are confirmed to the Ninth Circuit?

  The doctrine of *stare decisis* is the bedrock of the rule of law. Without it, people would be left in perpetual uncertainty about their rights and obligations. Nevertheless, the Supreme Court has repeatedly admonished that the doctrine is "not an inexorable command." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827–828 (1991)).

  Overruling precedent requires a "'special justification'—over and above the belief 'that [it] was wrongly decided.'" *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)). This is particularly true for errors that may be corrected elsewhere. In the case of a Ninth Circuit decision interpreting a statute, the holding may be superseded by a statutory amendment, and any decision may be overruled by the Supreme Court.

  If I were to confront a case controlled by a Ninth Circuit precedent I believed to be wrongly decided, I would first apply the precedent to rule on the pending case. If there were a special justification for revisiting the earlier decision, I would note in a special concurrence the reasons why the court should take up the matter *en banc* and encourage my colleagues on the court to vote to rehear the pending case in order to reconsider the validity of the erroneous precedent.

  I would apply any controlling precedent of the Supreme Court without reservation.

- What assurances can you give that all litigants in your courtroom would be treated fairly, regardless of your personal views?

  In addition to my solemn oath to "faithfully and impartially discharge" the duties of the judicial office, 28 U.S.C. § 453, I would advert to the many letters from opposing counsel, colleagues, classmates, law professors, and friends of various political persuasions attesting to my open-mindedness and respect for opposing viewpoints. I believe the support of the lawyers who have litigated against me over the years provides the firmest assurance of my willingness to treat even opposing parties fairly. As a judge, I

would sit in opposition to no party and would assure a respectful hearing to all who would appear before me.

Nomination of Ryan Wesley Bounds, to be United States Circuit Judge for the Ninth Circuit
Questions for the Record Submitted May 16, 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, if confirmed, apply the factors that the Supreme Court has identified, and the definitional guidance it has offered, in the cases where it has undertaken the most analogous inquiry, including, generally, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *McDonald v. City of Chicago*, 561 U.S. 742, 767-70 (2010); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

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

      Yes.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Yes. I would consult pre-independence English and colonial law, contemporaneous and antecedent state constitutions, statutes, and judgments, and treatises on the common law.

   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?

      I would consider myself bound by prior recognition by the Supreme Court or the Ninth Circuit and would consider the rulings of other circuits 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*).

      That is a factor that the Supreme Court has relied upon and one that I would be bound to consider.

f. What other factors would you consider?

I would consider all authorities and arguments adduced by the parties to the case or identified in relevant precedents of the Ninth Circuit and the Supreme Court.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has repeatedly held that the Equal Protection Clause ensures equal treatment under law for all Americans and essentially "direct[s] that all persons similarly situated should be treated alike." *See generally City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985). Most legislative classifications are presumed to be valid, but classifications based on race must be justified by a "compelling" governmental interest and classifications based on gender must be justified by an "important" governmental interest. *See id.*

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?

I would refer to the Supreme Court's repeated holdings that the Equal Protection Clause prohibits unwarranted discrimination based on gender in, for example, *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi U. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); and *Reed v. Reed*, 404 U.S. 71, 75 (1971).

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States*
v. Virginia, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I do not know the history of litigation in furtherance of that principle well enough to venture an answer to that question.

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 every state to afford married same-sex couples the full "constellation of benefits that [it] ha[s] linked to marriage" for heterosexual couples. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

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

As a nominee for judicial office, it would be inappropriate to comment on a question

that may come before me in litigation. The Supreme Court has not yet resolved this issue, and it is pending in numerous circuits.

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

   Yes. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

   a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

      Yes. *See, e.g., 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. *See Lawrence v. Texas*, 539 U.S. 558, 578 (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.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
   a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

      As a nominee to an inferior court, I could not say that any amount or type of evidence would justify deviating from the binding precedents of the Supreme Court (as the Court itself did in the *Obergefell* case by overturning *Baker v. Nelson*, 409 U.S. 810 (1972)). A court must nevertheless address any open question before it with the benefit of contemporary understandings of society.

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

      The Supreme Court has long accounted for sociological and scientific evidence in its

jurisprudence. Perhaps the single most famous and influential example of this was in *Brown v. Board of Education*, 347 U.S. 483, 494 & n.11 (1954), where the Court relied upon "modern authority" and a series of psychological studies to invalidate the "separate but equal" doctrine in public education, effectively overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896). More generally, cases involve facts, and deciding the facts inevitably requires consideration of evidence and data.

5. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

      As a nominee to an inferior court, I would be bound by the Supreme Court's decisions without regard to whether they are deemed properly originalist. But I do not see *Brown* as inconsistent with originalism. The Court in *Brown* indicated that historical sources left "uncertain" what individual legislators in the bodies that ratified the Fourteenth Amendment "had in mind." 347 U.S. at 489. Originalism, or at least the search for original meaning, is not concerned with the subjective intent of long-dead individuals but instead anchors judicial interpretation to the contemporaneous meaning of the words those legislators enacted. The *Brown* Court went on specifically to note that, "[i]n its first cases . . . construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race." *Id.* at 490. That understanding of the term "equal" seems not only to be the right one but the original one.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited May 15, 2018).

      As a nominee to an inferior court, I must leave the defense of originalism to others. My obligation and my vow would be to faithfully follow the precedents of the Supreme Court and the Ninth Circuit in interpreting those capacious terms.

   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?

      As a nominee to an inferior court, I believe the Supreme Court's prevailing

understanding of a constitutional provision is always dispositive, whether it is based on the public's understanding at the time of adoption or otherwise.

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

As a nominee to an inferior court, I believe the Supreme Court's prevailing understanding of a constitutional provision is dispositive without regard to whether it is constrained by the public's original understanding of the provision.

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

I would follow the relevant precedents of the Supreme Court and the Ninth Circuit and would rely on the sources identified in those authorities in applying any constitutional provision in a novel context.

6. At your nominations hearing, you discussed several controversial articles you wrote for the *Stanford Review* while you were in college.
   a. Is it your testimony that you did not provide these articles to the Oregon nominating committee because you understood that they only needed articles that you authored post-law school?

      I did not furnish writings that predated law school because I was explicitly directed to "go[] back as far as law school" unless another timeframe was specified.

   b. Did you provide any information from high school or college to the judicial nominating committee? If so, please describe this information.

      Certain questions on the committee's questionnaire requested information predating law school, such as organizational memberships in college. I answered accordingly. I also discussed how rewarding I found my experience attending diverse secondary schools during my interview with the committee. (For further context, please see my response to Question 3 from Senator Blumenthal.)

   c. Did you provide or discuss any *Stanford Review* articles to the White House in the course of being vetted for your nomination? If so, please list their titles and summarize the nature of any discussion of them.

      I did not provide any articles from the *Stanford Review* to the White House or discuss any articles with White House staff. I provided all of my college publications to the Department of Justice, however, in the preparation of my responses to the Senate Judiciary Committee Questionnaire.

   d. Why did you fail to mention these articles to the judicial nominating committee when you discussed equity and diversity with the committee?

      I regard my writings in the *Stanford Review* as having focused on campus politics; I did not then and do not now regard them as particularly informative of my professional or legal qualifications or views on equity and diversity in general.

   e. In retrospect, do you regret not turning over or discussing these articles with the nominating committee, given that committee members have indicated that they found the articles to be relevant and feel misled?

      I believe it was appropriate to follow the instructions I received, and I answered all questions put to me forthrightly. I cannot speak to committee members' subjective feelings, but I did not seek to mislead them.

7. In 1995, you penned an article for the *Stanford Review* titled "Race-Think: A Stanford Phenomenon?" In it, you claimed that student affinity groups were "ethnic elites" driven by "paranoia" and "delusional" beliefs about systemic racism engaged

in an irrational practice you called "race-think."

a. Do you still agree with the views on race that you expressed in your piece for the *Stanford Review*?

   I do not understand that article to express any views on race *per se* or to say that student affinity groups themselves were ethnic elites. The article criticized a subset of activists on campus (who held themselves out as leaders) for engaging primarily in three race-related practices: (1) stereotyping people by race and attributing malign motives to people based on race, (2) demeaning fellow members of their own racial or ethnic groups for not conforming to prescriptive notions of how they should act, and (3) self-segregating and excluding others based on race. I acknowledge the tone of the article in decrying these practices was juvenile, gratuitously provocative, and less respectful of other viewpoints than was warranted, and I am sorry for that.

b. Please define what you meant by "race-think."

   I could not add meaningfully to the definition of the term in the article itself.

c. Do you believe that systemic racism exists?

   I believe that there are still people in the United States who act in racially invidious ways, and I believe such behavior, in the aggregate, exacerbates frustratingly durable inequalities in various measures of well-being among different racial groups.

d. Do you continue to believe that student affinity groups like Black Student Unions are irrational or delusional?

   I have never believed any student groups are categorically irrational or delusional. The article in question asserted that certain groups on Stanford's campus (or the leaders of those groups) acted in ways that seemed counterproductive of the inclusiveness and mutual understanding they sought. In general, I believe that all exclusive, mission-focused groups of people should be mindful of the risks of group-think, and I believe all people can benefit from thoughtfully engaging with others who do not agree with them.

8. In a May 1995 piece for the *Stanford Review* called "Labor Unions and the Politics of Aztlan," you criticized Stanford's Chicano/Latino student organization, for engaging in a labor protest. You wrote that if the student organization "considers any sub-opulent living standard or less-than-enviable wage that is endured by a Latino or Chicano American to be grounds for it to make a bombastic organizational pronouncement, why hasn't it circulated a policy memo against the minimum wage for which so many Latinos and Chicanos are forced to slave away?"

   a. Why did you believe that this student group should not be permitted to adopt its own chosen political positions?

      The article's thesis was that university-funded student groups generally, and MEChA in this particular instance, should avoid holding political issues

"central to [their] mission" in light of the announcement by Stanford's president that the university itself should not—and would not—take sides on similar political issues.

b. Do you still stand by the views expressed in this 1995 article?

As a judicial nominee, I believe it would be inappropriate to opine on the political positions taken by private organizations or the merits of their electing to take such positions.

9. In a 1994 article called "Lo! A Pestilence Stalks Us," you claimed that LGBT people, students of color, and other communities liked to "fancy [themselves] oppressed" and therefore see instances of discrimination that do not reflect reality.
   a. Do you believe that LGBT people experience discrimination today?

   Yes.

   b. Do you disavow any of the opinions expressed in this article?

   I regret the tone of the article, which did not show adequate respect for other students' subjective concerns about the incidents in question.

Nomination of Ryan Bounds to be
United States Circuit Judge for the Ninth Circuit
Questions for the Record
May 16, 2018

QUESTIONS FROM SENATOR BLUMENTHAL

During your time as opinion editor of the Stanford Review opinion page, "Smoke Signals," the newspaper began using a crude caricature of a Native American figure even though the university had discontinued using the "Indians" mascot more than twenty years earlier in response to complaints from Native American groups. Stanford University President Gerhard Casper and Provost Condoleezza Rice both criticized the Review for using the image, yet the newspaper continued using the image.

1. **Why did the newspaper under your leadership use this image when the President and the Provost of the University both criticized you for using it?**

   I do not recall playing any role in adopting or defending the use of that image, which ran over a feature that, I believe, the editor-in-chief both conceived and wrote himself.

After your writings during college came to light, the Chair of Oregon's Federal Judicial Selection Advisory Committee wrote to Senators Wyden and Merkley, saying, "Mr. Bounds failed to disclose these writings when specifically asked by the committee about his views on equity and diversity. Although he felt free to volunteer details about his life going back to childhood, he misled the committee in response to this important inquiry."

2. **Did the Federal Judicial Selection Advisory Committee ask you about your views on equity and diversity?**

   Yes.

3. **Why did you volunteer information about your life before college that pertains to your views on equity and diversity without also volunteering your college writings on these topics?**

   A member of the committee asked me about the origin or source of my interest in diversity after I had recounted my efforts toward diversity and inclusion in the Portland bar. I attributed it to my youth in a small but diverse community (with a substantial immigrant population) where nearly all children in grades 7-12 attended the same public junior high school and high school. I was very proud of and grateful for the fact that I had the opportunity to grow up with and befriend classmates of many races, ethnicities, religious traditions, gender identities (though these were not fully expressed then) and socioeconomic circumstances. It seemed to me the sort of quintessentially American experience from which everyone would benefit. Nothing I wrote in college was inconsistent with that proposition or germane to the source of my views on the subject.

4. Are there other writings we on the Senate Judiciary Committee should be aware of?

After the submission of my questionnaire, I published a column in the February 2018 issue of the *Multnomah Lawyer* on the work and aims of the Equity, Diversity & Inclusion Committee, which I chaired. I have submitted it herewith.

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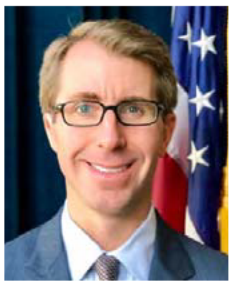

Equity, Diversity and Inclusion: Pursuing Essential Aims of Our Profession

by Ryan W. Bounds
Chair, Equity, Diversity & Inclusion Committee

The longstanding mission of the MBA's Equality & Diversity Committee has been "to foster and expand diversity, inclusion and equality in [our] legal community, and to create and strengthen a relationship of mutual support between the MBA and its diverse lawyers and bar organizations." The committee remains focused on these vital objectives.

Indeed, recent developments have confirmed they are as urgent as ever. As Chief Justice John G. Roberts, Jr., noted in his annual report on the federal judiciary, "[e]vents in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear the judicial branch is not immune." Neither, by extension, is the bar. And the persistence of sexual harassment is not the only obstacle to achieving the more inclusive, egalitarian, and meritocratic profession that most of us envisaged when we joined it. Too many lawyers perceive an uneven playing field, pitted with episodes of insensitivity and skewed by residual biases. Too many promising students may abjure a legal career altogether out of fear that their prospects for success will be dictated not only by the quality of their work but by less equitable factors as well.

Our committee has adopted a new name that better reflects the breadth of these challenges and our varied efforts to address them. As committee-member Duane Bosworth reports elsewhere in this issue [see p. 6], the Equality and Diversity Committee is now the Equity, Diversity & Inclusion Committee. The change conveys our emphasis on the creation and diffusion of social capital, which makes a career in the law more productive and rewarding for lawyers, colleagues and clients alike.

The new name does not portend any departure, however, from our established initiatives and programs. Those have long focused on professional networks, mentoring, and education. With the guidance of **Susan Cournoyer**, our vice chair (and organizational genius), we have continued to implement and expand upon those efforts under the leadership of five subcommittee chairs, who deserve special recognition for their sustained and outsized contributions.

Jollee Patterson of Miller Nash Graham & Dunn chairs our **Pipeline Subcommittee.** The Pipeline Subcommittee seeks to promote legal careers to younger students from diverse backgrounds with the aim of cultivating a more diverse bar. This effort generally involves collaborating with scholastic programs serving underrepresented populations in order to expose students to a variety of careers in the law and to demystify the work of lawyers for young people who otherwise may never interact with one.

This year, the subcommittee is preparing to unveil a "Judicial Shadow Program," which will offer high school students the opportunity to shadow a state or federal trial judge for a day. The experience will include time in the courtroom and in chambers, as well as the chance to have lunch with the judge and a practicing attorney. Participating students will get to see what really happens in adversarial proceedings and then get to hear insights from the judge presiding over the action. We expect to offer this program to students at one or two Portland-area high schools this year and hope to extend it to additional campuses in the future.

Maurisa Gates of Metropolitan Public Defender Services, Inc., chairs our **LSAT Scholarship Subcommittee.** A lack of familiarity with lawyers and the work they do may deter some young people from pursuing legal careers, but the LSAT can erect another barrier to college students who cannot invest in honing the analytical skills the test demands. In order to remedy this, the MBA established a scholarship program in 2014 to pay for LSAT-preparatory courses for Oregonian college students of limited means and diverse backgrounds. Over the last three years, the subcommittee has identified 41 such college students from more than 100 applicants. Applications for this year's scholarships are already out (and available on the MBA website) and should be submitted by early March. We confer the scholarships every spring

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FEBRUARY

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Judge Erin Lagesen
Steve Berman

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Derily Bechthold
Aruna Masih

2.28 Wednesday
Refugee Rights: Where We Are One Year After the First Travel Ban
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Z. Hanah Riley

MARCH

3.7 Wednesday
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Harry Wilson

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Presiding Court Update
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How to "Win" Your Next Mediation - Strategies for Effective Advocacy
Judge Jean Kerr Maurer
Richard Vangelisti

In This Issue

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Equity, Diversity & Inclusion

Continued from page 1

at the Tillicum Gathering, which our committee hosts in conjunction with the leadership of the specialty bar associations. In addition to helping select last year's recipients, US District Judge Marco Hernandez honored the current and past scholarship winners at the 2017 Tillicum Gathering with inspiring remarks that merit their own special note of thanks.

In addition to financing LSAT preparation itself, the subcommittee has also launched a mentoring program to track and support the scholarship recipients throughout the law-school admissions process. This effort will permit us to gauge how well the scholarship serves the purpose of generating more diverse classes of new Oregon lawyers in the coming years.

Emily Teplin Fox of Oregon Law Center chairs our **Multnomah Bar Fellows Subcommittee.** In 2016, the MBA formally announced the creation of the Multnomah Bar Fellows program for students from diverse backgrounds enrolling at U of O and Lewis & Clark Law Schools. The fellowships entitle each recipient to a substantial scholarship and paid summer employment at a law firm or other legal organization. The subcommittee is preparing for the first class of fellows to enroll this fall.

A great deal of work has already gone into making this program a reality. The subcommittee has confirmed employer sponsorships, coordinated publicity and programming with law school representatives, consulted with former University of Washington Law School dean Kellye Testy about her experiences with Seattle's analogous Gregoire Fellows program, and recruited judges in Eugene and Portland to mentor the fellows. We are all so excited to meet the inaugural class of Multnomah Bar Fellows and so grateful for the generosity of the program's judicial mentors and sponsoring employers.

Shalini Vivek of Portland State University chairs our **Education Subcommittee.** The Education Subcommittee's goal is to provide education and training on equity and diversity issues for practicing lawyers. Such efforts are essential to a fully inclusive bar. This year, the subcommittee is organizing a four-hour CLE seminar on bystander intervention. There have been a number of talks and CLEs over the past year on identifying and confronting implicit bias within the legal field. Building upon this, the bystander-intervention CLE will teach attorneys how best to intervene if they witness discriminatory or insensitive behavior in legal settings, such as courtrooms, offices, and bar-related social functions. Keep an eye out for announcements about this important educational opportunity, which has been set to occur in the coming weeks.

The subcommittee is also exploring opportunities for a CLE seminar in partnership with the Fair Housing Council of Oregon. This civil rights organization offers bus tours of the metropolitan area in which participants see the residual effects of Portland's history of discriminatory housing. The subcommittee is aiming to schedule that CLE in early 2019.

Maya Crawford Peacock of the Campaign for Equal Justice chairs our **Publicity Subcommittee.** This subcommittee publicizes the work of our committee and administers the MBA Diversity Award, which recognizes MBA members for their promotion of equity and inclusion. The subcommittee has already solicited nominees for this important commendation and referred its recommended nominee for the full committee's endorsement and the MBA Board's approval. The award will be presented at the MBA's annual dinner in May.

The subcommittee will also be authoring and soliciting articles on diversity-related topics for upcoming issues of the *Multnomah Lawyer*. Keeping the conversation going throughout the year not only reaffirms our bar's ongoing commitment to fairness and inclusivity but stokes the voluntary efforts that are indispensable to realizing those aspirations in every courtroom, chambers, and office.

Is this YOUR FINAL ISSUE?

MBA members not renewed by March 1 are removed from the membership roster and no longer receive the *Multnomah Lawyer*. **Renew your MBA membership for 2018 by February 12** to ensure you receive your copy of the March newsletter.

Renew online at www.mbabar.org or over the phone at 503.222.3275.

Calendar

FEBRUARY

1 Thursday
Are You Able to Live Well Today and Still Save for Tomorrow?

9 Friday
Blacks in Government Annual Black History Month Banquet

10 Saturday
WinterSmash
Details on p. 1

13 Tuesday
Solo & Small Firm Workshop
Details below

14 Wednesday
YLS OR/WA Employment Law CLE Seminar
See insert for details

15-17 Thursday-Saturday
NAAC Moot Court
Portland Regional

17 Saturday
Lewis & Clark Law School PILP Auction
Details on p. 6

16 Friday
OHBA Annual Awards Dinner
www.oregonhispanicbar.org

21 Wednesday
Campaign for Equal Justice Awards Luncheon
www.cej.oregon.org

22 Thursday
Lewis & Clark Law Student Networking Event
Details on p. 13

24 Saturday
Portland Children's Museum Event
Details on p. 12

MARCH

9 Friday
ACLU of Oregon Liberty Dinner
www.aclu-or.org

16 Friday
OWLS Roberts & Deiz Awards Dinner
www.oregonwomenlawyers.org

APRIL

5 Thursday
Portland Opportunities Industrialization Center Breakfast
www.portlandoic.org

26 Thursday
Classroom Law Project Legal Citizen of the Year Dinner
www.classroomlaw.org

27 Friday
OAAP/OWLS 11th Annual Women's Retreat
www.oregonwomenlawyers.org

Solo & Small Firm Committee Workshop

UNDERSTANDING BASIC ACCOUNTING/ BOOKKEEPING WITHIN YOUR LAW FIRM

Tuesday, February 13
Workshop: 12-1:30 p.m.
Red Star Tavern Club Room
503 SW Alder, Portland

It is not enough to have an IOLTA checking account or give your financial records to a bookkeeper and tax accountant. Learn what happens once you have a client trust account, where the money is located on your financial statements and how it coincides with your legal management system. Learn how your day-to-day business activities are reflected in your monthly financial statements. Learn basic accounting concepts and safeguards to protect your clients and your practice. **Lozelle Mathai**, MBA, CFEI, will share her vast experience with us. She is a financial educator and accountant and the founder of Closing Your Books, LLC.

Cost: $20 members/$60 non-members.

Lunch is provided.

One hour of Business Development CLE credit will be applied for.

Register at www.mbabar.org.

Nomination of Ryan Bounds to the
United States Circuit Court for the Ninth Circuit
Questions for the Record
Submitted May 16, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute 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.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] 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.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

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

    I have not reviewed the literature extensively, but I gather that there are studies of the phenomenon suggesting that implicit racial bias—a cognitive delay in associating certain race-related stimuli—is widespread. I have no reason to believe it would not affect participants in the criminal justice system as elsewhere.

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

    I believe the percentage of persons of color in custody in the United States exceeds the percentage of such persons in the U.S. population.

    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.

    I have not studied this issue in any depth. I have read news reports about studies reflecting disparate sentencing outcomes and incidence rates of officer-involved shootings across racial groups when other factors are controlled for.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

    a. Do you believe there is a direct link between increases of 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 studied the general relationship between incarceration rates and crime rates and do not have any fixed beliefs on the issue.

    b. Do you believe there is a direct link between decreases of 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.

    I have not studied the general relationship between incarceration rates and crime rates and do not have any fixed beliefs on the issue.

3. 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; I believe opportunities to serve in the judiciary, as in the other branches of government, should be fully open to Americans of all demographics and that the composition of the judiciary should reflect that.

4. Since Shelby County, Alabama v. Holder, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.[7] One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.[8] Despite this, President Trump, citing no information, alleged that widespread

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[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*

[7] JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), *available at* http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf.

[8] Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

   I have not studied the incidence of voter fraud and do not have any fixed or particularly informed beliefs on this issue.

b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

   I do not have sufficient data with which to evaluate that proposition, and I do not believe it would be appropriate for me to opine on the matter as a judicial nominee.

c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

   I do not have sufficient data with which to evaluate that proposition, and I do not believe it would be appropriate for me to opine on the matter as a judicial nominee.

Questions for the Record from Senator Kamala D. Harris
Submitted May 16, 2018

For the Nomination of:

- **Ryan Bounds** to be U.S. Circuit Judge for the Ninth Circuit (Oregon)

My colleague Senator Ron Wyden received correspondence from the chair of the Oregon Judicial Selection Committee that is notably relevant to your nomination. Senator Wyden has shared his concerns with me, and I now raise them with you. Five of the seven members of the Oregon Judicial Selection Committee have indicated that they would not have recommended you had they been aware of the deeply troubling writings that you authored. The majority of the Oregon Judicial Selection Committee found the writings themselves objectionable due to the alarming views that they express about sexual assault, people of color and LGBTQ individuals. They were also greatly disturbed that when specifically asked questions that should have led to your disclosure during the interview, it appears that you purposefully withheld this information.

Specifically, the Oregon Judicial Selection Committee conveyed that during your interview when they asked you to explain your views on diversity, race and gender, you made a point to highlight your former role as chair of the Multnomah Bar Association's Diversity, Equity and Inclusion Committee, a committee that you have since been asked to resign from. In sharing your former role as chair, you attempted to paint a picture of a person who believes strongly in the importance of diversity, rather than one who might have advocated against diversity initiatives at some point. You also told the Oregon Judicial Selection Committee about your experience attending a diverse high school, portraying yourself as a tolerant person shaped by his diverse upbringing. Your choice to include your former role as chair of the Multnomah Bar Association's Diversity, Equity and Inclusion committee while omitting your public writings against diversity is troubling. Further, your discussion of your high school experience, hearkening back to your early life makes your omission of the articles you wrote in college all the more remarkable.

- The Oregon Judicial Selection Committee evaluated your record and fitness to be a federal judge. Would you consider writings you authored expressing intolerant or dismissive views about people of color, sexual assault and LGBTQ individuals relevant to an interview question asking you to disclose your views on diversity, race and gender? Could you be fully responsive without disclosing those numerous articles?

  The articles in question were not indicative of any bias against any person based on his or her race, ethnicity or gender identity or indicative of any aversion to diversity. I have never harbored any such bias or aversion. I have always been very grateful for the diversity of my hometown, the schools where I studied, and the nation as a whole. The rhetoric with which I criticized certain campus activists and opined on certain controversies was juvenile, hyperbolic, and gratuitously provocative, however, and I apologize for that. But, to my mind, rhetorical excess in college is not at all illustrative of one's substantive views a quarter-century later.

Additionally, during your interview, the Oregon Judicial Selection Committee conveyed that they had asked you to disclose anything in your record that had not come up during your application and interview that could potentially embarrass your home-state senators or become an issue during the confirmation process. The Oregon Judicial Selection Committee asked you this question to provide you with an opportunity to disclose anything that could potentially be objectionable that had not previously been discussed during your interview or on your questionnaire. Again, you either deliberately withheld or neglected to mention your intolerant writings. The ensuing backlash over the substance of the articles you wrote in your early 20's evidences their relevance to your nomination.

- Why did you choose to withhold that information when given a second opportunity to disclose it?

  I do not recall being asked any question to which I felt reference to articles from college would be pertinent.

- As a lawyer, you are more familiar than most with the importance of disclosing relevant facts to decision makers. Did you conclude that the articles you wrote in your early 20's were not relevant to evaluating your record on diversity?

  I inferred from the senators' explicit lack of interest in writings predating law school that they did not regard such materials as relevant to evaluating my record for any purpose.

During your nomination hearing, you explained to members of the Judiciary Committee that you reached out to Senator Wyden's staff to ask how far back you needed to go in responding to several questions on the questionnaire, and that the staff indicated that you only needed to go back to law school.

- Please indicate why you would respond to questions on the subject matter of diversity by going back to your high school years, but then not include or mention your college writings on the matter?

  Please see my answer to Senator Blumenthal's Question #3.

Further, when asked whether you regretted your writings, you told the Senate Judiciary Committee that your goal with those writings was to "*seek greater tolerance and mutual understanding on campus and a way of celebrating diversity that everyone could participate in.*" In my view, the substance of those articles does not celebrate diversity or inclusion, but instead demonstrates a lack of judgement and a temperament that is unsuitable for a nominee for a lifetime appointment.

- Your characterization of the goals your college writings to the Judiciary Committee suggest an unwillingness to be accountable for your previous views. Yet you have suggested your views on diversity have changed since writing these articles in college. Can you explain the *evolution* of your views, if any, on the value of diversity?

I was raised never to treat anyone differently because of their skin color or to imagine that there were things women could not do—in short, I learned that race and gender should not matter. That's a lesson I have never doubted. Over the years, however, I have also come to appreciate that the personal, painful experiences of people from historically marginalized communities must be confronted and, when feasible, their lingering effects alleviated. Ignoring differences alone will not ensure a fully inclusive and diverse society.

- In your maturing since college, have you come to appreciate the reality that members of marginalized communities have had a very different life experience than you, often due to persistent systemic discrimination?

  I have always been mindful of the fact that many people—including many personal friends—have had to overcome far greater obstacles than I have ever faced. I admire their achievements all the more for that.

- <u>Can you explain, specifically and respectively, how the following statements contribute to greater tolerance and mutual understanding?</u>

  - "*The existence of ethnic organizations is no inevitable prerequisite to maintaining a diverse university community – white students, after all, seem to be doing all right without an Aryan Student Union*"

    This argument *ad absurdum* was juvenile and gratuitously provocative, but the underlying point was a cautionary one about the dangers of stoking intergroup conflict through racial exclusion.

  - "*I am mystified because these tactics [of those promoting multiculturalism] seem always to contribute more to restricting consciousness, aggravating intolerance, and pigeonholing cultural identities than many a Nazi bookburning.*"

    Several of the tactics described in that article struck me as racist and demeaning; the analogy here was to underscore how shocking and counterproductive they were.

- Is your characterization of the above statements as meant to contribute to "greater tolerance and mutual understanding" a good faith characterization?

  That was the intent behind the articles as a whole. Much of the rhetoric was juvenile and missed the mark. I have apologized for that.